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1939

JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1939.

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Puisne Judges.

The Hon'ble Justice Sir S. Burn, *Kt.*, I.C.S.

The Hon'ble Mr. Justice Vere Mockett, M.B.E., M.A. (*Barrister-at-Law*).

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THE
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II] JULY [1939

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

Anumala Ankamma .. *Appellant** (*1st Defendant*)

v.

Komaravolu Venkata Subbayya and others .. *Respondents* (*Plaintiff and Defendants 2 to 4*).

F.B.

Ankamma *v.* Venkata Subbayya.

Madras Estates Land Act (I of 1908), Ss. 146 and 147—If retrospective in effect.

In providing that transferees should be bound to give formal notice to the landlords, the Act did affect substantive rights and cannot be regarded as being retrospective unless this is so stated or this is necessarily implied. There is nothing in Ss. 146 and 147 which indicates an intention on the part of the Legislature to interfere with rights acquired before the Act came into force.

Sri Mahant Prayag Dossjee Varu v. *Sarangapani Chetty*, (1922) 17 L.W. 361, overruled.

Appeal under cl. 15 of the Letters Patent against the decree and judgment of the Hon'ble Mr. Justice Burn dated 2nd November, 1936 and passed in S.A. No. 299 of 1935 preferred to the High Court against the decree of the Court of the Subordinate Judge of Guntur in A. S. No. 96 of 1934 preferred against the decree of the Court of the District Munsif of Ongole in O. S. No. 356 of 1929.

This appeal coming on for hearing on Monday, the 20th February, 1939, the Court (*the Chief Justice* and *Somayya, J.*) made the following

* L. P. A. No. 18 of 1937. 1st March, 1939.

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ORDER.—In view of the decision in *Sri Mahant Prayag Dossjee Varu* v. *Sarangapani Chetty*[1], we consider that the case should be heard by a Full Bench and we direct accordingly.

V. Govindarajachari and *B. V. Ramanarasu* for Appellant.

G. Lakshmanna for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question which falls for decision in this appeal is whether S. 146 and S. 147 of the Madras Estates Land Act, 1908, are intended to have retrospective effect. Before considering the provisions of the Act I will state how this question arises. The appellant is a ryot in possession of a piece of land known as Survey No. 191/1. The land forms part of a holding granted by the Rajah of Venkatagiri. There are five lots bearing survey numbers in this holding, the other four being in the possession of one Venkata Subbayya, the pattadar. Venkata Subbayya is the son of one Vobayya, who in 1903 sold to the appellant and two others the land described as Survey No. 191/1. The appellant's co-owners eventually gave up their interests in the land and he alone cultivated it. Venkata Subbayya failed to pay to his landlord the rent due by him for the years 1919, 1920 and 1921 in respect of Survey Nos. 246, 445, 679 and 305 which comprised the remainder of the holding. The result was the landlord instituted a rent suit before the Sub-Collector, Ongole, in 1922 and obtained a decree. In execution of that decree the land held by the appellant was sold as being part of the area covered by the patta. The purchaser was one Poluri Yellamraju, who on the 28th November, 1928, conveyed the land to one Komaravolu Venkata Subbayya.

The appellant was recognised by the landlord as the holder of Survey No. 191/1 after his purchase in 1903 and he continued to pay year by year the rent due by him in respect of it. It was held by the trial Court in the suit out of which this appeal arises that Venkata Subbayya had deliberately defaulted, knowing that a rent suit could be filed. His scheme was to induce the decree-holder to sell in execution the appellant's land as it formed

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part of the holding and thus give him an opportunity of buying it at the Court auction. Of course, a scheme of this nature could only be carried through with the connivance of the Subordinate Officials of the Zamindar. The present suit was filed in the Court of District Munsif of Ongole by Komaravolu Venkata Subbayya on the 29th April, 1929, six years after the Court auction had taken place, to recover possession of the property from the appellant. The District Munsif dismissed the suit, holding that the appellant's title was not affected by the sale, because he had no notice of the suit or of the sale, he was not made a party to any of the proceedings, he had been in possession of the land since 1903, and he had regularly paid his rent to the landlord, who had recognised him as his tenant. The District Munsif also held that Poluri Yellamraju and Komaravolu Venkata Subbayya were creatures of Venkata Subbayya. Poluri Yellamraju had bought the property at the Court auction on behalf of Venkata Subbayya and had transferred it to Komaravolu Venkata Subbayya, who was also his benamidar. The plaintiff appealed to the Subordinate Judge of Guntur who held that the evidence was not sufficient to justify the conclusion that the auction purchaser was a benamidar of Venkata Subbayya, although he appears to have accepted the finding that the plaintiff was. The Subordinate Judge set out the evidence on which the District Munsif had held that the auction purchaser was a benamidar and apparently did not dispute its accuracy. If true, the evidence was sufficient to support the District Munsif's finding that the auction purchaser was a benamidar. Accepting the evidence as true, there was no other conclusion really open. Holding that the auction purchaser was not a benamidar and relying on the decision in *Sri Mahant Prayag Dossjee Varu* v. *Sarangapani Chetty*[1], where it was held that the Madras Estates Land Act had retrospective effect the Subordinate Judge allowed the appeal and decreed the suit. The appellant then appealed to this Court, but in his memorandum of appeal he took no exception to the finding of the Subordinate Judge that the auction purchaser was not a benamidar. He challenged the correctness of his decision on legal grounds and left the facts entirely alone. It is unfortunate that he did so because it was open to him to have challenged the decision of the Subordinate Judge with regard to the position of the auction purchaser. It is, however,

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too late in the day now for this question to be raised, and the Court is merely concerned with the question whether the decision of Burn, J., who heard the appellant's appeal which followed the decision of the Subordinate Judge, is right in law. Burn, J., dismissed the appeal on the ground that he was bound by the decision in *Sri Mahant Prayag Dossjee Varu* v. *Sarangapani Chetty*[1].

Before referring to what was said in that case I will set out the provisions of S. 146 and S. 147 of Madras Estates Land Act. S. 146 provides that whenever a holding or any portion thereof is transferred by the Act of a ryot, or in execution of a decree or order of a Civil Court passed against him, or by a sale for arrears of Government revenue or for any demand recoverable as arrears the transfer shall, subject to the provisions of S. 145, be recognised by the landholder if notice in writing be communicated to him by the transferor and transferee or a certified copy of a decree or order of a Civil Court establishing a transfer is produced, or in cases in which a transfer is effected by sale under the order of a Court or public officer the sale certificate or a certified copy is produced. On notice in writing given by the transferor and transferee or by the co-sharers, as the case may be, the landholder is required to enter into separate engagements with the holders of the sub-divisions from the revenue year next succeeding that in which the notice has been given. Therefore under this section the landlord is not bound to recognise a transfer unless he receives a notification in the manner prescribed by the section. S. 147 says that all acts or proceedings commenced or had under the Act against the transferor or the co-sharers prior to the giving of the notice under S. 146 or prior to the production of the copy of the decree or order or certificate of sale under S. 146 in so far as such acts and proceedings affect or purport to affect the land on which the arrear is due, the crops and the products, shall as against the transferee or co-sharer be as valid and effectual as if such acts and proceedings had been commenced or had against the transferee or co-sharer himself, and he had been the defaulter. In other words all proceedings which have been commenced before notice has been received by the landlord shall be effective against the transferee.

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In *Sri Mahant Prayag Dossjee Varu* v. *Sarangapani Chetty*[1], a Bench of this Court consisting of Oldfield and Ramesam, JJ., held that these two sections applied to cases where the transfer was before the Act. In other words they held that the Act had retrospective effect. Although the learned Judges seemed to have had some doubt as to what was the law before the Act came into force it was well settled that where a pattadar transferred his holding or part of his holding to another the transferee became the tenant and it was the duty of the landlord to find out the transferee and collect the rent from him. Proceedings for the recovery of the rent could not be commenced until notice had been given to the transferee. (See *Ekambara Aiyar* v. *Meenatchi Ammal*[2], *Peram Narasigadu* v. *Machireddi Butchireddi*[3], *Kesavaswami Aiyar* v. *Narayana Chetty*[4] and *Muthukaruppa Pillai* v. *Annamalai Chettiar*[5].) The decision in *Peram Narasigadu* v. *Machireddi Butchireddi*[3] and that in *Kesavaswami Aiyar* v. *Narayana Chetty*[4] had reference to a case where the pattadar had transferred only a portion of his holding. The decision of Oldfield and Ramesam, JJ., in *Sri Mahant Prayag Dossjee Varu* v. *Sarangapani Chetty*[1], that the Act had retrospective effect was based on the opinion which they had formed that the Act did not determine any substantive rights, but we are unable to share this view. Before the Act a transferee had a recognised status even without any notice being given of the transfer to the landlord. Therefore in providing that transferees should be bound to give formal notice to the landlords the Act did affect substantive rights and an act which has this effect cannot be regarded as being retrospective unless this is so stated or this is necessarily implied. That is not the position here. The wording of S. 146 is in the present tense, and there is nothing in that section or in S. 147 which indicates an intention on the part of the Legislature to interfere with rights acquired before the Act came into force.

To give retrospective effect to the Act would cause damage to the appellant. In 1903 he acquired a valid title to the land which was sold in execution of the rent decree. He was not in default and throughout had paid his rent to his landlord, the Zamindar, who recognised him as being the holder of the land.

1. (1922) 17 L.W. 361.
2. (1903) I.L.R. 27 Mad. 401.
3. (1910) 20 M.L.J. 732.
4. (1912) 24 M.L.J. 228.
5. (1935) 69 M.L.J. 297.

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The payment of the rent to the officials of the Zamindar and their acceptance of it means recognition by the Zamindar. The Legislature can take away rights which have become vested, but it can only do so by a measure which clearly expresses its intention. There is no indication here of any such intention on the part of the Legislature which passed the Madras Estates Land Act, and *Sri Mahant Prayag Dossjee Varu* v. *Sarangapani Chetty*[1] was wrongly decided. It follows that in our opinion the appellant was not required to serve formal notice on his landlord and that he got a good title to the land by the conveyance to him in 1903.

The result is that the appeal succeeds and the suit will be dismissed with costs throughout in favour of the appellant.

K. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

K. M. Duraiswami Reddiar .. *Appellant* (Plaintiff)*

v.

The Secretary of State for India in Council, represented by the Collector of South Arcot and others .. *Respondents (1st Defendant and 2nd Defendant's Legal Representatives).*

Duraiswami Reddiar v. Secretary of State for India in Council.

Madras Hereditary Village Offices Act (III of 1895), S. 13—Threat of unlawful ejection from office by official act—Suit to protect the office—Jurisdiction of Civil Courts to entertain—Board of Revenue Regulation (I of 1803), S. 5—Power of Board under where different machinery provided by statute for rectifying erroneous orders of subordinates.

When a Village Munsif lawfully appointed has been unlawfully threatened with ejection by an official act he can maintain a suit to protect his right of office, and it is a suit which the civil courts have jurisdiction to entertain.

Venkataraghavaiah v. *Chenchu Subbaiah*, (1930) 33 L.W. 294, followed.

S. 5 of the Board of Revenue Regulation does not give the Board the power to set aside a statutory order passed by one of its subordinates in cases where the statute provides a different machinery for rectifying an error.

Subba Rao v. *Secretary of State*, (1929) 58 M.L.J. 698 and *Secretary of State for India* v. *Subba Rao*, (1933) 65 M.L.J. 186: I.L.R. 56 Mad. 749, applied.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 105 of 1931 preferred against

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1. (1922) 17 L.W. 361.

* S. A. No. 658 of 1935. 9th March, 1939.

the decree of the Court of the District Munsif of Cuddalore in O. S. No. 1072 of 1929.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Appellant.

The Government Pleader (*B. Sitarama Rao*), *V. Krishnamachariar* and *P. G. Raghavendra Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is preferred by the plaintiff in a suit brought by him for a declaration that he is the legal holder of the office of village headman in a Government village and that the appointment of the second defendant in pursuance of the order of the Board of Revenue is illegal and for restraining the Government and the second defendant from interfering with his enjoyment of the office.

The facts are not in dispute. When the vacancy to the office occurred, the plaintiff was actually doing the work as a deputy. The second defendant is the son of a former dismissed occupant of the office and a cousin of the last actual holder of it. Both the Revenue Divisional Officer and the District Collector held that the plaintiff had a better claim to the office and the plaintiff was accordingly appointed and entered upon the duties of the office. I am informed that he is still the incumbent of the office getting the work done through a deputy. Against the Collector's order, the second defendant preferred what was called a second appeal to the Board of Revenue and the Board of Revenue passed an order, Ex. D, to the effect that it was in accordance with the spirit, if not with the letter of the Act, that the second defendant's claims should be preferred to those of the plaintiff who, if not an absolute stranger, had very much weaker connection with the office. The Board proceeded to make a reference to the plaintiff as one not likely to do the work himself and observed:

"The Board does not want a man of the plaintiff's type and considers it equitable to appoint the second defendant to the office."

The second defendant was accordingly appointed.

It has been held by both the Courts below that this is a suit relating to a claim to succeed to an office covered by the provisions of S. 13 and therefore under S. 21 of the Madras Act III of 1895, the jurisdiction of the Civil Court is ousted. It seems to me that this view of the case is erroneous. If the order passed by the Board of Revenue was one which the Board

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was legally competent to pass, then undoubtedly there would be an appointment of the second defendant to the office and a claim by any one else would be one which should have been brought by a suit under S. 13 in the Revenue Court. But the position taken up by the plaintiff in the present suit is that he is the legally appointed Village Munsif, that there has been no legal appointment of the second defendant and that the act of the Board of Revenue in trying to turn out the plaintiff from the office which he still holds and to put the second defendant into his place is an unwarranted invasion of the plaintiff's legal rights. If that case is made out, it is certainly not a case in which the plaintiff sued to establish his right to succeed to an office or to get the emoluments of an office. He already occupies the office and is still drawing its emoluments through his deputy. In fact the plaintiff's case is that having legal possession of the office, he seeks to avert a threat to that possession by the unlawful act of a powerful body. That, in my opinion, is a suit which the Civil Courts have jurisdiction to entertain.

The only question therefore is whether the order of the Board of Revenue on this so-called second appeal by the second defendant is a legal order which would have the effect of putting the plaintiff in the position of one seeking to establish his right to succeed to an office, or is it an unlawful attempt to invade the established rights which the plaintiff has already acquired. The scheme of Act III of 1895 is that when there is a vacancy to an hereditary office, the Collector shall fill that vacancy in accordance with the rules of primogeniture and that any dissatisfied claimant shall have the remedy of a suit before the Collector to establish that he has a better right. The powers of the Collector are in fact wielded in the first instance by the Revenue Divisional Officer by virtue of a delegation under the Subordinate Collectors' Regulation VII of 1828, which expressly provides that the orders of the Subordinate Collector under the powers so delegated shall be subject to a revision by the Collector and that the Collector shall have the power to confirm or modify or annul those orders. It has been held in *Srinivasa Aiyangar* v. *Jagannadha Aiyangar*[1], that this power of the Collector to modify the order of a Subordinate

1 (1938) 2 M.L.J. 488.

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Collector is not in conflict with the machinery of Act III of 1895; so that in effect there is a right of appeal to the District Collector from the order of the Subordinate Collector passed under S. 10 of that Act.

The only power which can be claimed by the Board of Revenue, is based on S. 5 of the Board of Revenue Regulation (I of 1803), whereby the Board is given authority to superintend and control all persons employed in the executive administration of the public revenue. It is contended on the analogy of decisions relating to the High Court's powers of superintendence under S. 15 of the Charter Act and S. 107 of the Government of India Act, 1919, that this power conferred on the Board by S. 5 of the Board of Revenue Regulation includes a power to set aside orders of a subordinate authority, passed under statutory powers, which, in the Board's opinion, are erroneous. In the first place I must observe that I am not aware of any decision which has gone so far as to say, under S. 15 of the Charter Act or S. 107 of the Government of India Act, 1919, that the High Court had the power in revision to set aside an order, which could be modified by another machinery prescribed by statute, merely because that order was, in the High Court's opinion, ill-advised or erroneous. Decisions relating to the High Court's powers under its general power of superintendence have, so far as I am aware, always restricted the exercise of that power in judicial matters to interference in cases of grave dereliction of duty for which no other remedy is available and which would have serious consequences if not remedied. There is no suggestion in the Board's order in this case that the grounds for its decision are any more than a difference of opinion with the Collector as to the legal rights of the two rival claimants and the desirability of one rather than the other as a village officer. I do not wish to say anything which might be taken as indicating that in no circumstances can the Board of Revenue by virtue of its powers under S. 5 of the Board of Revenue Regulation set aside a statutory order of its subordinate in the case of a gross error attended by serious consequences for which no other remedy is provided by law. But I am emphatically of opinion that these general powers of superintendence did not authorise the Board of Revenue to arrogate to itself a power of interference in revision or in second appeal from a statutory order, when machinery of the statute

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itself confers no such power and contemplates the utilisation of another remedy which is accessible to the person aggrieved, more especially in a case in which the consequences of any error are purely personal to the rival claimants. So far as I am aware, there is no decided case in which it has been recognised that S. 5 of the Board of Revenue Regulation gives to the Board of Revenue the power to set aside a statutory order passed by one of its subordinates in cases where the statute provides a different machinery for rectifying any error. The decisions in *Subba Rao* v. *Secretary of State*[1] and *Secretary of State for India* v. *Subba Rao*[2], though not precisely on this point, do at least indicate that the powers of the Board of Revenue under S. 5 of this Regulation must be read subject to the statutory delimitation of their subordinates' powers found in other laws. Authority for the view that when a village officer lawfully appointed, has been unlawfully threatened with ejection by an official act, he can maintain a suit to protect his right of office, may be found in the case reported in *Venkataraghaviah* v. *Chenchu Subbaiah*[3]. In my opinion, the order of the Board of Revenue purporting to act in second appeal or revision and to decide a matter which according to the machinery of the Act should have been decided by a suit under S. 13 of Act III of 1895, was an illegal attempt to invade the vested rights of the plaintiff and the plaintiff has a remedy by way of a suit for a declaration of his right to the office and for an injunction restraining the defendants from interfering therewith.

The appeal is therefore allowed with costs throughout and there will be a declaration declaring that the plaintiff is the legal holder of the suit office and restraining the defendants by a permanent injunction from interfering with the plaintiff's enjoyment of that office, except in accordance with the law.

Leave to appeal refused.

K. S. —— *Appeal allowed.*

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1. (1929) 58 M.L.J. 698.
2. (1933) 65 M.L.J. 186: I.L.R. 56 Mad. 749.
3. (1930) 33 L.W. 294.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE NEWSAM.

Ponnuman Dikshitar and another .. *Appellants* in the appeal (Plaintiffs 3 and 4 and Respondents in L. P. A. Nos. 56 and 57 of 1937)*

v.

The Board of Commissioners for the Hindu Religious Endowments, Madras and others .. *Respondents in the appeal (Defendant and Plaintiffs 1 and 2) (the 1st Respondent is the appellant in both the L. P. Appeals Nos. 56 and 57 of 1937).*

Ponnuman Dikshitar *v.* Board of Commissioners for the H. R. E., Madras.

Madras Hindu Religious Endowments Act (II of 1927), Ss. 62, 63 and 65-A —Board taking action under S. 62—Power to frame a scheme even in the absence of mismanagement—Notification under S. 65-A—When proper.

Once the Board takes action *suo motu* under S. 62 even though it may ultimately find that there was no mismanagement, nevertheless it can frame a scheme under S. 63 if it is necessary for the proper administration of the temple.

The procedure in regard to notification ought not to be lightly resorted to unless and until there is such serious mismanagement of a temple as would justify an ouster of the trustees in charge of a temple from their office.

Appeal against the decree of the District Court of South Arcot in O. S. No. 16 of 1933.

Appeals under cl. 15 of the Letters Patent against the orders of the Hon'ble Mr. Justice King dated respectively 15th March, 1937, and passed in C. M. P. Nos. 4627 and 4626 of 1936—petitions presented to the High Court respectively for stay of all further proceedings by way of giving effect to the scheme framed in O. S. No. 16 of 1933, District Court, South Arcot, pending Appeal No. 306 of 1936 on the file of the High Court and for an injunction restraining the respondent Board from taking proceedings or passing orders by way of notifying the suit temple in pursuance of the Hindu Religious Endow-

* Appeal No. 306 of 1936 and L. P. A. Nos. 56 and 57 of 1937. — 3rd April, 1939.

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ments Act, Madras, pending the said Appeal No. 306 of 1936 on the file of the High Court.

K. Rajah Aiyar, V. Ramaswami Aiyar and *V. Seshadri* for Appellants.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.: *Appeal No. 306 of 1936.*—This is an appeal from the judgment of the learned District Judge of South Arcot modifying a scheme framed by the Madras Hindu Religious Endowments Board in regard to the temple of Sri Sabanayakar *alias* Nataraja of Chidambaram. This action was filed as a representative suit on behalf of the Dikshitars (who are said to be over 200 in number) who claim to be trustees—archakas and poojaris of the said temple. Before the learned District Judge various questions as to jurisdiction were raised. It is unnecessary for us to mention all of them. It is sufficient for us to say that one of the main questions raised in this behalf was in regard to the non-applicability of the Hindu Religious Endowments Act and the consequent want of jurisdiction in the Board to frame a scheme. The contention of the Dikshitars is that the suit temple is only a private temple and not a public religious institution within the meaning of the Act and therefore the Board had no jurisdiction to frame a scheme. Another contention in regard to jurisdiction was that even assuming that the Board had jurisdiction, the provisions of Ss. 62 and 63 of the Act were not complied with, in that the Board could frame a scheme on its own initiative only if there was mismanagement and not merely because it would be proper to frame a scheme in the interests of efficient administration of the temple. The learned District Judge disallowed all the contentions on behalf of the plaintiffs and upheld the scheme of the Board but only modifying it in some particulars with a view to satisfy some of the objections raised on behalf of the plaintiffs. Mr. Rajah Aiyar on behalf of the plaintiffs-appellants confined his objections mainly to the scheme, though incidentally he made mention of the two main objections which we have outlined in regard to the jurisdiction of the Board to frame the scheme. So far as the question of jurisdiction based on the non-applicability of the Act is concerned, the learned Counsel, we think, wisely refrained from pressing it because it cannot be seriously

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doubted that the suit temple is a public institution within the meaning of the Act and not a private temple as contended for. We agree that some of the grounds on which the learned District Judge purported to hold against the plaintiffs may not be valid, but having regard to the character of the temple it seems to us that it would be too much to contend that this is a private temple. So early as 1885 when the question was raised in a suit by the Dikshitars, Muthuswami Aiyar and Shephard, JJ., in their judgment dated 17th March, 1890, in A. S. Nos. 108 and 159 of 1888 observed that it was not denied that the institution was being used as a place of public worship from time immemorial and that there was no particle of evidence in support of the assertion that this ancient temple of Sri Nataraja was the private property of the Dikshitars. Even now it is not denied that this temple is held to be very sacred by all the Saivites in this Presidency and is resorted to as a place of public worship. The other contention of Mr. Rajah Aiyar with reference to the Board's jurisdiction to frame a scheme under S. 63 is that the Board could frame a scheme when it takes action *suo motu* only if it finds mismanagement. There is a finding in this case that there was mismanagement, but it seems to us that the Board can always take action if it has reason to believe that a temple is being mismanaged. In this case there was ample material on which it could take action on its own initiative. It accordingly instituted an enquiry and then proceeded to frame a scheme. Once the Board takes action *suo motu*, we think even though it may ultimately find that there was no mismanagement, nevertheless it can frame a scheme if it is necessary for the proper administration of the temple that a scheme should be framed. S. 62 imposes a restriction to taking action *suo motu* by confining it to a case where the Board has reason to believe there is mismanagement but once it initiates an enquiry, the power to frame a scheme is not restricted to a case of mismanagement. Under S. 63 it can frame a scheme on any one of the grounds mentioned therein, namely, mismanagement or improper alienation of endowed property or in the interests of proper administration of the endowment. When we put this aspect of the matter to Mr. K. Rajah Aiyar, he very properly refrained from pressing this contention. His main complaint was that while the scheme was *sub judice* and while the question of jurisdiction was being agitated by the plaintiffs and while

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the Board's proceedings in regard to the scheme were stayed, the Board took action under S. 65-A for the purpose of notifying the temple. It seems to us very undesirable that the Board should have taken any steps in regard to the notification of this temple. The procedure in regard to notification ought not to be lightly resorted to, unless and until there is such serious mismanagement of a temple as would justify an ouster of the trustees in charge of a temple from their office. The scheme was framed in 1933 and proceedings relating to its modification were pending in the District Court and the scheme had not been given any fair trial. It could not possibly be said that the scheme was not worked satisfactorily by the trustees and that therefore in the interests of proper administration of the temple it was necessary for the Board to take the drastic step of having the temple notified. We trust and hope that the Board would drop all proceedings in the matter and allow the scheme as modified by the District Court and as modified by us to be given a fair trial and would give the trustees a fair opportunity to carry on the administration in accordance with the scheme.

Now coming to the actual scheme, so far as we can see it is a perfectly innocuous scheme and the Board has interfered as little as possible with the internal administration of the trustees. But the learned District Judge has out of regard for the sentiment of the trustees modified the scheme in certain particulars which we believe ought to satisfy a most scrupulous trustee. Even this however does not seem to satisfy the plaintiffs because for ages they have been going on with their traditional methods of administration and any slight variance naturally evokes some sort of hostility. We think that in the proper administration of the temple a scheme such as the one in question is absolutely necessary because the trustees are more than 200 in number and it would be impossible in the very nature of things to expect proper administration by such an unwieldy body. The main objections of Mr. Rajah Aiyar to the scheme as modified by the District Court relate to paragraph 4, paragraph 8 (*f*) and paragraph 10 of the scheme. Paragraph 4 relates to the appointment of nine trustees annually, six by election and three by nomination. This is objected to by Mr. Rajah Aiyar on the ground that the principle of election would introduce a factious spirit and that when there are nearly 230 trustees every one of them would not according to the principle proposed have the

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chance of participating in the management of the affairs of the temple in accordance with the time-honoured custom which prevailed among them. It was to satisfy this sentiment that the learned District Judge modified the clause by introducing the principle of nomination in regard to three of the trustees, leaving six to be elected by the Dikshitars among themselves. Even this would not satisfy the Dikshitars because every one of the trustees may not have a chance of participating in the management and therefore some method must be devised by which their wishes should be respected in regard thereto. We think that a provision by which all persons who have been appointed by election should be declared ineligible for office for a period of five years from the termination of their office would meet the justice of the case. We accordingly modify paragraph 4 of the scheme by adding that six trustees who will be appointed by election should not stand for re-election for a period of five years from the termination of their office. Paragraph 8 (*f*) relates to the duties of the manager in regard to the proper performance by the archakas, paricharakas and other internal servants of the devasthanam and the office establishment, of their work. What Mr. Rajah Aiyar objects to is the word "control" which may connote, that a servant like the manager can control the trustees some of whom happen to be archakas and paricharakas. We modify paragraph 8 (*f*) by deleting the words "immediate control" and by saying

"Do see to the proper performance of their duties by archakas, paricharakas and have immediate control over the internal servants of the devasthanam as well as over the office establishment in accordance with the usage."

In paragraph 10 the following sentence will be added:

"In regard to the putting up of sheds, the Managing Committee of Trustees may in their discretion select such sites as would be proper places for putting up temporary sheds for opening stalls during festival occasions."

The scheme shall come into operation from the 1st June, 1939.

The appeal is dismissed with costs of the first respondent (to come out of the temple funds) which we fix at Rs. 250.

The Letters Patent Appeals are not pressed. Dismissed. No costs.

K. S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Puligoru Subbarama Reddi (dead) and another .. *Appellants** (*1st Defendant and nil*)

v.

Palamkota Krishniah Chetti and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

Subbarama Reddi v. Krishniah Chetti.

Mortgages—Alienee advancing money—Money used for discharging two prior mortgages—If gives alienee priority over a mortgage omitted to be discharged.

The first defendant (a subsequent alienee of the suit property) contended that he having discharged the prior mortgages was entitled to priority in respect thereof. The plaintiff contended that the money was advanced by the first defendant for discharging the suit mortgage as well and having failed to discharge it is precluded from setting up any claim to priority.

Held, it would not be open now to the first defendant to set up the mortgages that had actually been discharged as a shield against the plaintiff's mortgage.

Lakshmi Amma v. *Sankara Narayana Menon*, (1935) 70 M.L.J. 1: I.L.R. 59 Mad. 359 at 374 (F.B.), followed.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor in A. S. No. 56 of 1936 preferred against the decree of the Court of the District Munsif of Tirupati in O. S. No. 235 of 1934.

T. Kumaraswamiah for Appellants.

K. Rajah Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit to enforce a mortgage dated 10th January, 1924, executed by one Ganji Guruva Reddi in favour of one Dhupam Gangakka. The said mortgage has now become vested in the plaintiff by two successive transfers. The interest of the mortgagor is vested in defendants 1 and 2 by purchase. The main question for decision in this appeal is whether the first defendant is entitled to have priority over the mortgage sued on in respect of two prior mortgage debts discharged by him, namely, one in favour of Kathi Chandra Reddi and another in favour of Dhupam Narayana Reddi. The learned District Munsif decided the

* S. A. No. 960 of 1937. 2nd February, 1939.

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question in favour of the first defendant, but the learned Subordinate Judge reversed his decision. It is against this decision that the first defendant has preferred this appeal.

The relevant facts are not in dispute. The owner of the suit property which formed the subject-matter of the several mortgages in question was one Ganji Guruva Reddi who effected the suit mortgage in favour of Dhupam Gangakka who transferred it in favour of her son Ramiah, who again transferred it in favour of the plaintiff. On the 17th September, 1925, that is, subsequent to the date of the suit mortgage, the said Guruva Reddi borrowed a sum of Rs. 1,200 from the first defendant partly by selling a portion of the mortgaged property and partly by mortgaging a portion of the mortgaged property to him. The transactions are evidenced by two documents, Exs. E and F. Ex. E purports to be a deed of sale for Rs. 800 and the purpose of effecting the sale is thus stated in the deed:

"Kathi Chandra Reddi having died, his heir and brother Venkata Reddi, the said Chandra Reddi's sons (1) minor Bhathi Reddi and (2) Yanadi Reddi, being minors, by guardian and junior paternal uncle the said Venkata Reddi, obtained a decree against me in O. S. No. 173 of 1924 on the file of the District Munsif's Court, Tirupati and executed the decree in E. P No. 374 of 1925. For paying the said decree amount and costs, etc., and for paying the mortgage-debts of Dhupam Gangakka and others, I have received from you this day Rs. 800 excluding the amount received under the hypothecation deed executed in your favour separately this day, and for this amount, I have this day sold to you the house and site, etc."

Ex. F purports to be a mortgage for Rs. 400 and the purpose for which the mortgage was executed is thus stated:—

"Kathi Chandra Reddi, having died, his heir and brother Venkata Reddi, and his minor sons, Bhathi Reddi and Yanadi Reddi, by guardian and junior paternal uncle the said Venkata Reddi brought O. S. No. 173 of 1924 on the file of the District Munsif's Court, Tirupati, obtained a decree and is executing the decree in E. P. No. 374 of 1925. For paying the said decree amount, etc., and for paying the mortgage amount of Dhupam Gangakka and others, I have received this day in cash Rs. 400 excluding the amount received by my selling the house, etc., in your favour. I have become indebted to that extent."

It will thus be seen from the recitals in these two deeds that the same purpose is stated in both. It has been concurrently found by both the Courts that from and out of the sum of Rs. 1,200 advanced by the first defendant two mortgages were discharged, namely, (1) the mortgage in favour of Kathi Chandra Reddi which resulted in O. S. No. 173 of 1924 on the file of the District Munsif's Court, Tirupati and (2) the mortgage in favour of Dhupam Narayana Reddi the discharge of

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which was one of the purposes for which the suit mortgage Ex. A was executed. The first defendant's plea is that the suit mortgage was a nominal transaction and the successive transfers including that in favour of the plaintiff were fraudulent and collusive transactions and therefore not binding on him and that he having discharged admittedly the prior mortgages was entitled to priority in respect thereof. The contention of the plaintiff is that the money advanced by the first defendant was for the purpose of discharging the suit mortgage as well and he having failed to discharge it is precluded from setting up any claim to priority. It is conceded by Mr. Rajah Aiyar that S. 92 of the Transfer of Property Act as amended by Act II of 1930 would not apply to the case in view of some recent decisions which will be binding on me and that the law to be applied will be the law before the amendment. I therefore do not think it necessary to go into the correctness of the interpretation of S. 92 of the Transfer of Property Act placed by my learned brother Varadachariar, J., and myself in the Full Bench decision reported in *Lakshmi Amma* v. *Sankara Narayana Menon*[1].

The mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a person personally liable to pay pays it, it must *prima facie* be deemed to be extinguished. This will be the obvious case of the mortgagor because the mortgagor cannot set up his own encumbrance against any subsequent encumbrance which he himself has created. The principle underlying this is stated by Lord Justice Fletcher Moulton in *Manks* v. *Whiteley*[2] thus:

> "The two encumbrances were created by the mortgagor and embodied obligations on his part to discharge the two debts, and therefore he could not be allowed to set up the fact that he had fulfilled the one obligation to shield himself in any way from the performance of the other."

This principle is also extended to the case of a person 'who has assumed the duty of paying the debt either by a contract with the mortgagor or with those who have succeeded to his rights'. There may be an express covenant to pay the later mortgage also against which the prior mortgage is sought to be set up or it may be the case of the money being left in the hands of a purchaser or a mortgagee with directions to pay. In those cases the prior mortgage is deemed to be extinguished. *Brown*

1. (1935) 70 M.L.J. 1 : I.L.R. 59 Mad. 359 at 374 (F B.).
2. (1912) 1 Ch. 735 at 759.

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v. *Stead*[1] and *Govindasami Thevan* v. *Doraisami Pillai*[2] are cases where a purchaser or mortgagee covenanted to pay the debts. *Narayanasami Naidu* v. *Narayana Rao*[3] and *Chidambara Nadan* v. *Muni Nagendrayyan*[4] are cases where the money had been left with a purchaser or mortgagee. It may be that in the case of such a purchaser or mortgagee the mortgages he discharged will be kept alive against an unknown encumbrance or a known encumbrance which he has not undertaken or was not directed to discharge. It is well settled that if the owner of an estate pays off a charge on the estate which he is not personally liable or under no obligation to pay, it is always open to him to extinguish it or to keep it alive and if no intention is expressed one way or the other, it is presumed that he intended to keep the charge alive. The intention to the contrary can be inferred from the terms of the purchase or mortgage-deed in cases where the purchaser or the mortgagee advances money for the purpose of discharge or from legitimate evidence. Tested in the light of these principles, the question in this case is whether the contention of the first defendant is sustainable. There can be no doubt that though a sum of Rs. 1,200 was advanced under two separate documents they formed part of one transaction. They were both executed on the same date for one and the same object, namely, for the discharge of mortgages existing on the property. In fact the recitals in the document clearly show that one document refers to the other. The two documents may therefore be treated as one deed. The substance of the transaction is that a sum of Rs. 1,200 was intended to be advanced by the first defendant and received by Guruva Reddi for the purpose of discharging specific mortgages including the mortgage sued on. It was intended that the first defendant should get in the one case property free from encumbrances and in another a first mortgage on the property for the amount advanced. Therefore the intention as appearing from the terms of the document is clearly to extinguish all the mortgages including the mortgage sued on. There is no distinction made between one mortgage and another. If at all an intention should be presumed in favour of the first defendant, it must be to the

1. (1832) 5 Sim. 535: 35 R.R. 186: 58 E.R 439.
2. (1910) 20 M.L.J. 380: I.L.R. 34 Mad. 119 at 121.
3. (1893) 4 M.L.J. 17: I.L.R. 17 Mad. 62.
4. (1920) 39 M.L.J. 445.

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effect that all the mortgages must be deemed to be kept alive against any unknown encumbrance and not that one mortgage should be kept alive against the other mortgage. The case really in my opinion is governed by the principle enunciated by me in my judgment in *Lakshmi Amma* v. *Sankara Narayana Menon*[1], namely:

"Therefore, if as in this case, a person advances money or covenants to discharge three encumbrances, payment of two prior encumbrances cannot be availed of by him as a shield against the third."

The decision of the division bench of the Calcutta High Court reported in *Surjiram Marwari* v. *Barhamdeo Persad*[2] is also in point. In that case a conveyance was executed for the purpose of discharging a mortgage in favour of one Narku Singh and also a mortgage in favour of the appellants therein. The evidence was that the mortgage in favour of Narku Singh was discharged but not the mortgage in favour of the said appellants. The question that arose was whether the vendees could claim priority in respect of the prior mortgages of Narku Singh. It was held that they could not. Mookerjee, J., after dealing with the case-law on the subject, proceeded to deal with the matter thus:

"The deed recites that the property was conveyed free of the encumbrances in favour of the appellants and Narku Singh and that the vendors had received in full the consideration and by payment to the encumbrancers would get the property released from the mortgages. There was no reason for keeping alive either of these charges, as there was no other incumbrance intermediate in date between them and the conveyance. The intention, on the other hand, of the purchasers was to acquire the property free from these charges, the existence of which had been ascertained, and the amount due upon each had been carefully specified. . . . . . Along with this circumstance, we must take the recital that the creditors were, under the terms of the conveyance, to be paid by the vendors and not by the purchasers . . . . . . Under these circumstances, I find it impossible to hold that there was any intention on the part of the purchasers to keep alive the security in favour of Narku to be used as a shield against the security of the appellants, should any occasion arise."

Mr. Somayya attacks the correctness of this decision and also my observations in *Lakshmi Amma* v. *Sankara Narayana Menon*[1], on the ground that it is only in cases where a person advancing money covenants to pay the debt, he will be deprived of the benefit resulting from the payment of an earlier charge

1. (1935) 70 M.L.J. 1: I.L.R. 59 Mad. 359 at 374 (F.B.).
2 (1905) 2 C.L.J. 288.

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and not in any other case. He strongly relied upon the observations in *Govindasami Thevan* v. *Doraisami Pillai*[1], namely:

"The rule as to subrogation only applies when the purchaser has not covenanted to discharge the previous encumbrance"

Mr. Somayya therefore argued that as the first defendant in this case has not covenanted to discharge any of the encumbrances and the obligation was undertaken by the vendors, it must be presumed that his client intended to keep alive the mortgages in favour of Chandra Reddi and Dhupam Narayana Reddi. Mr. Somayya relied also upon a number of other cases in support of his contention some of which I shall deal in the course of the judgment. In *Govindasami Thevan* v. *Doraisami Pillai*[1], the learned judges were dealing with a case where a person has covenanted to pay two mortgages but had only discharged one and in such a case they inferred that the intention could not have been to keep alive the first mortgage, the object being to discharge both. Any observations made by them must be understood with reference to the facts they were dealing with. In fact they approved the decision in *Surjiram Marwari* v. *Barhamdeo Persad*[2]. The distinction contended for by Mr. Somayya has really no substance because the question in each case is what was the intention of the parties. In this case either the money with which Chandra Reddi and Narayana Reddi were paid may be taken to be the money of Guruva Reddi or the money of the first defendant. The decision in *Mohesh Lal* v. *Mohant Bawan Das*[3] will be an authority for the position that it will be Guruva Reddi's money and a payment by Guruva Reddi will be a discharge by the mortgagor and therefore it will not be open to him to say that he kept those mortgages alive. If it be viewed as the money of the first defendant paid through Guruva Reddi who may be treated as his agent for the said purpose, certainly when the first defendant paid Rs. 1,200 into the hands of Guruva Reddi, it was with the object of discharging both the mortgages. That the agent committed fraud upon him will not displace the intention of the first defendant in discharging the mortgages. Therefore if the facts do warrant an inference of an intention not to keep the charge alive, the charge cannot be treated as subsisting because as the events

1. (1910) 20 M.L.J. 380: I.L.R. 34 Mad. 119 at 121.
2. (1905) 2 C.L.J. 288.
3. (1883) L.R. 10 I.A. 62: I.L.R. 9 Cal. 961 (P.C.).

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turned out, it would have been better to have kept it alive. Mr. Somayya strongly relied upon the decision in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*[1] to show that *Toulmin* v. *Steere*[2] was considered to be wrong both in England and in India and therefore the legitimate inference is that if from the consideration money for a sale of property it was intended to discharge certain encumbrances and an earlier encumbrance was discharged but not a later one, the presumption must be that the earlier encumbrance should be deemed to have been kept alive as it would obviously be for the benefit of the purchaser. It seems to me that neither of the cases suggests this inference; on the other hand, the observations of Lord Herschell go strongly against the contention of Mr. Somayya. In *Toulmin* v. *Steere*[2], it was decided that a purchaser who took a conveyance purporting to be free from encumbrances could not set up a mortgage which had been paid off out of the purchase money against an encumbrance subsequent in date of which he had constructive notice. It will be seen from the terms of the transaction in that case that the parties intended to discharge two mortgages in favour of Welby and the annuity which was subsisting on the property was never intended to be discharged. The purchaser had neither covenanted to pay the annuity sued on nor was it intended that it should be discharged out of the purchase money. The Court could well have presumed an intention in favour of the purchaser to keep the discharged mortgages in force. But *Toulmin* v. *Steere*[2] decided otherwise. Lord Herschell in explaining *Toulmin* v. *Steere*[2], indicated that that case may be justified on a certain view of facts; that is, that the purchaser intended to discharge all the encumbrances including the annuity and if so, the discharge of an earlier encumbrance would not entitle a purchaser to keep it as a shield against a later encumbrance. Lord Herschell remarks thus:

"In *Toulmin* v. *Steere*[2], the owner of the equity of redemption had purchased the property with the intention of paying off all the mortgages upon it and thought all the mortgages had been paid off out of the purchase-money. One mortgage had been omitted; but so far from the intention there being to keep any of the mortgages alive, the intention was to extinguish all the mortgages and it was believed that such intention had been successfully accomplished." (*Thorne* v. *Canon*[3].)

1. (1884) L.R. 11 I.A. 126: I.L.R. 10 Cal. 1035 (P.C.).
2. (1817) 3 Mer. 210: 36 E.R. 81.
3. (1895) A.C. 11 at 16.

Though in fact the annuity was not intended to be discharged Lord Herschell assumes that it must have been and on that view the decision may possibly be correct. If the above observations of Lord Herschell are applied to this case, it is clear that the first defendant had purchased the property and advanced money upon the mortgage with the intention of paying all the mortgages on it and thought that all the mortgages were paid off or would be paid off out of the purchase money, but the mortgage sued on had been omitted. Nevertheless as the intention was not to keep any of the mortgages alive, it would not be open now to the first defendant to set up the mortgages that had actually been discharged as shield against the plaintiff's mortgage. The case in *Dinabandhu Shaw Chowdhry* v. *Jogmaya Dasi*1 was relied on. It will be seen from that case that the amount was advanced to discharge both mortgages and both the mortgages were discharged but still both of them were kept alive as against an unknown encumbrance, an attachment which was subsisting in that case. That decision is no authority for a case where one of the mortgages which was intended to be discharged had not been discharged and the vendors had spent away the money intended for it.

The conclusion of the learned Subordinate Judge is right whatever may be the reasoning on which it is based. I therefore dismiss the second appeal with costs.

Leave refused.

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE ABDUR RAHMAN.

The Secretary of State for India in Council, represented by the Collector of North Arcot .. *Appellant* in both (8th Defendant)*

v.

M. A. C. Arunachala Mudaliar and others .. *Respondents (Plaintiffs 1 and 2 and Defendants 1 to 7 and 9 to 12).*

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Land Improvement Loans Act (XIX of 1883), S. 4—Agriculturists' Loans Act (XII of 1884), S. 4—Applicant to Government for loan already made

1. (1901) 12 M.L.J. 73: L.R. 29 I.A. 9: I.L.R. 29 Cal. 154 (P.C.).

* Appeals Nos. 77 of 1934 and 296 of 1935. 6th January, 1939.

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improvements on land with advances from private parties—Money advanced by Government paying off creditors—Priority of claim of Government whether subsisting—Construction of words of statute—Rules of construction.

A comparison of S. 4 of the Land Improvement Loans Act (XIX of 1883) and S. 4 of the Agriculturists' Loans Act (XII of 1884) would show that if a loan would be granted under the Land Improvement Act, it would not be granted under the Agriculturists' Loans Act.

On a grammatical and ordinary construction of the words of S. 4 of the Land Improvement Loans Act, the words are unambiguous and can only be held to apply to improvements which have not been effected at the time when the loan was granted and cannot be held to apply to improvements which had already been carried out at the time when the grant was made. Therefore the Government cannot be allowed to have priority in respect of advances applied for and made after the improvements was carried out with funds belonging to a private individual

Appeals against the decree of the Court of the Subordinate Judge of Vellore dated 27th November, 1933, 16th August, 1935 and passed in O. S. No. 69 of 1932.

The Government Pleader (*B. Sitarama Rao*) for Appellant.

K. Rajah Aiyar, D. Krishnaswami and *Ch. Raghava Rao* for Respondents.

The judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—This is an appeal by the Secretary of State for India and arises out of a suit filed by one Arunachala Mudaliar and his son on the basis of a mortgage deed (Ex. A) executed in their favour by Narayanaswami Naidu and his sons on the 19th of July, 1925. Since a priority was being claimed on behalf of the Secretary of State, in respect of a sum of Rs. 5,000 advanced to Narayanaswami Naidu on various dates between the 28th of September, 1925 and the 6th of May, 1926, he was also impleaded as a defendant in the suit. The trial Court decreed the plaintiff's claim and overruled the plea of priority raised on behalf of the Secretary of State and the only question which we have now been called upon to decide is if the decision of the trial Court is correct.

The facts which have given rise to this litigation are simple and may be set forth here. It appears that Narayanaswami Naidu was desirous of installing a Suction Gas pumping plant on his land and intended to move the Government for an advance of Rs. 5,000, to effect this improvement. Before making a formal application, he seems to have approached the Assistant Industrial Engineer first and laid the proposed project before him for his consideration. The officer made two reports in this connection

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in April and May, 1923 (Ex. XII). In view of the uncertainty of result of the application which he intended to make and at all events of the inordinate delay which an application of this nature would take before it could be finally disposed of, he borrowed a sum of Rs. 2,000 on 26th May, 1923, from the plaintiffs for purchasing an oil engine and executed a promissory note in their favour (Ex. C). Narayanaswami then presented an application to the Supervisor of Industries on the 1st of June, 1923 (Ex. II) in which he asked for "an agricultural loan of Rs. 5,000." During the investigation which proceeded on this application, he made two statements on 23rd July, 1924 (Ex. XVII) and on 9th September, 1924 (Ex. XVIII) to which we shall advert later. This application was rejected on 23rd October, 1924, although Narayanaswami made another attempt to secure the loan and addressed a letter to the Director of Industries on the 26th of February, 1925 (Ex. G) which was referred to the Collector. He was again examined by the Tahsildar on the 10th of April, 1925 (Ex. XIX) who recommended the loan to be advanced to him (Ex. XXII) and this was finally sanctioned by the Director on the 13th of July, 1925, and communicated to Narayanaswami by means of a letter dated 16th July. 1925 (Ex. XXI). The plaintiffs at this stage appear to have been approached for another loan of Rs. 1,000 or so and found an opportunity to have a deed of mortgage for Rs. 7,500 executed by Narayanaswami and his sons in their favour (Ex. A). This deed was executed on the 19th July, 1925, in consideration of the two prior promissory notes (Exs. B and C) and of a sum of Rs. 1,007-11-0 which is stated to have been advanced at the time of the execution of the deed.

There is no doubt that the action of the plaintiffs in getting their simple money debt converted into a secured debt at this stage when the Director of Industries had sanctioned a loan for Rs. 5,000 six days earlier excites one's suspicion against the *bona fide* nature of this transaction but in the absence of any other evidence, it is impossible to rest our decision on a surmise and a conjecture. They may have been duped by Narayanaswami and his sons in the manner as the Secretary of State and his officers have been. It is equally probable that the knowledge of Narayanaswami having made or revived his application to the Government for a loan, or of the Director having sanctioned it, was deliberately kept back from the plaintiffs. It is easy to

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conceive that if they had come to know of these facts, they would not have advanced a further sum of Rs. 1,000; but taking advantage of their position as creditors, they availed themselves of the opportunity afforded to them by agreeing to make a further advance only on the condition of their debt being secured. Whatever be the case, no question was put to Rungaswami Mudali (P. W. 1) who was a clerk of the plaintiffs for 20 years and no evidence was produced on behalf of the appellant which would justify an inference of this nature.

To resume the narrative, Narayanaswami executed a mortgage-deed in favour of the Secretary of State on 5th August, 1925 (Ex. XXIV) under which some of the lands mortgaged with the plaintiffs were again mortgaged with him but the mortgage-deed recites that the debt was advanced under the provisions of the Land Improvement Loans Act (XIX of 1883) and those of the Agriculturists' Loans Act (XII of 1884). The learned Government Pleader contends that in spite of the fact that the deed of mortgage in favour of the Secretary of State is subsequent to that of the plaintiffs, the former should have been held to have priority as the loan was advanced under the provisions of and for a purpose covered by the Land Improvement Loans Act and not under the Agricultural Loans Act. He urges that a reference to both the Acts in the forms Exs. III (*a*) and III (*c*), in Narayanaswami's application Ex. XIII and in the mortgage-deed Ex. XXIV was made under a mistake as the purpose, for which the money could have been advanced, and that it fell under the provisions of the Land Improvement Loans Act alone and not under the provisions of the other Act. The learned Counsel on behalf of the respondents contends on the other hand that a reference to both the Acts was deliberate as the purposes for which the money was advanced fell partly under one Act and partly under the other. The determination of this question is important as a loan granted under the provisions of the Improvement Loans Act would have priority over the debts due to other mortgagees who have a charge or incumbrance on the land for the benefit of which it was granted by the Government.

This necessitates an examination of the various provisions of both the Acts referred to above. S. 4 of the Land Improvement Loans Act provides, as its name indicates, that loans may be granted under this Act for the purpose of making any improvement

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which adds to the letting value of the land. In the sub-clause of the same section 'improvement' has been stated to include besides other things the construction of wells, tanks and other works for the storage, supply or distribution of water for the purpose of agriculture. The loans made under the Agricultural Loans Act can be made to owners or occupiers of arable land for the relief of distress, the purchase of seed and cattle or any other purpose not specified in the Land Improvement Loans Act (1883) but connected with agricultural objects (S. 4). A comparison of the two sections would thus show that if a loan could be granted under the Land Improvement Loans Act, it could not be granted under the Agriculturists' Loans Act.

The relevant provision of S. 7 of the Land Improvement Loans Act is to the effect that all loans granted under the Act along with the interest and costs shall be recoverable out of the land for the benefit of which the loan has been granted as if they were arrears of land revenue due in respect of that land.

S. 8 of the Act provides that a written order under the hand of an officer empowered to make loans under this Act granting a loan for the purpose of a carrying out a work described therein shall be conclusive evidence of—

(*a*) that the work described is an improvement within the meaning of this Act;

(*b*) that the person mentioned had at the date of the order a right to make such an improvement; and

(*c*) that the improvement is one benefiting the land specified.

After an examination of the various provisions of the Land mprovement Loans Act, there is little doubt that if the loan was advanced for the purpose of installing a gas plant to facilitate the supply or distribution of water on Narayanaswami's lands, it would fall within S. 4 of the Act. The only question then is if it was advanced for that purpose? In this connection it will be interesting to note Narayanaswami's statement recorded by the Revenue Inspector on the 23rd of July, 1924 (Ex. XVII) which reads as follows:—

"The loan now applied for is not intended for sinking a well and purchasing an engine. I have applied for an agricultural loan of Rs 5,000 for discharging the debt *previously contracted* in respect of this item. One year has elapsed since the date of purchase of the engine and lands are cultivated by this. The engine has been working. I have prepared and produced lists

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(Ex. XVI) relating to debts contracted in respect of engine and expenses. Amount spent till this date is Rs. 4,300. Cost of building to be constructed is Rs. 500.......... ."

He made a similar statement to the Tahsildar on the 9th of September, 1924 (Ex. XVIII). To the same effect was his statement which he made on the 10th of April, 1925 (Ex. XIX) after his application was rejected and was being re-considered at his request.

In view of these statements, Mr. Sitarama Rao contended that it was wholly immaterial whether the improvements were already carried out on the date of the order granting the loan or not, as long as the purpose for which the loan was granted is covered by S. 4 of the Act. In other words he argued that the improvements for which the loan is advanced need not necessarily be such as have to be carried out in future. It was suggested by him that an application by an intending borrower for the purpose of making one of the improvements mentioned in the Act is conclusive of the matter, if it is accepted by the officer empowered to make loans under the Act. Reliance was placed by him on a case decided by a Division Bench of this Court in *Sankaran Nambudripad* v. *Ramaswami Aiyar*[1].

The facts of the case, however, are distinguishable from the facts of the present one. It was found for a fact in that case that the borrower had utilized the portion of the loan advanced under the Act for the improvement already effected while it has not been established in this case that any portion of the money taken by Narayanaswami from the Government went to liquidate the debts incurred by him for making the improvements. Mr. Sitarama Rao characterises this fact to be a mere accident in that case and urged that this would not touch the principle on which the case was decided. We do not agree. There is no doubt that the learned Judges were greatly impressed by this fact and the following remark made by Seshagiri Aiyar, J., although liable to a different interpretation as well, must be understood to have been made in this sense. He observed:

"The test is not whether the improvement was subsequently made but whether the money was applied for the construction of agricultural improvements upon the property."

If the words 'applied for' were used by the learned Judge in the sense of merely making an application to the Government,

1. (1918) 34 M.L.J. 446: I.L.R. 41 Mad. 691.

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we would, with great deference, disagree. The whole case really turns on the interpretation of the words "for the purpose of making any improvement" used in S. 4 of the Act. It is a well-known canon of construction as observed by Lord Wensleydale in *Grey* v. *Pearson*[1], that

> "In construing wills and indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther.

The business of an interpreter is not to improve upon the words of an enactment but to expound them. As observed by Cockburn, C. J., in *Palmer* v. *Thatcher*[2], the question for him is not what the Legislature meant, but what its language means, that is, what the Act has said that it meant.

We have therefore to proceed on the principle enunciated by these noble Law Lords and interpret the language of S. 4 of the Land Improvement Loans Act. To our minds, the words in the section are unambiguous and can only be held to apply to improvements which have not been effected at the time when the loan was granted and cannot be held to apply to improvements which had already been carried out at the time when the grant was made. A reference to S. 8 of the same Act will not be out of place. The words used in that section are "for the purpose of carrying out a work" (thereby meaning improvement) can only be taken to mean future improvements only and not those which have already been made. We would have to face all kinds of difficulties and would not know where to draw a line, if we once failed or refused to place a grammatical construction on these words. As an illustration, we may take the case of a person who mortgaged his lands with *A* in 1910 and made certain improvements on those lands with the money received by him from *A*. Let us suppose that he mortgaged the same lands with *B* in 1922, discharged *A's* debt, re-mortgaged the same lands with *C* in 1934, discharged *B's* debt out of the money received from *C* and then made an application in 1935 to the Government under S. 4 of the Act. If the Government accepts his application and grants him a loan in 1936, would the claim by the Secretary of State be held to have priority over *C's* claim as a mortgagee?

1. (1857) 10 E R 1216 at 1234: 6 H L. C. 106.
2. (1878) 3 Q.B.D. 346 at 353.

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If the construction suggested by Mr. Sitarama Rao is correct, he must, to be logical, say that it would be so. But when this case was put to him by one of us, he was not prepared to go to that extent and said that this construction would be unreasonable, but he would confine the operation of the section to those cases only when improvements were affected by a person while he was either contemplating to make an application under the Act or had made one before the improvements were made. Where is the guarantee but, that the application made by a person would necessarily be accepted by the Government? Are the mortgagees, who have taken a mortgage without any knowledge of the borrower's intention to make an application or of the fact that an application has already been made by him, to remain in suspense for all this time? The position is to our minds impossible and cannot be accepted. After all it is for the Government to see, at the time when loan is being granted, if any improvements have already been effected by the borrower and if it finds that they have been, its officers should see that the persons who have advanced loans for this purpose are satisfied. In this case there is a volume of evidence on the record from which it has been established that Narayanaswami never concealed the fact that improvements for which the money was being asked for, except to a small extent of Rs. 500 or so, were carried out long before the order granting the loan was passed. In fact he stated that his object in taking the money was not to make improvements but to pay off the creditors from whom he had raised loans to carry out these improvements. Is the payment of such debts one of the purposes mentioned in S. 4? The answer can only be one and that in the negative. There is no reason to hold why we should read the words 'for the purpose of making any improvement' as having the same meaning as the words 'for the purpose of paying for an improvement' would have meant, if used in the section. There is nothing in the Act, which would make the interpretation we are placing on these words as repugnant or inconsistent with the rest of the Act and surely there is no absurdity which this construction would entail. We would therefore put a grammatical construction on these words and hold that they refer to future improvement only.

It cannot be denied, in our opinion, that the object of placing both these Acts on the Statute Book of India was to

help the agriculturist and proprietors of agricultural lands and not to benefit the Government at least directly. If the assumption made by us be right, would it be correct to place the construction suggested by the learned Government Pleader on S. 4 of the Land Improvement Loans Act? Why should it be presumed that the Legislature was trying to take away an advantage from them by one hand which was conferred on them by the other? It would be so, as in that case, the agriculturist would find it extremely difficult, if not impossible, to raise money on the security of their lands. Why should, one may well ask again, the mortgagees, who had already advanced moneys on the security of lands, be treated so unjustly? Why should they be deprived of their securities or their claims deferred to those of the Government, by an action of their own mortgagors in making applications and getting advances under the Land Improvement Loans Act? Why should the loans advanced by the Government under the two Acts be treated differently when the Agricultural Loans Act was passed only one year later? The answer to all these questions is not far to seek. While the loans advanced under the Agriculturists' Loans Act are, as provided in the Act, with the object of relieving the distress of agriculturists and for supplying seeds, etc., objects which would not improve the letting value of the land, the purpose of advancing loans under the Land Improvement Loans Act is specifically declared to be the improvement of the lands themselves. This would then mean that it was expected by the Legislature that the letting value of the lands would be improved, if the loans advanced by the Government were utilized for the purpose for which they were advanced, at least to the extent to which the money taken by the landlords under the Act was spent on them. In that case, the prior mortgagees could not be reasonably held to have suffered in regard to their security, as they had advanced money at the time when the improvements were not effected and the securities on which they had advanced their money would thus remain unaffected. It may be contended that the value of their securities enhanced by improvement effected with the funds advanced by the Government under the Act should not be permitted to be taken advantage of by prior mortgagees in the same way as they could have done if the mortgagors had effected improvements with their own funds. But this is a different matter. The Government

could reasonably and perhaps justly insist that if any money was advanced by it under the Act, it would have priority to that extent in view of the fact that the lands have been improved with the funds provided on its behalf; and it would be unfair for the prior mortgagees to improve their position at the cost of the Government, which might not in that case agree to advance any money at all and the agriculturists would suffer in consequence. Looked at even from this point of view, the same result would follow and we must hold that the money advanced by the Government should have preceded and not followed the improvements effected on the land. The Government cannot therefore be allowed to have a priority in respect of advances applied for and made after the improvements were carried out with funds belonging to a private individual.

For the aforesaid reasons, we must hold that a sum of Rs. 4,150 out of Rs. 5,000 advanced by the Director of Industries, does not fall within S. 4 of the Land Improvement Loans Act and the appellant would not therefore have any priority to that extent over the plaintiffs.

As for the rest, the position is different. A sum of Rs. 675 was spent in constructing the Engine shed after the grant was made and Rs. 175 were allowed by the Director to make further improvements to the installation. Mr. Raghava Rao's contention that Rs. 175 were also paid for a past improvement does not appear to be correct (*see* Ex. XXXVI). This sum of Rs. 850 falls under S. 4 and could be recovered by the appellant under S. 7 of the Act with interest. The costs claimed by the Government against defendants 9-12 are not allowed and the appeal is in that respect rejected.

The result is that the appeal is allowed to this extent only and the decree of the lower Court would be modified accordingly.

As for costs, there is no reason why the respondents, who have succeeded to a large extent, should not be allowed to have them at least to the extent to which they have won. They would therefore have $\frac{7}{8}$th of their costs in this Court and in the Court below.

The Second Appeal No. 296 of 1935 is also dismissed.

These appeals having been set down to be spoken to on Friday, the 29th July, 1938, the Court made the following

ORDER.—It is now brought to our notice that before the hearing the guardian of minors 5 and 6 was dead. Adjourned one month to appoint a guardian for the minors. The drawing up of the decree will be postponed in the meanwhile.

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These appeals having been posted for orders again this day, the Court made the following

ORDER.—A guardian has now been appointed and the final decree will be drawn up in accordance with our judgment which stands.

K. C. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW,

Rao Bahadur V. Ranganadham Chetty .. *Petitioner* (Accused).*

v.

The Corporation of Madras .. *Respondent (Complainant).*

Ranganadham Chetty v. Corporation of Madras.

Madras City Municipal Act (X of 1936), S. 217—Notice calling on owner to alter a street laid out by him—Lane with vacant plots on either side—If "street" under the Act.

The petitioner's land was parcelled out into 12 plots and sold to various purchasers leaving a passage about twelve feet in width for a lane, the title to which still vested in the petitioner. The petitioner was convicted for disobeying a notice by the Commissioner of the Corporation of Madras under S. 217 of the City Municipal Act calling on him to alter the street. On a petition for revision,

Held, this passage set apart for a lane would come under the definition of a street under the Act and it is not necessary that there should actually be rows of buildings on either side before a street comes into existence. The notice under S. 217 was legal and the conviction for disobeying the same was proper.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Third Presidency Magistrate of the Court of Presidency Magistrates, Egmore, Madras, in M. No. 5322 of 1936.

V. T. Rangaswami Aiyanyar for *M. E. Rajagopalachariar* and *C. Krishnamachariar* for Petitioner.

A. Suryanarayanaiah for Respondent.

K. V. Ramaseshan for *The Crown Prosecutor* for the Crown.

The Court made the following

* Crl. R. C. No. 571 of 1938. (Crl. R. P. No. 542 of 1938). 3rd January, 1939.

Ranga-nadham Chetty v. Corporation of Madras.

ORDER.—The petitioner in this case was convicted under S. 380 of the Madras City Municipal Act and sentenced to pay a fine of Rs. 10 and in default of payment to undergo simple imprisonment for one week. The charge against him was that he failed to comply with a certain notice issued by the Commissioner of the Corporation of Madras under S. 217 of the Madras City Municipal Act. The notice Ex. A-2 is dated 3rd June, 1936 and it appears to have been served on the petitioner on the 6th July, 1936. It called upon the petitioner to alter a certain street which had been laid out by him in R.S. No. 828/2 of Mylapore without the orders of the Standing Committee. It is admitted that this notice was not obeyed and that what was required in that notice was not done by the petitioner either within the time allowed or till now. Disobedience therefore to the notice is clearly established and as the notice was one which was issued subsequent to the coming into force of the Act amending the Madras City Municipal Act (X of 1936) the new provision introduced by that Act as sub-S. 3 of S. 380 would apply to the present case and the conviction would be proper unless as contended on behalf of the petitioner the notice itself was an illegal one and was issued without any authority. The authority under which the notice was issued is stated to be S. 217 of the Act which says that:

> "If any person lays out or makes any street referred to in S. 216 without or otherwise than in conformity with the orders of the Standing Committee the Commissioner may, by notice, require the offender to show sufficient cause why such a street should not be altered to the satisfaction of the Commissioner"

and so on. S. 216 requires that:

> "Any person intending to lay out or make a new private street must send to the Commissioner a written application with plans and sections"

showing certain particulars. Admittedly the provisions of this section, that is, S. 216 were not observed by the petitioner in this case, and indeed it is his contention that he never intended to lay out or make a new private street at all. The question therefore resolves itself into this, namely, whether, when the petitioner sold his land, that is, R. S. No. 828/2 of Mylapore in 1934 to certain persons, he did intend to lay out or make a new private street. There is no doubt from the evidence that the land was parcelled out into as many as 12 plots for building purposes and sold to four or five purchasers leaving a passage about twelve feet in width. The petitioner himself

in a letter of his dated 20th March, 1935, namely, Ex. II says that he has sold the lands leaving twelve feet from north to south and eleven feet from east to west and adds that the rest has been sold away. In his reply to a subsequent letter, namely, Ex. III-C, the petitioner says as follows: Ranganadham Chetty v. Corporation of Madras.

"The whole plot has been sold away leaving twelve feet of land in the middle for a lane."

It is therefore clear that the twelve feet passage was left for the purpose of forming a lane. The sale deeds themselves have not been produced and it has not been shown that this twelve feet wide passage was included in any of the sale deeds. On the other hand from the admissions of D.W. 1 in cross-examination it would appear that the passage is not included in the area purchased by the purchasers and is not included in the pattas issued in their names. Presumably therefore the title to this particular portion of land which was left to form a lane is still vested in the petitioner. The learned advocate for the petitioner referred to *Robinson* v. *Local Board for Barton*[1], but in a case of the present nature we have to look more to the definition of the word "street", private or public, found in the Act itself rather than to English decisions as to the meaning of the word "street". The definition in the Act itself is clear and it shows that the passage set apart in the present case for the purpose of a lane would come under the definition of a street; it is not necessary that there should be rows of buildings on either side actually in existence before a street comes into existence so far as the provisions of the City Municipal Act are concerned. It is therefore in my opinion impossible to say that there was no street laid out in this case. It may be that nothing was done to the passage that was left to serve the purpose of a pathway. But nonetheless what was done would amount to laying down a new private street. In these circumstances, as the other facts are admitted, namely, that no plans were sent in respect of such a street and the street was laid out without the orders of the Standing Committee, the Commissioner was entitled in law to issue the notice in question. The disobedience to the notice is admitted and in these circumstances it cannot be said that the conviction of the petitioner is contrary to law. No complaint has been made about the severity of the sentence. The petition is therefore dismissed.

K. S. —— *Petition dismissed.*

1. (1882) 21 Ch. D. 621.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Mekraj Alli Sahib and others .. *Accused**.

Mekraj Alli Sahib, *In re.*

Indian Penal Code (XLV of 1860), Ss. 147, 324, 325 and 349 read with S. 149—Separate sentences—Legality—Criminal Procedure Code, S. 106—Applicability.

The award of separate sentences under S. 147 and Ss. 324, 325 and 342 read with S. 149 of the Indian Penal Code is illegal. S. 106 of Criminal Procedure Code is applicable.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the Sessions Judge, Bellary, in his letter Dis. No. 3092 dated 24th June, 1938.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

Accused not represented.

The Court made the following

ORDER.—The conviction of the petitioners was under S. 147 and Ss. 324, 325 and 342 read with S. 149 of the Indian Penal Code and the view of the Sessions Judge that S. 106 of the Code of Criminal Procedure is inapplicable to the case is untenable. But the award of separate sentences under S. 147 and Ss. 324, 325 and 342 read with S. 149 of the Indian Penal Code is illegal and the separate sentences awarded under Ss. 324, 325 and 342 read with S. 149 of the Indian Penal Code are set aside. The sentences of the third and fourth accused under S. 147 of the Indian Penal Code are reduced to the period already undergone as recommended by the Sessions Judge and the order under S. 106 of the Code of Criminal Procedure will stand.

K. S. ——— *Sentences set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Kuppainethu Guruvappa Naicker .. *Petitioner*† *(Respondent)*

v.

M. Mounaguruswami Naicker .. *Respondent (Appellant).*

Guruvappa Naicker *v.* Mounaguruswami Naicker.

Civil Procedure Code (V of 1908), S. 110, cl. 2—Property of the value of Rs. 10,000—Affected by the decree—Certificate for leave to appeal to the Privy Council.

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* Crl. R. C. No. 450 of 1938. 29th July, 1938.
(Case Referred No. 14 of 1938).

† C. M. P. No. 5450 of 1938. 31st March, 1939.

Guruvappa Naicker v. Moonaguruswami Naicker.

In a suit between two co-owners of a village there was a compromise decree under which the petitioner was allowed to cultivate the 14 kulis of land in suit from Channel A. The respondent contended that the petitioner was restrained from cultivating any further area. When the petitioner cultivated a further 5 kulis from Channel B from the stream the respondent applied in execution to restrain the petitioner. The District Judge dismissed the petition holding that the petitioner was entitled to use the water from Channel B. The High Court reversed the decision and held that the petitioner was not entitled to draw further water from either channel. In an application for a certificate under S. 110 (2) of the Civil Procedure Code for leave to appeal to His Majesty in Council,

Held, inasmuch as the property affected by the decree is of the value of Rs. 10,000 the application must be allowed.

Radhakrishna Aiyar v. *Sundaraswamier*, (1922) 43 M.L.J. 323: L.R. 49 I.A. 211: I.L.R. 45 Mad. 475 (P.C.), applied.

Mussamat Aliman v. *Mussamat Hasiba*, (1897) 1 C.W.N. 93 (S.N.), followed.

Petition under Ss. 109, 110 and O. 45, r. 1 of the Civil Procedure Code praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant a certificate to the petitioner herein to enable him to appeal to His Majesty in Council against the order of the High Court in A. A. O. No. 460 of 1936 preferred against the order of the District Court of Madura dated 17th July, 1936 and made in E. P. No. 20 of 1935 in O. S. No. 81 of 1909.

T. R. Venkatarama Sastri and *T. M. Krishnaswami Aiyar* for Petitioner.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Respondent.

The Court made the following

ORDER.—This is an application for a certificate permitting an appeal to His Majesty in Council. The facts as stated at the Bar are shortly these. The petitioner and the respondent are co-owners of a village in the Madura District, the petitioner owning one-third and the respondent two-thirds of the property. Through the village lands run two water channels, which have been referred to as A and B. Originally the wet cultivation of the village lands covered 200 kulis, roughly 110 acres. Of the 200 kulis the petitioner had 50 kulis and the respondent 150 kulis. In 1908 the petitioner brought under wet cultivation by means of Channel B an additional 14 kulis, which resulted in a suit being filed against him by the respondent for an injunction restraining him from using the channel for this purpose. The suit was compromised and the agreement arrived at was embodied in the decree. Under the decree the petitioner was allowed to cultivate the 14 kulis, but according to the respondent he was to

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be restrained from cultivating any further area. The petitioner subsequently brought under wet cultivation a further 5 kulis obtaining the water from stream A. This resulted in an application being filed by the respondent in execution proceedings to restrain him. The contention was that by reason of the injunction which had been granted the petitioner was not entitled to bring under wet cultivation any additional land, either by means of the water from Channel A or from Channel B. The reply was that the injunction which had been granted only referred to Channel B. The District Judge of Madura dismissed the petition, being of the opinion that the petitioner was entitled to use the water from Channel A, notwithstanding the decree. An appeal followed to this Court. The appeal was allowed, this Court holding that the petitioner was not entitled to draw further water from either channel. The petitioner desires to appeal to His Majesty in Council against this decision.

The application for leave is opposed on the ground that the subject-matter is not of the value of Rs. 10,000. The application came before this Court in the first instance on the 9th February, 1939, and a report on the value of the property was called for from the District Judge. Before the District Judge it was conceded by the respondent that the value of the land belonging to the petitioner which is affected by the judgment of this Court is far more than Rs. 10,000. The value of the additional 5 kulis which the petitioner brought under cultivation and which resulted in the present proceedings is admittedly under Rs. 10,000. The petitioner says that in as much as the property affected by the decree is of the value of Rs. 10,000 he is entitled to the certificate under the second clause of S. 110 of the Code of Civil Procedure.

We consider that this contention is well founded. In *Radhakrishna Aiyar* v. *Sundaraswamier*[1], the Judicial Committee observed:—

"In the first place, the sum of money actually at stake may not represent the true value. The proceedings may, in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit."

That is the position here. This is not a case of a person claiming a right in a property where the value of the property

1. (1922) 43 M.L.J. 323 : L.R. 49 I.A. 211 : I.L.R. 45 Mad. 475 (P.C.).

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is over Rs. 10,000 and the value of the right is less than that amount. It is the construction of the agreement embodied in the compromise decree which is in dispute. If the decision of this Court stands it will mean that the petitioner will not be able to bring any further portion of his land under wet cultivation and his interest in the village is of far greater value than Rs. 10,000. The case reported in *Mussamat Aliman* v. *Mussamat Hasiba*[1] is directly in point.

The application will be allowed on the usual conditions. The costs of this application will be made costs in the appeal.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Muthuswami Pillai .. *Petitioner* (Accused).*

Muthuswami Pillai. *In re.*

Criminal Procedure Code (V of 1898 as amended), S. 4 (b)—Filing of complaint—Charge-sheet filed by police under S. 379, Penal Code—Facts constituting offence set out—Effect.

Where the charge-sheet filed by the police under S. 379, Indian Penal Code, set out the facts constituting an offence under S. 163 (*a*). (2) of the Madras Local Boards Act,

Held, that the charge-sheet filed would amount to a complaint as defined in S. 4 (*b*) of the Criminal Procedure Code.

Public Prosecutor v. *Ratnavelu Chetty*, (1926) 52 M.L.J. 210: I.L.R. 49 Mad. 525 (F.B.), followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Musiri, in C. A. No. 27 of 1938 preferred against the order of the Court of the Stationary Sub-Magistrate, Musiri, in C. C. No. 762 of 1937.

N. Somasundaram for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The charge-sheet filed by the Police under S. 379, Indian Penal Code, sets out the facts which constitute the offence under S. 163, clause (*a*) (2) of the Madras Local Boards Act and as pointed out in the *Public Prosecutor* v. *Ratnavelu Chetty*[2], this would amount to a complaint as defined

1. (1897) 1 C.W.N. 93 (S.N.).

* Crl. R. C. No. 784 of 1938. 21st February, 1939.
(Crl. R. P. No. 746 of 1938).

2. (1926) 52 M.L.J. 210 I.L.R. 49 Mad. 525 (F.B.).

Muthuswami Pillai, *In re.*

in S. 4, clause (*b*) of the Criminal Procedure Code. S. 223 of the Madras Local Boards Act empowers the police to make the complaint and the charge-sheet was filed within three months of the commission of the offence. The revision petition therefore fails and is dismissed.

B. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. MADHAVAN NAIR, *Officiating Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

S. A. Ramanathan Chettiar .. *Petitioner* (1st Respondent in A. S. No. 57 of 1933 on the file of the High Court)*

v.

P. P. Palaniappa Chettiar and others .. *Respondents (Appellants Nos. 1 and 4 to 7 and Respondents Nos. 2 and 3 in do.).*

Ramanathan Chettiar *v.* Palaniappa Chettiar.

Civil Procedure Code (V of 1908), S. 109, cl. (a)—"Final order" meaning of—Order of remand deciding one of the cardinal issues but leaving other issues undecided—If a final order.

"Final order" in S. 109, cl. (*a*) of Civil Procedure Code means an order which finally disposes of the rights of the parties and does not leave the suit a live suit in which the rights of the parties have still to be determined. The finality must be a finality in relation to the suit.

Where therefore in an appeal to the High Court from a decision of the lower Court in a suit for accounts, the High Court determined one of the important questions in the suit and remanded the case to the lower Court for determination of the other questions in the case, the order is not 'a final order' within the meaning of S. 109 (*a*) of the Civil Procedure Code, though the High Court might have decided one of the cardinal points in issue.

Abdul Rahman v. *D. K. Cassim & Sons*, (1932) 64 M.L.J. 307: L.R. 60 I.A. 76: I.L.R. 11 Rang. 58 (P.C.), followed.

Petition under Ss. 109 and 110 and O. 45, rr. 2 and 3 of Act V of 1908 praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioner herein to appeal to His Majesty in Council against the judgment and order of the High Court dated 16th March, 1938 and passed in Appeals Nos. 57 and 235 of 1933 respectively preferred against the interim and final decrees of the Court of the Subordinate Judge of Devakottai dated 9th February, 1933 and 30th March, 1933 and made in

* C. M. Ps. Nos. 2608 to 2610 of 1938. 8th August, 1938.

Ramanathan Chettiar v. Palaniappa Chettiar.

O. S. No. 29 of 1931 and in I. A. No. 364 of 1933 in O. S. No. 29 of 1931, respectively.

A. Swaminatha Aiyar and *S. Theagaraja Aiyar* for Petitioner.

K. Rajah Aiyar, *K. S. Rajagopalachariar* and *N. G. Krishna Aiyangar* for Respondents.

Civil Miscellaneous Petition No. 2610 of 1938.

The judgment of the Court was delivered by

Madhavan Nair, Offg. C.J.

The Officiating Chief Justice.—These are applications for leave to appeal to the Privy Council against the order of remand made by this Court in Appeals Nos. 57 and 235 of 1933. The applications have been made under S. 109, clause (*a*) of the Code of Civil Procedure and the question which we are called upon to decide is whether in passing the remand order we passed a final order within the meaning of the term "final order" as used in clause (*a*) of the section.

The above appeals arose out of a suit for accounts. The lower Court's decree was reversed and the suit was remanded for further enquiry. The suit was upon a promissory note for a sum of Rs. 60,000 in which the plaintiff and the defendants were interested in the proportion of 5/17 : 2/17. The promissory note was in the possession of the defendants and they had the obligation to collect the amount due under it. One of the questions which arose in the case was, what was the rate of interest due under the note and how it should be calculated. The document mentioned no particular rate of interest beyond stating that it carried the 'Rangoon nadapu rate'. The learned Subordinate Judge determined that interest should be calculated at the Rangoon nadapu rate calculating compound interest with half yearly rests. We decided that the plaintiff should be allowed to claim only simple interest at the Rangoon nadapu rate. The point was not seriously contested before us by the learned Advocate-General who appeared for the plaintiff. After deciding this question of interest we remanded the suit to the lower Court for disposal in the light of our observation on the other points involved in the case. At the end of our judgment we observed as follows:

"After receiving the Commissioner's report the learned Judge will fix a time for objections and after due consideration of the report and the objections he will pass a final decree for the amount ultimately found due from

Ramanathan Chettiar v. Palaniappa Chettiar.

Madhavan Nair, Offg. C.J.

the defendants to the plaintiff calculating simple interest at the Rangoon nadapu rate till the date of the decree."

It may be mentioned here that the defendants contended amongst other things that certain collections under the promissory note had been made by the plaintiff and that certain securities which were entrusted to him were still with him. They also contended that no money would be found due from them if an account was taken.

It is now argued by the learned Counsel for the petitioner that, though the order is one of remand, inasmuch as it decides the question of interest, one of the questions involved in the suit, the order would fall within the description of "final order", because one of the main points at issue, or to use the term of the learned Advocate, one of the cardinal points at issue, had been decided by this Court. Various cases have been brought to our notice by the learned Counsel on both sides. It may be said that it is difficult to reconcile the decisions in some of the cases: but we do not propose to consider them, because in their latest pronouncement in *Abdul Rahman* v. *D. K. Cassim & Sons*[1], their Lordships of the Judicial Committee have laid down clearly the principle to be applied in deciding this question. That was a case where the plaintiff after instituting the suit became insolvent and the Official Assignee who was joined as plaintiff declined to proceed with the suit in the absence of security. The trial Judge made a decree dismissing the suit. Upon appeal the learned Judges held that the cause of action was personal and did not vest in the Official Assignee but remained with the plaintiff who continued to be treated as a party on record; accordingly they set aside the decree and remanded the suit for trial. The question was whether that order came within the description of "final order". The observations of their Lordships of the Privy Council appearing at page 65 of the report give a clear indication as to the meaning of the expression "final order". Their Lordships say:

"It should be noted that the appellate Court in India was of opinion that the order it had made 'went to the root of the suit, namely, the jurisdiction of the Court to entertain it', and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under S. 109 (*a*) of the Code."

1. (1932) 64 M.L.J. 307: L.R. 60 I.A. 76: I.L.R. 11 Rang. 58 at 65 (P.C.).

Ramanathan Chettiar *v.* Palaniappa Chettiar.

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Further on their Lordships explain the principle thus:

"The effect of the order from which it is here sought to appeal was not to dispose finally of the rights of the parties. It no doubt decided an important, and even a vital, issue in the case, but it left the suit alive, and provided for its trial in the ordinary way."

Now, applying that test to the facts of this case it may be said that one of the issues has been decided in the case, that is, the issue as to the rate at which interest should be charged, but that does not dispose of finally the rights of the parties. The suit is still alive and has to be tried in the ordinary way. Our order gives merely the correct method of calculating the amount due from one party to the other. It may be that on calculating the interest as directed by us no amount is due from the defendants to the plaintiff. The two decisions relied upon by the learned Counsel for the petitioner, *viz.*, *Rahimbhoy Habibbhoy* v. *Turner*[1] and *Syed Muzhar Hussein* v. *Radha Bibi*[2], were referred to by their Lordships and were distinguished by them as cases decided with reference to the old Civil Procedure Code. In support of their conclusion their Lordships refer to their own decision in *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand*[3], which laid down, following the decision in English Courts, that the test of finality is whether the order "finally disposes of the rights of parties" and that if those rights are left to be "determined by the Courts in the ordinary way" there is no final decision in the case. These observations make it quite clear that the order in the present case cannot be said to be a final order. In view of the clear pronouncement by their Lordships it is not necessary to discuss the other cases referred to by the learned Counsel. In the circumstances we hold that the petitioner is not entitled to ask this Court to grant him leave to appeal under S. 109 (*a*).

We dismiss these applications with costs (one set in C. M. P. No. 2608 of 1938).

S. V. V. — *Petitions dismissed.*

1. (1890) L.R. 18 I.A. 6: I.L.R. 15 Bom. 155 (P.C.).
2. (1894) 5 M.L.J. 20: L.R. 22 I.A. 1: I.L.R. 17 All. 112 (P.C.).
3. (1920) 39 M.L.J. 27: L.R. 47 I.A. 124: I.L.R. 47 Cal. 918 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Manickavachakam Chettiar .. *Petitioner** (*Petitioner—1st Defendant*)

v.

The Official Receiver, East Tanjore at Negapatam .. *Respondent* (*Respondent—Plaintiff*).

Manickavachakam Chettiar *v.* Official Receiver, East Tanjore at Negapatam.

Civil Procedure Code (V of 1908), S. 115—Lower Court framing issues—High Court not to interfere in revision.

It is not any part of the legitimate duties of the High Court to help lower Courts to frame issues. They alone have jurisdiction to frame issues in suits which come before them for trial, and as their Lordships of the Privy Council have so often remarked, they have jurisdiction to decide wrongly as well as rightly.

Petition under Ss. 115 of Act V of 1908 and 224 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram, dated 27th September, 1937 and made in I. A. No. 194 of 1937 in O. S. No. 7 of 1937.

T. M. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for Petitioner.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Respondent.

The Court delivered the following

JUDGMENT.—It is very clear to me that this is not a case for interference in revision under S. 115 of the Code of Civil Procedure. The jurisdiction of the learned Subordinate Judge is not questioned. It could not be, since it is by law the duty of the trial Court to frame the issues. When I ask what is the illegality or material irregularity in the exercise of jurisdiction, Mr. T. M. Krishnaswami Aiyar can say no more than that, in his view, the burden has been wrongly thrown on his client in issues 1, 3 and 6. But this, namely, which way the burden was to be thrown, was the precise question which the learned Subordinate Judge had to decide. There is no allegation that the learned Subordinate Judge has acted perversely or has omitted to consider anything which it was his duty to consider. The sole complaint against him is that he has come to the wrong decision. That, in my opinion, can never be a ground for interference in revision. With all respect to Mockett, J. and

* C. R. P. No. 1361 of 1937. 12th May, 1938.

Stodart, J., whose decisions in *Sri Tripurasundari Cotton Press Company, Ltd., Bezwada* v. *Venkata Gurunadha Ramaseshayya*[1] and *Natesan Chettiar* v. *Mariyayee Ammal*[2] have been cited before me on behalf of the petitioner, I prefer to follow the principles laid down by a Full Bench of this Court in *Kristamma Naidu* v. *Chapa Naidu*[3]. It may well be said that it is the duty of this Court to interfere in revision to correct lower Courts when they act perversely; it can never be said that we should interfere with them in revision merely because they have decided wrongly. It is not, in my opinion, any part of the legitimate duties of this Court to help lower Courts to frame issues. They alone have jurisdiction to frame the issues in the suits which come before them for trial, and as their Lordships of the Privy Council have so often remarked, they have jurisdiction to decide wrongly as well as rightly.

Manickavachakam Chettiar v. Official Receiver, East Tanjore at Negapatam.

Since there is not even an allegation of perversity against the learned Subordinate Judge I decline to consider the questions raised on their merits. I am satisfied that there is no ground for interference in revision under S. 115 of the Code of Civil Procedure and accordingly I dismiss this petition with costs.

K. C. —— *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD MACMILLAN, LORD ROMER AND SIR GEORGE RANKIN.

Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu .. *Appellant**

v.

The Revenue Divisional Officer, Vizagapatam .. *Respondent.*

P.C. Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v. Revenue Divisional Officer, Vizagapatam.

Land Acquisition Act (I of 1894), S. 24 (5)—Compulsory acquisition—Compensation—Principles for assessment—Acquiring authority only possible purchaser—Effect if any on assessment—Potentiality of land—If value, after exploitation can be considered.

The principle that, where land is acquired compulsorily under statutory powers, the compensation payable to the owner shall be ascertained by reference to the price which a willing vendor might reasonably expect to obtain

1. (1935) 69 M.L.J. 239. 2. A.I.R. 1936 Mad. 526.
3. (1894) I.L.R. 17 Mad. 410 (F.B.).

* P. C. Appeal No. 36 of 1938. 23rd February, 1939.

P.C.

Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v. Revenue Divisional Officer, Vizagapatam.

from a willing purchaser is applicable even where the only possible purchaser of the potentiality of the land to be acquired is the person or authority clothed with the statutory powers of acquisition, and accordingly the assessor must in such a case ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor for the land with its potentiality in the same way as he would ascertain it in a case where there were several possible purchasers; and he is no more confined in the former case than he would be in the latter to awarding as compensation the value of similar land stripped of the potentiality attached to the land in question.

That the provision in S. 24 of the Land Acquisition Act, 1894, "But the Court shall not take into consideration . . . . . *fifthly*, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired . . . ." means no more than that the land must be valued as it stands at the date when the owner is notified under the Act of the intention to purchase it compulsorily, and not as it will stand when it has been acquired and when its potentiality has been exploited. The provision does not, however, mean that the possibility that a particular purchaser of land will give a higher price for it by reason of its possessing a special adaptability must be disregarded merely because the land will be more valuable in his hands when he exploits that adaptability than it would be if left in the hands of a vendor unable to exploit it. The land must be valued at the sum which the acquirer would in a friendly negotiation be willing to pay on the date of negotiation in order to exploit the land for the purposes which he has in mind.

In re *Gough and the Aspatria, Silloth and District Joint Water Board*, (1904) 1 K.B. 417, explained.

Dictum of Fletcher—Moulton, L.J., in Re *Lucas and Chesterfield Gas and Water Board*, (1900) 1 K. B. 16, not followed.

Sidney v. *North Eastern Railway Co*, (1914) 3 K B. 629, doubted.

Appeal from a decision of the High Court, Madras (Wadsworth and Stodart, JJ.), dated 4th May, 1937, reversing an award of the Subordinate Judge, Vizagapatam, dated 11th September, 1933, made on a reference under the Land Acquisition Act, 1894.

The appellant was the owner of certain land known as Lova Gardens which adjoined on the south Vizagapatam Harbour which was being reconstructed. The land surrounding the harbour was in a malarial condition so serious as to be likely to keep from using the harbour the various enterprises which it was desired to attract to it. The appellant's land contained a spring with a large yield of pure water, the use of which would make possible the closing of the many wells in the villages surrounding the harbour, which wells formed the breeding grounds for malaria bearing mosquitoes. The upper part of the appellant's land consisted of the catchment area for the spring which on emerging from the ground flowed down the valley forming the lower part of the land. In order to divert the spring straight to the harbour, it was

desired by the harbour commissioners, who in these proceedings were represented by the Revenue Divisional Officer, the respondent, to acquire compulsorily from the appellant a certain part of his land under the Land Acquisition Act, 1894. The appellant was notified of this under S. 4 (1) on 13th February, 1928, the public purpose for which the land was needed being specified as the execution of anti-malarial works. The procedure laid down by Ss. 6, 7 and 8 of the Act having been followed, and the Collector having taken steps under Ss. 9, 10 and 11 to determine what compensation the appellant ought to receive, the latter on 5th January, 1929, filed a claim for compensation, claiming Rs. 3,96,730 in all. The Land Acquisition Officer having awarded the appellant Rs. 17,745, the latter had the matter referred to the Subordinate Judge who awarded him Rs. 1,20,750. The High Court having restored the Land Acquisition Officer's award, which had originally been paid to the appellant and received by him under protest, the appellant now appealed to His Majesty.

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A. M. Dunne, K. C. and *P. V. Subba Row* for Appellant.—It was, it is submitted, a mistake on the part of the High Court to hold that the special adaptability of the appellant's land as a source of supply of drinking water had no value apart from the harbour commissioners' scheme, simply because they were the only possible purchasers of the land for that purpose. The fact that a certain authority are the only possible purchasers of a potentiality attaching to certain land does not mean that the authority are not willing to pay a sum representing that potentiality as increasing the value of the land. Counsel referred to *Inland Revenue Commissioners* v. *Clay*[1] and *Glass* v. *Inland Revenue*[2].

H. U. Willink, K.C., W. Wallach and *W. W. K. Page* for Respondent.—The fact that the harbour commissioners are the only possible purchasers of the potentiality attaching to the appellant's land cannot be lost sight of in settling the compensation. A good way of illustrating the position is to consider an auction sale of the land. At such a sale of this particular land, there would attend, besides would be purchasers in the ordinary way, only one person interested in the potentiality of the land. As, however, he would have no competition from the ordinary purchasers, his bidding would add very little to the price fetched by the land apart from the potentiality; for the bidding at the sale generally will only rise just enough above the ordinary bidding level to enable the special purchaser to outbid the ordinary purchasers. *Inland Revenue Commissioners* v. *Clay*[1] and *Glass* v. *Inland Revenue*[2] are

1. (1914) 3 K.B. 466. 2. (1915) S.C. 44.

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both distinguishable from a case like this where the only possible purchaser of the potentiality is the authority who have obtained the compulsory powers of purchase. (Counsel referred to the judgment of Sir R. Henn Collins, M.R., in In re *Gough*[1].)

Further the fifth matter specified in S. 24 of the Land Acquisition Act, 1894, as something not to be taken into consideration in assessing compensation confirms the respondent's argument. The value of the land which is likely to accrue from the use to which the purchaser of the potentiality will put it has, by that enactment, to be disregarded. It is, therefore, not possible to fix compensation by reference to what that special purchaser might give in competition with other special purchasers.

23rd February, 1939. Their Lordships' judgment was delivered by

Lord Romer.

LORD ROMER.—This appeal is concerned with the question of what is the proper sum to be awarded to the appellant by way of compensation in respect of the compulsory acquisition by the Vizagapatam Harbour Authority of certain land of his adjoining the Harbour, the respondent being the representative of such authority for the purposes of this appeal. The circumstances in which the land was acquired are as follows.

The Vizagatapam Harbour, the construction of which appears to have been begun in the year 1920, was formed by making excavations in swampy land situate to the south-west of the town of Vizagapatam and by dredging a deep water channel in the creek to the south of that town that led from the swampy land into the Bay of Bengal. On the south of the land acquired by the Harbour Authority for the purpose of these works is situated the property of the appellant known as the Lova Gardens. These gardens are formed by a valley which runs down from high ground on the south-west to low ground on the north-east adjoining the land of the Harbour Authority on the south of the above-mentioned creek. The upper portion of this valley consists of a shallow basin in the hills which forms the catchment area of a spring of water that emerges from the ground at the north-east end of the basin. This spring, which appears to yield even in the dry season an average flow of 50,000 gallons a day of excellent drinking water, is situated at a height of 150 feet above sea level. Until a part of it was diverted by the Harbour Authority, as narrated hereafter, the

1. (1904) 1 K.B. 417 at 423.

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Lionel Cohen, K.C., P. V. Subba Row and *K. Umameshwaram* for Appellant.—It was, it is submitted, a mistake on the part of the High Court to hold that the special adaptability of the appellant's land as a source of supply of drinking water had no value apart from the harbour commissioners' scheme, simply because they were the only possible purchasers of the land for that purpose. The fact that a certain authority are the only possible purchasers of a potentiality attaching to certain land does not mean that the authority are not willing to pay a sum representing that potentiality as increasing the value of the land. Counsel referred to *Inland Revenue Commissioners* v. *Clay*[1] and *Glass* v. *Inland Revenue*[2].

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whole of the water from this spring ran down the valley to the lower end of Lova Gardens and from thence discharged itself into the creek. By the early part of the year 1926 the construction of the harbour had made considerable progress and it was hoped that it would be ready for opening by the end of 1929. With that end in view a portion of the harbour site had been allocated by the Harbour Authority for the purpose of being used by oil companies and other industrial concerns. The entire south side of the harbour had indeed been allocated for industrial purposes. But the harbour land was very malarious, and so, too, was much of the land to the south of the harbour, including the lower part of the Lova Gardens; a circumstance that gave rise to some anxiety in the minds of the Harbour Authority. They accordingly consulted Mr. Senior White, who is an expert upon the subject, and upon the 1st May, 1926, that gentleman, after making an "anti-malarial survey" of the area, embodied the results of his survey in a report. This report disclosed a serious state of affairs in the villages situated in the area of which there appear to have been at that time no less than 32 of which nine were on the south side of the creek. These villages, or many of them, seem to have been dependent upon wells for their water supply, and these wells formed breeding grounds for the malaria-bearing mosquitoes. It is plain from the report that persons carrying on business at the harbour would run a serious risk of contracting malaria as matters then stood, and this would greatly hamper the development of the harbour site for industrial purposes. Further, as Mr. White pointed out, there was the possibility of shipping at the quays becoming infected, and the mere possibility, which had already been suggested in the Indian Press, was detrimental to the interest of the port. It appears from a letter written by Mr. Rattenbury, the Deputy Engineer in Chief to the Harbour Authority, dated the 14th July, 1926, that in these circumstances, Mr. White was "very keen on closing the wells along the south side", and this, the letter adds, could be done if a gravity water supply were provided instead. Such a supply could be furnished by the spring at the upper end of Lova Gardens, and accordingly the Harbour Authority conceived the idea of using the water from the spring for the purpose of freeing the harbour from malaria. But apart altogether from the assistance that this supply of water would

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give to the prevention of malaria, there was much to justify its acquisition on its own merits, as was pointed out in a letter of the 2nd October, 1926, written by one of the harbour officials. For the water could be made available as a supply to the oil companies and other industrial concerns that might be established in the southern part of the harbour area. The method of utilizing the water for these purposes that was ultimately adopted was this: The water was to be diverted from the lower part of the valley to which reference has been made and led from a short distance below the spring directly to the harbour area by means of a tunnel to be made through the hilly land to the north-west of the valley. This scheme, which was in due course carried out and is now in operation, involved the acquisition from the appellant of the shallow basin forming the catchment area of the spring, the site of the spring itself, and a narrow strip of land below the spring. In due course the necessary steps were taken for the compulsory acquisition of this land under the provisions of the Land Acquisition Act, 1894, the notification under S. 4 (1) of the Act being given on the 13th February, 1928. the public purpose for which the land was needed was stated in the notification to be the execution of anti-malarial works, the total area to be acquired from the appellant being 108·9 acres. Of this acreage the catchment area, including the site of the spring referred to as 2-1D and 2-1E, accounted for 105·92 acres, and the land below the spring referred to as 2-1B (0 53 acres), 2-1C (0·48 acres) and 2-3B (1·97 acres) accounted for the rest.

After the giving of the notification, and the procedure laid down in Ss. 6, 7 and 8 of the Act having been followed, the Collector took the steps prescribed by Ss. 9, 10 and 11 to determine the compensation that ought to be allowed to the appellant for his land. It is provided by S. 15 of the Act that in so doing, the Collector shall be guided by the provisions contained in Ss. 23 and 24, and it will be convenient before continuing this narrative to turn to these provisions. So far as material to the present purpose they are as follows:—

"23.—(1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—

first, the market-value of the land at the date of the publication of the Notification under S. 4 (1);

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

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thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings.

24. But the Court shall not take into consideration—

first, the degree of urgency which has led to the acquisition;

secondly, any disinclination of the person interested to part with the land acquired;

. . . .

fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired."

The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act, 1845, before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of 1919. As was said by Wadsworth, J., when giving judgment in the High Court in the present case, "It is well settled that English decisions under the Lands Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act". The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent it should affect the compensation to be awarded, is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor, a sentimental value far in excess of its "market value". But the compensation must not

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be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at "the market price"; to use the words of S. 23 of the Indian Act. It is perhaps desirable in this connection to say something about this expression "the market price". There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by "the market value" in S. 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined [that time under the Indian Act being the date of the notification under S. 4 (1)], but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that, in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in S. 24 (5) of the Act and is sometimes expressed by saying that it is the possibilities of the land and not its realised possibilities that must be taken into consideration.

But how is the increase accruing to the value of the land by reason of its potentialities or possibilities to be measured? In the case instanced above of land possessing the possibility of being used for building purposes, the arbitrator (which expression in this judgment includes any person who has to determine the value) would probably have before him evidence of the prices paid, in the neighbourhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land might never be so required or might not be so required for a considerable time. In the case, however, of land possessing potentialities of such an unusual nature that the arbitrator has not similar cases to guide him, the value of the land must be ascertained in some other way. In such a case, moreover, there will, in all probability, be only a very limited number of persons capable of turning the potentialities of the land to account.

If the owner of the land is the only person who can do so, the value to him must be ascertained by reference to what profit he might thereby have been able to derive from the land in the future. Take as an example the case of an owner of vacant land that adjoins his factory. The land possesses the potentiality of being profitably used for an extension of the factory. But the owner is the only person who can turn that potentiality to account. In valuing the land, however, as between him and a willing purchaser, the value to him of the potentiality would necessarily have to be included.

The same consideration will apply to cases where the owner is not the only person but merely one of the persons able to turn the potentiality to account. The value to him of the potentiality will not be less than the profit that would accrue to him by making use of it had he retained it in his own possession. But now take the case where the owner is himself unable to turn the potentiality to account whether by promotion of a company or otherwise. In such a case there may be several other persons who would be able to do so, or there may be only one. If there are more than one, it is recognised by all the authorities that have been cited to their Lordships, and seems to be consistent with common sense, that the owner is entitled to be paid the value to him of the potentiality, though the

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ascertainment of its value may in many cases be a matter of considerable difficulty.

It has been suggested that in order to ascertain it, the arbitrator is to hold an imaginary auction. But with all respect to those who have made the suggestion, their Lordships are unable to see how this is going to help the arbitrator. At such imaginary auction, all possible purchasers must, no doubt, be imagined as attending. They will include, therefore, persons who are in no way interested in the land's potentialities, and such persons will bid no higher price than the value of similar land without its potentialities. This value in this judgment is referred to as the "poramboke" value. But they will also include what may be called the purchasers of the potentialities. There may also be present some speculative buyers who will be willing to bid more than the "poramboke" value upon the chance of being able to resell to a purchaser of the potentiality at a profit. It would seem, however, logically, that such purchasers should be disregarded. For the object of the imaginary auction is to discover what a purchaser of the potentiality will be willing to pay for it, and this cannot depend upon the presence at the auction of persons willing to pay less, unless it be that such ultimate purchaser is to be considered willing to pay whatever fantastic price he may be forced up to by competition. And no one suggests this.

Proceeding, therefore, with the imaginary auction at which are present two classes of buyers—namely, the "poramboke buyers" and the "potentiality buyers",—the former will disappear from the bidding as soon as the "poramboke" value has been reached, and the bidding will thereafter be confined to the "potentiality buyers." But at what figure will this bidding stop? As already pointed out, it cannot be imagined as going on until the ultimate purchaser has been driven by the competition up to a fantastic price. For he is *ex hypothesi* a willing purchaser and not one who is by circumstances forced to buy. Nor can the bidding be imagined to stop at the first advance on the "poramboke" value. For the vendor is a willing vendor and not one compelled by circumstances to sell his potentiality for anything that he can get. The arbitrator will, therefore, continue the imaginary bidding until a bid is reached which, in the arbitrator's estimate, represents the true value to the vendor of the potentiality. The auction will, there-

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fore, have been an entire waste of the arbitrator's imagination. If the value of the potentiality be Rs. X, the imaginary auction will have taken place to ascertain the value of X from the imaginary bidding, and all that can be said is that the bidding will stop at Rs. X.

The truth of the matter is that the value of the potentiality must be ascertained by the arbitrator on such materials as are available to him and without indulging in feats of the imagination.

Their Lordships would not have thought it necessary to deal with this question of the imaginary auction at such length, were it not for the fact that in the argument before them the respondent's counsel endeavoured to show, by reference to such an auction, that when there was only one possible purchaser of the potentiality the value of it to the vendor was nil—that is to say that the value of the land with the potentiality was substantially nothing in excess of its value without it. This argument, it may be observed, commended itself to Lord Cullen in the Scottish case of *Glass* v. *Inland Revenue*[1], referred to below, but was rejected by the majority of the Court.

Upon the question of the value of the potentiality where there is only one possible purchaser, there are some authorities to which their Lordships will have to refer. But dealing with the matter apart from authority it would seem that the value should be the sum which the arbitrator estimates a willing purchaser will pay and not what a purchaser will pay under compulsion. It was contended on behalf of the respondent that, at an auction where there is only one possible purchaser of the potentiality, the bidding will only rise above the "poramboke" value sufficiently to enable the land to be knocked down to that purchaser. But, if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it. An instance of this is to be found in the case of *Inland Revenue Commissioners* v. *Clay*[2]. That was a case under S. 25 (1) of the Finance (1909-1910) Act, 1910,

1. (1915) S.C. 449. 2. (1914) 3 K.B. 466.

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and is not perhaps strictly relevant to the present case. The facts of it, however, are worth recalling. There was a house of which the value to anyone except certain trustees was no more than £750. These trustees were the owners of a nurses' home which adjoined the house, and they were desirous of extending their premises. They accordingly purchased the house for £1,000, the owner thus receiving £250 for the potentiality his house possessed by reason of its position adjoining the nurses' home. It was held by the Court of Appeal that £1,000 was the value of the house to a willing seller. "To say", said Lord Cozens Hardy, M.R., "that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely with reference to its ordinary agricultural value, seems to me absurd". Had the house in that case been acquired compulsorily by a railway company, or local authority under the provisions of the Lands Clauses Consolidation Act, 1845, before its purchase by the trustees, the house ought, in their Lordships' opinion, and for the reasons already given, to have been valued at £1,000 and not merely at £750.

A case in many respects similar to *Clay's case*[1] is that of *Glass* v. *Inland Revenue*[2]. That also was a case arising under the Finance (1909-1910) Act, 1910, and was one where land of an agricultural value of £3,379 had been sold in 1911 to certain Water Commissioners for £5,000, they being the only possible purchasers of the land for other than agricultural purposes. It was held that in valuing the land as on the 30th April, 1909, the possibility that the Commissioners might give more than the agricultural value for the land must be taken into consideration. In Lord Johnston's words, it was necessary in order to fix the value of the land on the 30th April, 1909, to ascertain:

"What is to be attributed to the probability of the Water Commissioners, in the circumstances, desiring to acquire the property, and what figure in a friendly negotiation they would be prepared to pay for it."

But however this may be, it is said that the matter assumes a totally different complexion when the only possible purchaser is the one who has obtained the compulsory powers of purchase, and that this has been established by authorities that should be

1. (1914) 3 K.B. 466. 2. (1915) S.C. 449.

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followed by this Board. Of these authorities, the first one to which reference need be made is that of In re *Gough and The Aspatria, Silloth and District Joint Water Board*1. In that case it was not proved that the acquiring authority was the only possible purchaser and it may be that all that the Court of Appeal decided was that it was not incumbent upon the claimant for compensation to specify that any particular body of persons were possible purchasers, though the judgment of Lord Alverstone, L.C.J., seems quite consistent with the view that the potentiality must be valued, even if the acquiring authority be its only possible purchaser. But it is contended that Sir Richard Henn Collins, M.R., expressed the contrary view. After referring to the particular adaptability of the land that was in question and that it ought to find a place in the estimate of the amount of compensation, he said (423) :—

"That view is supported by authority and long practice; but underlying it is the question, which is one of fact for the Arbitrator, whether there is a possible market for the site, and in determining that the statutory purchase is not to be considered."

But the Master of the Rolls said that the purchase, not the purchaser, was to be left out of consideration. Any enhanced value attaching to the land by reason of the fact that it has been compulsorily acquired for the purpose of the acquiring authority must always be disregarded, and the Master of the Rolls meant no more than that. The case of *Lucas and Chesterfield Gas and Water Board*[2] must, nowever, be considered in greater detail, for it is on certain dicta of Fletcher Moulton, L. J., in that case that the respondent chiefly relies. The land that had been compulsorily acquired in that case had potentialities for which the acquiring authority was not the only possible purchaser. The point now being considered did not, therefore, arise for decision. But in the Court below, *Lucas and Chesterfield Gas and Water Board*, In re,[3] Bray, J., had said this:—

"I come back to the question whether the fact that no buyer for reservoir purposes can be found, except a buyer who has obtained parliamentary powers, prevents the special value of the land being marketable.. In my opinion the answer I ought to give to that question is 'No'."

In the Court of Appeal, Vaughan Williams, L.J., said (p. 25) :—

"I agree with Bray, J., that the fact that no buyer for reservoir purposes can be found except a buyer who has obtained parliamentary powers does not prevent the special value being marketable."

1. (1904) 1 K.B. 417. 2. (1909) 1 K. B. 16.
3. (1908) 1 K B. 571 at 579.

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and stated that one of his reasons for so agreeing was that the fact that the board (who were the acquiring authority) might themselves become possible purchasers who would give a special price for the land, ought to be considered. Fletcher Moulton, L.J., however, said that the decided cases to his mind laid down the principle that, when the special value exists only for the particular purchaser who has obtained powers of compulsory purchase, it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the land to be purchased under it. He added that where there were other possible purchasers there would be competition among them and this fact would enhance the market price. The learned Lord Justice did not specify the authorities which laid down the principle in question and their Lordships are not aware of any that would justify it. It must, of course, be conceded that the existence of the scheme must not be allowed to enhance the price, if by "scheme" is meant the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality. The valuation must always be made as though no such powers had been acquired, and the only use that can be made of the scheme is as evidence that the acquiring authority can properly be regarded as possible purchasers. But their Lordships have some difficulty in seeing why the taking into consideration of the fact that the special value exists for those purhasers only should be said to be allowing the existence of the scheme to enhance the value of the lands. The only difference that the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land; and that is a circumstance that is never allowed to enhance the value. If, on the other hand, the Lord Justice meant by "the scheme" the intention formed by the acquiring authority of exploiting the potentiality of the land, his statement can only mean that the value of the land is not to be enhanced by the fact that they are possible purchasers. The result of this would be that, even in a case where there are two or more possible purchasers, their existence must not be allowed to enhance the value. For each purchaser must be deemed to have a scheme in the sense supposed, and the enhancement of value due to their competition which the

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Lord Justice envisages will in fact be due to the "schemes". In these circumstances their Lordships are not prepared to follow the dictum of Fletcher Moulton, L. J., in the *Lucas case*[1], and prefer the opinion there expressed by Vaughan Williams, L.J. It is said, however, that the dictum of Fletcher Moulton, L.J., has already received the approval of this Board on more than one occasion. But in no case to which their Lordships' attention has been called was the question of the effect of there being only one possible purchaser of the land being considered by the Board, and any approval of the statement of the law by the Lord Justice must be regarded merely as an approval of such statement so far as it affected the particular question then before the Board. It is sufficient in this connection to refer to two of such cases. In *Cedars Rapids Manufacturing and Power Company* v. *Lacoste*[2], Lord Dunedin, in delivering the judgment of the Board, said this:—

"The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England and it has been explained in numerous cases, nowhere with greater precision than in the case of In re *Lucas and Chesterfield Gas and Water Board*[1], where Vaughan Williams and Fletcher Moulton, L.JJ., deal with the whole subject exhaustively and accurately."

As has already been pointed out, the opinions of the two Lords Justices upon the question now being considered were diametrically opposed to one another. The other case is that of *Fraser* v. *City of Fraserville*[3], where Lord Buckmaster, in delivering the judgment of the Board, said (p. 194):—

"The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of In re *Lucas and Chesterfield Gas and Water Board*[1], *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*[2] and *Sidney* v. *North Eastern Railway Co.*[4] The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case."

It will be observed that Lord Buckmaster makes no reference whatsoever to the present question. But in one of the cases to which the noble and learned Lord referred—namely, *Sidney* v. *North Eastern Railway Co.*,[4] Rowlatt, J., is thought

1. (1901) 1 K.B. 16. 2. (1914) A.C. 569 at 576.
3. (1917) A.C. 187. 4. (1914) 3 K.B. 629.

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to have said much the same as had been said by Fletcher Moulton, L.J. In that case certain land possessed the potentiality of being used for the purposes of a railway. That potentiality was capable of being turned to account by a railway company who had obtained compulsory powers of acquiring it and by the proprietor of an adjoining colliery. In assessing the compensation to be paid by the railway company for the land, the arbitrator took into account the possibility that, but for its acquisition by the railway company, the colliery proprietor might have purchased it, but he did not take into consideration the possibility that the company might in friendly negotiation have been willing to pay more for it than the colliery proprietor. In their Lordships' opinion he was wrong in this. The Divisional Court, however, on a case stated, upheld the decision of the arbitrator. In the course of his judgment Rowlatt, J., said this:—

"Now if and so long as there are several competitors including the actual taker who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land is an element of the value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail to what can any further value be attributed? The point has been reached when the owner is offered more than the land is worth to him for his own purposes and all that any one else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers, the owner need not sell to that one and that one would need to make higher and yet higher offers. In respect of what would he make them? There can only be one answer—in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell without obtaining for himself a share in that value. Nothing representing this can be allowed."

If and so far as this means that the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor, and not the price that would be paid by a "driven" purchaser to an unwilling vendor, their Lordships agree. But so far as it means that the possibility of the promoter as a willing purchaser being willing to pay more than other competitors, or in cases where he is the only purchaser of the potentiality, more than the value of the land without the potentiality is to be disregarded, their Lordships venture respectfully to differ from the learned Judge.

For these reasons, their Lordships have come to the conclusion that, even where the only possible purchaser of the land's

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potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers and that he is no more confined to awarding the land's "poramboke" value in the former case than he is in the latter.

It is now necessary to take up once more the narrative of the events that have led up to this appeal. On the 5th January, 1929, the appellant filed his claim for compensation. It was certainly not lacking in courage, but it was lacking strangely enough in any suggestion that the land had a potential value as a source from which water might be supplied to persons or corporations outside Lova Gardens. He did, however, allege that Lova Gardens had a valuable potentiality as a building site and that such potentiality would be destroyed if he were deprived of the spring. He accordingly claimed Rs. 2,50,000 in this respect, calling it "Damages sustained by severance", though in strictness it should have been called damages sustained by reason of the acquisition injuriously affecting his other property. He also claimed Rs. 1,200 per acre in respect of the land and Rs. 16,050 as the value of the masonry structures, roads, and trees on the land, the total claim amounting to Rs. 3,96,730.

On the 18th January, 1929, the Land Acquisition Officer made his award. He allowed in all a sum of Rs. 17,745-1-3 including the 15 per cent. addition prescribed by S. 23 (2) of the Act. It appears from the grounds of award bearing the same date that he thought nothing of the potentiality of Lova Gardens as a building site, and the existence of any such potentiality has now disappeared from the case and need not be referred to again. He valued the land at Rs. 50 an acre with the exception of the land numbered 2-3B which he valued at Rs. 300 an acre. As to the claim in respect of "Damages sustained by severance", he thought that the rest of the appellant's land was probably better off without the water from the spring than with it. The lower part of the gardens, which was marshy and malarious, had too much water as it was. In any case he considered that the appellant would be amply compensated for the loss of the spring water by the Rs. 5,000 that he awarded under

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this head. The appellant's claim of Rs. 2,50,000 was, he said, preposterous. He also awarded a sum of Rs. 4,493 in respect of trees and buildings. The appellant thereupon required that the matter should be referred to the Court for determination under S. 18 of the Act, and in due course it came on for hearing before the Subordinate Judge of Vizagapatam. It was then claimed on the appellant's behalf that the spring could, but for its acquisition, have been used by him as a source of water supply either to the Harbour Authority or to the oil companies and others residing or carrying on business in the harbour area; and the appellant claimed to be compensated upon this footing. After a lengthy hearing before him, in the course of which many questions of law and fact not now in issue were discussed, the learned Judge made his award. He found as a fact, and the fact cannot be disputed, that the water of the spring was on the 13th February, 1928, capable of being used as a source of water supply to persons outside the plaintiff's land. He also found that the only possible buyers of the water at that date were the Harbour Authority itself and the oil companies and labour camps that might be established as a result of the development of the harbour, and stated that this fact would be taken into consideration in fixing the amount of compensation. But, after considering the authorities on the subject, he came to the conclusion as a matter of law that the value to a vendor of a potentiality of his land can be assessed even though there are no other possible purchasers beyond the acquiring authority. Other principles of law stated by him for his guidance in making his award were that it was the contingent possibility of the user that had to be taken as the basis of valuation and not the realised possibility, and that the use to which the acquiring authority had actually put the property could be taken as a strong piece of evidence to show that the property acquired could be put to such use by the owner at the date of acquisition. Applying these principles, he found that the value of the land acquired, including the spring, was Rs. 1,05,000, which, with the addition of the 15 per cent. under S. 23 (2) of the Act, amounted to Rs. 1,20,750. The Rs. 17,745-1-3 awarded by the Land Acquisition Officer had been paid to the appellant and received by him under protest, and deducting this sum from the Rs. 1,20,750, there remained Rs. 1,03,004-14-9 due to the appellant. This sum he decreed in favour of the appellant with

certain interest. The valuation of Rs. 1,05,000 was arrived at in this way. Evidence had been given before the learned Judge by two witnesses on behalf of the appellant as to what would be a proper charge for water supplied to the harbour area from the spring, and they estimated the charge at Re. 1-8-0 per 1,000 gallons. The learned Judge, however, said that taking into consideration the conclusions arrived at by him, which were presumably the conclusions of law and findings of fact referred to above, he thought it would be reasonable and proper to fix the value of the acquired property, that is, the water source on the date of the acquisition on the basis of Re. 1 per 1,000 gallons. Taking the normal supply of water at 50,000 gallons a day, this gave as the gross annual value of the water the sum of Rs. 18,250. He estimated that maintenance charges, depreciation of machinery, and interest on the capital outlay, would come to Rs. 12,273; but, taking these items at the round figure of Rs. 13,000, the net annual income from the spring would be Rs. 5,250. This he capitalised at 20 years' purchase, and so arrived at the Rs. 1,05,000. Having regard, amongst other things, to the extravagant claims put forward by the appellant in the first instance he awarded him no costs.

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From this decision an appeal was taken by the present respondent to the High Court at Madras, the appellant lodging a memorandum of cross-objections to the valuation of the Subordinate Judge which need not be specified. The appeal was heard by Wadsworth and Stodart, JJ., and judgment allowing the appeal was delivered on the 4th May, 1937. The reasons for this decision given by Wadsworth, J., in whose judgment Stodart, J., concurred, may be summarised as follows:—

The scheme for utilisation of the water and the carrying-out of anti-malarial operations in the valley (that is, the Lova Gardens) was not really an independent scheme. It was linked up with a bigger scheme for getting rid of breeding places of mosquitoes all round the southern side of the harbour so as to make the whole of that area fit for development. At the time when this scheme was promulgated the whole of that area was undeveloped. It was full of malaria and was incapable of any profitable use apart from the success of the anti-malarial campaign of which this acquisition was part. It was not conceivable that the present appellant himself would ever have been able to develop a water supply scheme, carrying out the

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necessary anti-malarial works and thereby encouraging business concerns to occupy the harbour land and buy water from him. The conclusion, therefore, must be that the special adaptability of the land for the supply of drinking water had no value apart from the scheme for which the acquisition was made.

The Harbour Authority, therefore, was at the date of the notification the only reasonably possible purchaser for the drinking water supply on the appellant's land and this being so, the Subordinate Judge had erred in awarding compensation for the special adaptability of the land to supply drinking water to persons outside the appellant's land. After referring to the authorities and, in particular, the dictum of Fletcher Moulton, L. J., in the *Lucas case* (*supra*), he said:—

"There can be little doubt that this exposition of the law when applied to the facts of the present case as we have found them would justify the conclusion that no value can be awarded to the special adaptability of this land for supplying drinking water to the harbour alone, if it can be shown that the land cannot have any value as a source of drinking water to anyone else."

By the harbour the learned Judge meant, of course, the Harbour Authority. Stodart, J., who, as already stated, concurred in the judgment of Wadsworth, J., added that:—

"It is not contended that any other public authority or private undertaker except the Harbour Authority would ever have come forward to develop this area and make it habitable. Thus the value of the . . . spring as a source of drinking water. . . arose entirely from the Anti-Malarial Scheme carried out by the Harbour Authority and depended on the success of that scheme. To my mind S. 24, sub-S. (5) of the Land Acquisition Act is completely applicable to the facts of this case."

The appeal was accordingly allowed with costs there and below and the award of the Land Acquisition officer was restored *in toto*. The memorandum of cross-objections was dismissed with costs. From that judgment, the necessary leave having been obtained, the appellant now appeals to His Majesty in Council.

Their Lordships agree with the High Court that on the 13th February, 1928, the only really possible purchasers of the special adaptability of the appellant's land as a water supply was the Harbour Authority. The position at that time was that the harbour was so far advanced that its opening in a few years was in contemplation. It was expected that, when that had taken place, oil companies and other industrial concerns, with their attendant labour camps, would be attracted to the harbour

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area, and they would all require to be supplied with water. It is plain that neither the appellant nor any purchaser from him would encounter any engineering difficulties in conducting the water from the spring to the southern boundary of the harbour area. Nor would they encounter any engineering difficulty in conducting the water from that boundary to the premises of the oil companies and other concerns. They would, however, have had to obtain the consent of the Harbour Authority to lay the necessary pipes in the harbour area itself and the possibility of such consent being refused would have to be taken into consideration in estimating the value to the appellant of the special adaptability of his land, though the risk of such consent being refused was not a serious one, assuming that there was no other source from which the water could be profitably supplied by the Harbour Authority itself. There was, however, on the 13th February, 1928, a much more serious matter to be taken into consideration. As already pointed out, the harbour area was at that date a highly malarious place, little calculated to prove attractive as a site for any industrial concern. Unless, therefore, this state of affairs was remedied, there would be no customers for the appellant's water and the value to him of the special adaptability was nil. Now it is true that there was a practical certainty of the Harbour Authority's taking steps to render the site as free as possible from malaria; for, if they did not, the harbour would not be used to any great extent even as a port of call. But, in order to carry out the necessary anti-malarial works, it was essential for the Harbour Authority to obtain a supply of drinking water from some source other than the wells in the area which were largely responsible for the malarious condition of the area and were going to be closed. The appellant on the 13th February, 1928, would therefore have been in this dilemma. If the only other source of water were the appellant's spring, the Harbour Authority would be the only possible purchaser. If, on the other land, the Authority could obtain water from other sources sufficient both for the anti-malarial work and the supply of the traders in the harbour area, the appellant would almost certainly be refused permission to carry his competing supply over the Authority's land. In point of fact there was at one time an alternative scheme on foot for obtaining water known as the Meghadrigedda Scheme. The scheme was to be for the benefit of the Municipality of Vizagapatam, the Bengal Nagpur Railway and the Harbour.

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The scheme aimed at a supply of one million gallons a day of which the harbour was to have 150,000 gallons a day. The scheme has not been proceeded with, but it is impossible to say what would have been done about it had the spring in the Lova Gardens not been acquired. In these circumstances the possibility of the appellant's water being made available for the harbour by anyone other than the Harbour Authority was altogether negligible, and the only enhancement in the value to the appellant of his land by reason of its special adaptability as a water supply was the sum that the Harbour Authority, as a willing purchaser, would have been willing to give in excess of the land's "poramboke" value.

Their Lordships have given their reasons for thinking, contrary to the view taken by the High Court, that such sum must be taken into consideration in fixing the compensation payable to the appellant, and that such sum is not to be treated as being a negligible one merely because the Harbour Authority was the only possible purchaser.

It remains to deal with S. 24 (5) of the Land Acquisition Act. That sub-section as applied to the present case means no more than this: that in valuing the appellant's land on 13th February, 1928, it must be valued as it then stood, and not as it would stand when the land had been acquired and the water on it used for ridding the harbour area of malaria. The Harbour Authority would otherwise be made to pay for the water twice over. But the sub-section does not mean that the possibility that a particular purchaser of land will give a higher price for it by reason of its possessing a special adaptability must be disregarded merely because the land will be more valuable in his hands when he exploits that adaptability than it would be if left in the hands of the vendor who was unable to exploit it. In *Clay's case* (*supra*), for instance, the house after being added to the nurses' home was no doubt more valuable than it was before. That, indeed, was the reason why the trustees of the home paid £250 more than any other purchaser would have paid. The house in that case was held to be of the value of £1,000, not because that was its value after being put to the use for which it was acquired, but because that was the price which the willing purchaser was prepared to pay for its acquisition. In the present case the land must be valued not at the sum it would be worth after it had been acquired by the Harbour

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Authority and used for anti-malarial purposes, but at the sum that the Authority "in a friendly negotiation" (to use Lord Johnston's words) would be willing to pay on the 13th February, 1928, in order to acquire it for those purposes.

Returning to the award made in the present case by the learned Subordinate Judge, it is to be observed that, in valuing the land with its special adaptability as being worth Rs. 1,05,000 to the appellant, he did so on the footing that the appellant would himself have been in a position to supply the water to the harbour but for its compulsory acquisition by the Harbour Authority. He would also seem to have so valued it upon the footing that the spring could have been made an income-earning concern on the 13th February, 1928. He would otherwise have made a substantial discount from the Rs. 1,05,000. It is plain, therefore, that in view of the fact that the water could not be exploited by the appellant himself and that it would necessarily be some years before the water would become a profit-earning asset in their hands, the Harbour Authority, however willing purchasers they might be, would not have agreed to pay anything like that sum. In these circumstances the matter should in strictness be referred back to the Subordinate Judge to revise his award. Both the parties to this appeal, however, have asked their Lordships, with a view to saving expense, to state what should be the proper amount of the award, and this their Lordships have consented to do. Giving the matter the best consideration they can, their Lordships are of opinion that the total price which the Harbour Authority would have been willing to pay on the 13th February, 1928, for the land acquired, is the sum of Rs. 40,000, and this sum with the additional 15 per cent. amounts to Rs. 46,000. In their Lordships' judgment the order of the High Court of the 4th May, 1937, should be discharged except in so far as it dismissed the present appellant's memorandum of objections with costs. The amount decreed by the Subordinate Judge in favour of the appellant should be reduced from Rs. 1,03,004-14-9 to Rs. 28,254-14-9 with interest as stated in his award. His order as to costs must stand. But the respondent must pay the appellant's costs before the High Court and his costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent: *The Solicitor, India Office.*

R.C.C. — *Appeal allowed.*

K.S.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR, MR. JUSTICE VARADACHARIAR, MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

Voora Sreeramulu Chetty .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

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Income-tax Act (XI of 1922), S. 66 (2)—Order of Income-tax Commissioner under S. 33 merely confirming an order of the Income-tax Officer without mentioning the question of law—If involves question of law under S. 66 (2)—Order refusing to revise "prejudicial order"—If "prejudicial" to assessee under S. 66 (2).

If the Commissioner dismisses the petition under S. 33 without mentioning the question of law (supposing one arises on the order complained of), the Commissioner's order must be read with the order of the Income-tax Officer.

An order which dismisses an application asking for the revision of a prejudicial order must be deemed to be "prejudicial" within the meaning of S. 66 (2), and an application for reference is competent.

N.A.S.V. Venkatachalam Chettiar v. *Commissioner of Income-tax, Madras*, (1934) 68 M.L.J. 227: I.L.R. 58 Mad. 367: 8 I.T.C. 74 (F.B.), overruled.

The application came up for hearing before the Chief Justice, Madhavan Nair and Varadachariar, JJ.

A preliminary objection was raised on behalf of the Commissioner of Income-tax that no order had been passed under S. 33 which was 'prejudicial' to the assessee.

ORDER OF REFERENCE TO A FULL BENCH.

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The Chief Justice.—A preliminary objection has been taken on behalf of the Commissioner of Income-tax. It is said that the application for reference is incompetent and reliance is placed on the decision of this Court in *N.A.S.V. Venkatachalam Chettiar* v. *Commissioner of Income-tax, Madras*[1], where it was held that the words 'otherwise prejudicial' appearing in S. 66 (2) of the Income-tax Act meant an order made by the Commissioner altering the position of an assessee or applicant to that person's prejudice. If the order of the Income-tax Commis-

* O. P. No. 146 of 1938. 10th November, 1938.

1. (1934) 68 M.L.J. 227: I.L.R. 58 Mad. 367: 8 I.T.C. 74 at 76 (F.B.).

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sioner merely confirmed an order. this would not amount to passing an order prejudicial to the petitioner or applicant under this section. It seems to us that this question is open to further argument and must be referred to a Full Bench of five Judges. The question referred will be in these words:—

"Was *N.A.S.V. Venkatachalam Chettiar* v. *Commissioner of Income-tax, Madras*,[1] rightly decided?"

K. Bhimasankaran for Petitioner.

M. Patanjali Sastri for Respondent.

The Court delivered the following

JUDGMENTS: *The Chief Justice.*—The question which has been referred is whether the case of *N. A. S. V. Venkatachalam Chettiar* v. *Commissioner of Income-tax, Madras*,[1] was rightly decided. The answer depends on the meaning to be given to the word 'prejudicial' in S. 66 (2) of the Indian Income-tax Act. S. 66 (2) states that within sixty days of the date on which he is served with notice of an order under S. 33 enhancing an assessment or otherwise prejudicial to him the assessee may require the Commissioner of Income-tax to refer to the High Court any question of law arising out of the order. S. 33 authorises the Commissioner of Income-tax of his own motion to call for the record of a proceeding under the Act which has been taken by an authority subordinate to him or by himself when exercising the power of an Assistant Commissioner under sub-S. (4) of S. 5, and having called for the record he is empowered, subject to the provisions of the Act, to pass such order as he thinks fit, but he may not pass an order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard. The section makes no mention of the right of an assessee to move the Commissioner to take action but as the Commissioner may take action of his own motion the assessee must have the right of calling his attention to a prejudicial order and of asking that action be taken. This in fact frequently happens.

In *Venkatachalam Chettiar's case*,[1] the petitioner applied to the Income-tax Officer for a refund of income-tax under S. 48 of the Act, but his application was refused. The petitioner then filed an application asking the Commissioner to revise the order of the Income-tax Officer under S. 33. Having heard

1. (1934) 68 M.L.J. 227: I.L.R. 58 Mad. 367: 8 I.T.C. 74 at 76 (F.B.).

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the application the Commissioner refused to interfere. The petitioner then required the Commissioner to refer the matter to the High Court under S. 66 (2) of the Act as involving a question of law. The Commissioner dismissed the application on the ground that it was incompetent. His reason was that his order under S. 33 was not one enhancing the assessment or otherwise prejudicial to the applicant. In accepting this interpretation, Beasley, C.J., observed:—

> "What S. 33 clearly contemplates is an order made by the Commissioner which alters the position of an assessee or an applicant to that person's prejudice. In this particular case, his position had been prejudiced already by the refusal of the Income-tax Officer to grant him the refund which he required. The Commissioner's order did no more than leave him in that position and, it is quite clear to us, was not an order which was prejudicial to the petitioner in the sense intended, namely, that his position at that time, that is, the date of the Commissioner's order, was altered by that order to one of prejudice to him."

With these observations the other Judges (Ramesam and King, JJ.) agreed.

With great respect I am unable to accept this interpretation. It means that the Commissioner's order must be more prejudicial than the order complained of before it can come within the purview of S. 66 (2). The section does not say so. All that it contemplates is a prejudicial order. It seems to me that if an order of the Income-tax Officer is prejudicial an order which confirms it or rejects an application asking that it be revised is also prejudicial. It could not be said that a decree of an appellate Court dismissing an appeal from a Court of first instance is not prejudicial to the appellant. It is just as prejudicial as the original decree. There is no difference in this respect between the dismissal of an appeal and the dismissal of an application for revision when the law permits such an application to be made.

In expressing this opinion I have not lost sight of the first proviso to S. 66 (2), which reads as follows:—

> "Provided that a reference shall lie from an order under S. 33 only on a question of law arising out of that order itself, and not on a question of law arising out of a previous order under S. 31 or S. 32 revised by the order under S. 33."

S. 66 (2) also applies to orders made under Ss. 31 and 32. Mr. Patanjali Sastri has suggested that the proviso only relates to orders under Ss. 31 and 32 revised under S. 33. In other words he asks the Court to read the second part of the

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proviso as governing the first part. I do not read it in that way. I consider the effect of the proviso to be this. A reference shall lie only when a question of law arises out of the order passed under S. 33 but if the matter is one which relates to an order under S. 31 or S. 32 a question of law which arose out of the previous order alone cannot be referred.

Reading the first part of the proviso as standing alone it does not mean that the Commissioner can render the provisions of sub-S. (2) nugatory by dismissing the assessee's petition without stating his reasons. When the Commissioner receives a petition filed under S. 33 it is his duty to consider it and pass an order on it. If the petition relates to an order of the Income-tax Officer the consideration of the petition involves the consideration of the Income-tax Officer's order and if the Commissioner dismisses the petition without mentioning the question of law, supposing one arises on the order complained of, the Commissioner's order must be read with the order of the Income-tax Officer. Whether a question of law arises on an order of the Commissioner passed on an application under S. 33 will depend on the circumstances of the particular case, but because a question of law is not set out in an order does not necessarily follow that a question of law does not arise. The Commissioner cannot, of course, be required to receive a frivolous or belated petition.

Our attention has been drawn to the case of *The Central India Spinning, Weaving and Manufacturing Co., Ltd.* v. *The Commissioner of Income-tax, Central and United Provinces*[1], in which the Nagpur High Court followed the decision in *Venkatachalam Chettiar's case*[2] and considered the first proviso to S. 66 (2). The Court accepted *Venkatachalam Chettiar's case*[2], without discussing it and therefore its judgment does not carry the matter further. With regard to the proviso the Court considered that its true intent is that a question of law that is common to both the Assistant Commissioner's and the Commissioner's order is not a proper subject-matter of a reference unless the question of law is raised on a reference from the decision of the Assistant Commissioner. This question does not arise in the present case and we are not called upon to discuss it.

The answer that I would give to the question referred is that *N. A. S. V. Venkatachalam Chettiar* v. *Commissioner*

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1. (1936) 10 I.T.C. 131.
2. (1934) 68 M.L.J. 227 : I.L.R. 58 Mad. 367 : 8 I.T.C. 74 (F.B.):

F.B.
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*of Income-tax, Madras*1, was wrongly decided and that an order which dismisses an application asking for the revision of a prejudicial order must be deemed to be prejudicial within the meaning of S. 66 (2).

The costs of this reference will be made costs in the case out of which it arises and we fix the amount at Rs. 150.

Madhavan Nair, J.—I agree.

Varadachariar, J.—I agree.

Venkataramana Rao, J.—I agree.

Abdur Rahman, J.—I concur and wish to add nothing more.

K.S. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Yerlagadda Mahalakshmi .. *Appellant** (*Plaintiff*)

v.

Midde Somaraju and others .. *Respondents* (*Defendants*).

Mahalakshmi v. Somaraju.

Civil Procedure Code (V of 1908), O. 21, r 62—Mortgage of 1917—Attachment before judgment of some mortgaged properties in 1918—Sale to mortgagee a few months later—Sale by attaching decree-holder in execution—Claim petition by mortgagee—Sale held invalid but mortgage recognised—No suit under O. 21, r. 63—Effect of sale to mortgagee—Effect of claim order—Court auction-purchaser if can plead extinguishment of mortgage—T.P. Act, S. 101—Applicability of.

A suit was filed to recover money due on a mortgage for Rs. 3,000 executed in plaintiff's favour by defendants 1 to 3 and their father on 13th March, 1917. In August, 1918, a third party who had a money claim against the mortgagors attached some of the mortgaged items before judgment. On 2nd October, 1918, the mortgagors purported to sell the mortgaged items to the plaintiff under Ex. I partly for the mortgage amount and partly for a further consideration of Rs. 441 When the money-decree-holder brought the properties to sale in execution, the plaintiff filed a claim petition on 29th September, 1920. He set up his sale and in the alternative his mortgage. The executing Court held that the sale being subsequent to the attachment was invalid against the attaching decree-holder but directed the sale to be held subject to the mortgage "referred to by the decree-holder". The property was so sold and purchased by decree-holder and later conveyed by him to seventh defendant As a result plaintiff lost possession of some items and retained possession of the others. So he filed this suit for recovery of the amount on foot of the mortgage. The seventh defendant, relying on I.L.R. 57 M. 195, contended that the sale must be deemed to have extinguished the mortgage and that the later events could not revive the plaintiff's claim under the mortgage.

1. (1934) 68 M.L.J. 227: I.L.R. 58 Mad. 367: 8 I.T.C. 74 (F.B.).

* Appeal No. 245 of 1934. 10th November, 1938.

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Held, that the plaintiffs' claim under the mortgage was not extinguished by the sale and was enforceable that *Daso Polai* v. *Narayana Patro*, (1933) 65 M L.J. 819: I L R. 57 Mad. 195, was distinguishable as here the claim order was one under O. 21, r. 62. The decree-holder did not impeach the order nor the plaintiff. So the sale was gone and the Court only sold the equity of redemption. But in *Daso Polai* v. *Narayana Patro*, (1933) 65 M.L.J. 819: I.L.R. 57 Mad. 195, claim petition was dismissed as late and therefore it was not possible to say that the Court upheld the mortgage there.

Daso Polai v. *Narayana Patro*, (1933) 65 M.L.J. 819: I.L.R. 57 Mad. 195, doubted and distinguished.

Gopal Sahoo v. *Gunga Pershad Sahoo*, (1882) I.L.R. 8 Cal. 530, followed.

Lachman Prasad v. *Lachmeshwar Prasad*, (1922) 20 A.L.J. 151: 66 I.C. 203 not followed.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in O.S. No. 1 of 1932.

K. Bhimasankaran for Appellant.

P. Somasundaram for Respondents.

The judgment of the Court was delivered by

Varada-chariar, J.

Varadachariar, J.—The appellant sued to recover money due under a mortgage deed for Rs. 3,000 executed in his favour by defendants 1 to 3 and their father on 13th March, 1917. The seventh defendant was the principal contesting defendant. His defence was in the main founded upon certain events that happened in 1918 and 1920.

In August, 1918, a third party who had a money claim against the mortgagors attached some of the mortgaged items, before judgment, pending his money suit against them. On 2nd October, 1918, the mortgagors purported to sell the mortgaged items to the plaintiff under the original of Ex. I partly for the mortgage amount and partly for a further consideration of Rs. 441. When the money decree-holder attempted to bring the properties to sale on the basis of the attachment already made, the plaintiff filed a claim petition (Ex. G) on 29th September, 1920. In this petition she claimed one of two reliefs: she set up her sale and asked that the property should be released from attachment, in the alternative, she asked that even if the sale should be held to be invalid as against the attaching decree-holder, the execution sale should be directed to be held subject to the mortgage in her favour. It appears from the endorsement on Ex. G that the decree-holder himself had referred in his sale proclamation to the mortgage in the plaintiff's favour but suggested that it was supported by consideration only to the extent of Rs. 2,500. When the matter came on

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for final disposal the executing Court held that the sale having been effected subsequent to the attachment was invalid as against the decree-holder and it directed the sale to be held subject to the mortgage "referred to by the decree-holder." The property was accordingly sold subject to the mortgage and purchased by the decree-holder himself, who in turn conveyed it to the seventh defendant as the result of a decree for specific performance of an agreement entered into between them. The result of the execution sale was that the plaintiff was deprived of possession of items 1, 2 and 4 to 6 of the plaint schedule and retained possession only of items 3 and 7. The plaintiff accordingly filed this suit for the recovery of the amount due under the mortgage, contending that as the sale had failed, he was entitled to fall back upon the mortgage. The seventh defendant contended that the sale must be deemed to have extinguished the mortgage and that the subsequent events could not revive the plaintiff's claim under the mortgage. The learned Subordinate Judge gave effect to this contention and dismissed the suit. The seventh defendant raised other contentions which formed the subject-matter of the other issues raised in the case. One of them was a plea of partial discharge which forms the subject-matter of the fourth issue. Another was a claim that the plaintiff should give credit as against the mortgage amount and the interest due thereon for the profits realised by him during the time that he had been in possession of the properties sold to him. Finally there was a question of the amount which the plaintiff was entitled to recover in view of the fact that he still retains as vendee two items of the hypotheca.

So far as the lower Court dismissed the plaintiff's suit, we are unable to concur in its decision. The decision is mainly based on the judgment of this Court in *Daso Polai* v. *Narayana Patro*[1]. We shall presently show that that case is distinguishable on its facts; but we think it right to add that we are, with all respect, unable to concur in some of the observations in that case. In the present case, the order Ex. G-1 was clearly an order under O. 21, r. 62, Civil Procedure Code. As we have already stated, the plaintiff put forward alternative claims in his claim petition—one on foot of the sale in his favour and the other on foot of the mortgage. The Court rejected the claim

1. (1933) 65 M.L.J. 819: I.L.R. 57 Mad. 195.

based on the sale but upheld the claim based on the mortgage. Neither party took steps to impeach that order and it became conclusive between the claimant and the decree-holder in the money suit. The Court accordingly purported to sell only the equity of redemption and the decree-holder (who became the auction purchaser) having purchased only the equity of redemption could convey only that interest to the present seventh defendant. In respect of these facts the position in *Daso Polai* v. *Narayana Patro*[1] was very different. The claim petition there was dismissed as preferred too late and as no suit was brought by the claimant under O. 21, r. 63, Civil Procedure Code, that order became final. It was in those circumstances impossible to imply any adjudication that the claim founded on the mortgage was well founded. The learned Judges had therefore to hold that the reference to the mortgage in the sale proceedings amounted to nothing more than a notice to intending purchasers under r. 66 of O. 21, Civil Procedure Code. It is on that footing that they held that the Court auction purchaser was not precluded from contesting the existence or validity of the mortgage. On the facts of the present case as we have set out above neither the decree-holder in the money suit nor the Court auction purchaser nor the seventh defendant as the purchaser from him could go behind the order in the claim proceedings which upheld the mortgage claim. We may also point out that in *Daso Polai* v. *Narayana Patro*[1], the learned Judges laid stress on the fact that even in the claim petition the claim based on the mortgage was never put forward and that the claimant insisted that the mortgage had been discharged by the sale deed in his favour. The conclusion reached in that case that the mortgage had been extinguished has largely been based upon this ground. That ground also will not avail the seventh defendant in this case because as already stated the claim was put forward both on the mortgage and on the sale. The portion of the judgment with which we are unable to agree is the interpretation which the learned Judges have placed on S. 101 of the Transfer of Property Act. With all respect we think that in a case like the present it must be presumed that it is to the advantage of the mortgagee to keep his interest as mortgagee and his interest as purchaser of the equity of redemption distinct because of the

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1. (1933) 65 M.L.J. 819: I.L.R. 57 Mad. 195.

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intervening attachment against which his sale cannot be effective.

The question in this class of cases is not whether the sale is not effective as between the vendor and the vendee, but whether there being the possibility of the sale proving ineffective as against a third party, it is not to the interest of the mortgagee not to treat his mortgage, as extinguished by the sale. In the application of this principle of presumed intention, it makes no difference whether the third party is allowed to claim in preference to the sale, on the ground of his being a subsequent encumbrancer or on the ground of his being an attaching decree-holder. If the decree in pursuance of which the attachment was made is paid off, the sale will of course stand as between the vendor and the vendee and the mortgage will be satisfied. But if in pursuance of the attachment the properties are brought to sale in execution, the vendee is deprived of his rights under the sale to the extent to which the properties are sold in execution and we think that there is no meaning in saying that even to this extent, the sale is operative as between the vendor and the vendee. This seems to us to be the principle of the decision in *Gopal Sahoo* v. *Gunga Pershad Sahoo*[1], which we are prepared to follow. The learned Subordinate Judge distinguished that case as a decision under the Civil Procedure Code of 1882 according to which he thought that a transfer pending an attachment was wholly void whereas under the present Code, it is voidable only as against the rights enforceable under the attachment. This distinction drawn by the learned Judge is obviously erroneous. The law has always been that transfer pending an attachment is void only as against the rights enforceable under the attachment.

The learned Counsel for the respondent drew our attention to a decision of the Allahabad High Court in *Lachman Prasad* v. *Lachmeshwar Prasad*[2]. With all respect, we are unable to follow that decision. The sale was there made to the father of the mortgagee and the father was a member of a joint Hindu family with the mortgagee. The sale deed directed that a portion of the consideration should be applied by the vendee to discharge the mortgage bond in favour of his son. The learned Judges observed that the father and the son must be

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1. (1882) I.L.R. 8 Cal. 530. 2. (1922) 20 A.L.J. 151: 66 I.C. 203.

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treated as virtually one and the same person and that the direction to the father to pay off the mortgage must be treated as an extinction of the mortgage debt. We do not find any reference in the judgment to the principle of S. 101 of the Transfer of Property Act. In the leading case in *Gokuldas Gopaldas* v. *Puranmal Premsukh Das*[1], their Lordships of the Privy Council referred to the practice prevailing in England of circumventing the doctrine of *Toulmin* v. *Steere*[2], by taking a conveyance of the equity of redemption in favour of trustees for the benefit of the prior mortgagee and added that in India it was unnecessary to resort to this conveyancing device and as a rule of equity the principle of presumed intention to keep the mortgage alive might be applied. It seems to us that what was done in the Allahabad case was practically the conveyancing device referred to by their Lordships of the Privy Council in *Gokuldas Gopaldas* v. *Puranmal Premsukhdas*[1] and if even under the decision in *Toulmin* v. *Steere*[2], such a device would have prevented the extinction of the mortgage, we venture to think with all respect that it would be *a fortiori* so in this country.

Though S. 101 of the Transfer of Property Act has generally been invoked in cases where the rights of mesne encumbrancers come up for decision, the principle of the section is not limited to those cases. It only lays down a general rule of presumed intention and where the later conveyance will be inoperative as against any intermediate right whether founded on an encumbrance or on an attachment, the principle must be held equally to apply. In *Dinabundhu Shaw Chowdhry* v. *Jogmaya Dasi*[3], this question had to be considered in respect of the effect of an intermediate attachment, as in the present case, and their Lordships observed (at p. 164):

"It is idle to contend that there was any intention to extinguish the old mortgages for the benefit of the execution creditor or any purchaser at the sheriff's sale."

We must accordingly hold that the plaintiffs' claim under the suit mortgage has not been extinguished by the subsequent sale and that it is enforceable in the events that have happened.

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1. (1884) L.R. 11 I.A. 126: I.L.R. 10 Cal. 1035 (P.C.).
2. (1817) 3 Mer. 210: 36 E.R. 81.
3. (1901) 12 M.L.J. 73: L.R. 29 I.A. 9: I.L.R. 29 Cal. 154 (P.C.).

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Mr. Somasundaram next contended that according to the proper construction of the order (Ex. G-1) the mortgage must be held to be valid only to the extent of Rs. 2,500. We do not think that is the effect of the order. The only point then decided was that as between the sale and the mortgage the Court upheld the mortgage and negatived the claim under the sale. This is made clear by the use of the words 'mortgage *referred* to by the decree-holder' instead of words like 'mortgage *admitted* by the decree-holder'. The Court has now found that the mortgage was fully supported by consideration and nothing has been shown against the correctness of that finding.

It remains to deal with two other questions raised by Mr. Somasundaram on behalf of the seventh defendant. He first contended that the lower Court's finding on the fourth issue was not in accordance with the evidence and that the issue should have been found in his client's favour. This relates to a plea of discharge, it being the seventh defendant's case that in or about April, 1925, he paid to the plaintiff a sum of Rs. 1,950 in full quit of so much of the mortgage debt as would be recoverable from the properties agreed to be purchased by the seventh defendant. Though the seventh defendant is not able to fix the exact date of payment, he states that the agreement between himself and the Court auction purchaser was in February, 1925, and that the payment to the plaintiff was about two months later. Though the learned Sub-Judge has not discussed in detail the evidence bearing upon this question, he has clearly indicated that he was not impressed by the evidence adduced in support of the plea of discharge. We have been taken by Mr. Somasundaram through the relevant portions of the oral evidence, and we see no reason to come to a different conclusion. The seventh defendant has not thought fit to take any voucher for the payment of such a large sum of money nor has he even cared to insist upon the payment being endorsed on the mortgage bond. Even according to his version, the plaintiff promised to make the endorsement in due course and yet, after the plaintiff had failed to do so for more than a year, the seventh defendant never even thought fit to send any notice to the plaintiff complaining of her conduct. Further, the seventh defendant's evidence as to the circumstances under which the alleged payment was made and the manner in which he found the money to make the payment, is not at all convincing. It is very

doubtful if at or about this time he had the money to pay at all. D.W. 1 whose help has been availed of to support this story apparently because he had to receive some money from the plaintiff, is the son-in-law of the seventh defendant's brother and assuming it to be true, that he had to receive a sum of Rs. 200 from the plaintiff and did receive it about this time, we are not, by any means satisfied that there is any connection between that transaction and the alleged payment by the seventh defendant to the plaintiff. The remaining witnesses who support this story of payment do not really seem to have had anything to do with the transactions between the plaintiff and the seventh defendant and, as one of them admits, it is probably the seventh defendant's local influence that has enabled him to get these witnesses to support his story. We must accordingly find against the seventh defendant on his plea of alleged discharge.

The second issue raised the question of the accountability of the plaintiff for the profits received by her from the lands which had been purchased by the seventh defendant. The law on this point is not, by any means, settled. We may observe in passing that the observations in *Muthammal* v. *Rasu Pillai*[1] are not wholly reconcilable with the view taken in *Natesan Chettiar* v. *Ramalinga Chettiar*[2]. As we do not propose to decide the question as an abstract question of law in this case, we do not think it necessary to refer to the cases in detail. We only wish to guard ourselves against being understood as concurring in all the observations in *Natesan Chettiar* v. *Ramalinga Chettiar*[2]. For instance, the statement that a purchase by a prior mortgagee in execution of a decree obtained in his suit without impleading the puisne mortgagee therein is a *nullity* and will not be effective even to pass the title of the mortgagor as against the puisne mortgagee seems to us too broadly stated. In the circumstances of the present case and in view of the fact that a petition has been filed before us on behalf of the seventh defendant for relief under the Agriculturists' Relief Act (IV of 1938), we think it best to hold that no accounting is necessary and it would be more equitable to say that after 23rd October, 1920, the plaintiff is not entitled to claim interest as against the seventh defendant to the extent of the proportion of the

1. (1917) I.L.R. 41 Mad. 513. 2. (1937) 46 L.W. 332.

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mortgage debt recoverable from the properties in the seventh defendant's possession. In this view, there is no occasion in our opinion, to deal with the petition under Madras Act IV of 1938 either. As the plaintiff has become the owner of the equity of redemption in some of the items of the mortgage property, the mortgage must be held to have been split up and the plaintiff will be entitled to a decree only for a proportionate share of the mortgage debt as against the properties purchased by the seventh defendant.

The parties are not able to agree before us as to the proportion. The lower Court will ascertain the amount due for principal and interest as per terms of the mortgage bond, on 23rd October, 1920, the date on which the seventh defendant's vendor became the Court auction purchaser; out of that amount, there will be a decree for sale of the properties purchased in that Court sale by the seventh defendant's vendor for an amount bearing the same proportion to the mortgage debt due on that date as the said properties bear to the entirety of the mortgaged properties valued as on the date of the mortgage.

The appeal is allowed and the case will be sent back to the lower Court to give effect to the above directions and pass a preliminary decree for sale for the amount ascertained as above. The plaintiff and the seventh defendant will pay and receive proportionate costs both here and in the Court below.

S. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

The United Motor Finance Company .. *Plaintiffs**

v.

Fiat Motors Eastern India Agency .. *Defendants.*

United Motor Finance Company v Fiat Motors Eastern India Agency.

Civil Procedure Code (V of 1908), O. 21, rr. 41 and 42—Decree directing inquiry as to damages—Applicability of O 21, r. 41—Position under Old Codes of 1877 and 1882, Ss. 255 and 267.

On the question whether a plaintiff, who has obtained a decree directing an enquiry as to damages, is entitled to invoke the aid of O. 21, r. 41, Civil Procedure Code, in order to enable him to effect an attachment in pursuance of the right given to him under O. 21, r. 42, Civil Procedure Code,

Held, that he is entitled to the benefit of that provision and the Court is vested with the discretion whether to give relief under O. 21, r. 41 or not.

*Application No. 2666 of 1938 in C. S. No. 57 of 1934. 30th January, 1939.

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Bivi Ammal v. *Union Bank, Ltd.*, A.I.R. 1938 Mad. 771, relied on.

Up to the passing of the present Code the law is fairly clear that the holder of a decree directing inquiry into mesne profits can apply to the Court to have the judgment-debtor examined in order to ascertain what property he is possessed of for the purpose of effecting an attachment of the property in order to enable him to get satisfaction of his decree.

O. 21, r. 42 replaces S. 255 of the Code of 1877, 1882 and O. 21, r. 41 replaces S. 267 of the Code of 1877, 1882. The only difference introduced in the new Code is where a decree directs an inquiry into the mesne profits, the inquiry is in the suit itself and not by way of execution; but still the principle of S 255 is retained in enacting O. 21, r. 42. This seems to indicate that partial execution is permitted in the case of a decree directing an inquiry into mesne profits pending final ascertainment of the same. But the interpretation adopted under the old Code in regard to a decree for unascertained mesne profits or to a similar relief would still hold good. See *Ramasami Aiyar* v. *Vedambal Ammal*, (1934) 67 M.L.J. 303: I.L.R. 58 Mad. 233; *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*, (1867) 8 W.R. 9 and *Viraraghava Aiyangar* v. *Varada Aiyangar*, (1882) I.L.R. 5 Mad. 123, relied on.

S. V. Narayana Aiyar for Plaintiffs.

C. Narasimhachariar for Defendants.

The Court delivered the following

JUDGMENT.—The question in this appeal is whether a plaintiff who has obtained a decree directing an enquiry as to damages is entitled to invoke the aid of O. 21, r. 41, Civil Procedure Code, in order to enable him to effect an attachment in pursuance of the right given to him under O. 21, r. 42, Civil Procedure Code. The learned Master took the view that he is not entitled to the benefit of O. 21, r. 41, Civil Procedure Code. The language of O. 21, rr. 41 and 42 *prima facie* tends in favour of the said view. The words 'as in the case of an ordinary decree for the payment of money' in O. 21, r. 42 would seem to indicate that a decree directing an enquiry as to rent or mesne profits or any other matter like the one in question, damages, is not a decree for payment of money. But on a close examination of the sections in the light afforded by the history of the sections and the interpretation placed on the corresponding provisions in the prior Codes of Civil Procedure, I have come to a different conclusion. In the Code of 1859 there was no provision corresponding to O. 21, r. 42, Civil Procedure Code. The relevant sections of the said Code bearing on the matter are Ss. 201, 232 and 219. S. 201 so far as it is relevant for the purpose of this case, runs thus:

"If the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both if necessary."

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S. 232 is in these terms:—

"If the decree be for money, and the amount thereof is to be levied from the property of the person against whom the same may have been pronounced, the Court shall cause the property to be attached in the manner following."

In *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*[1], there was a decree for possession and mesne profits the amount of which had to be determined in the course of the execution. It was held that the decree for mesne profits was a decree for money within the meaning of S. 232 of Act VIII of 1859. After getting possession of the property in pursuance of the decree an application for attachment of certain property was made and effected and after the amount of mesne profits had been determined, the sale of the property took place. Objection was taken to the legality of the sale on the ground that there was no legal attachment of the property previous to the sale. This contention was negatived both by Justice Jackson and Justice Hobhouse on the ground that the decree for mesne profits was a decree for money and attachment could be effected in pursuance of such a decree. Justice Jackson remarked thus:

"This decree, it seems to me, was a decree for money within the terms of S. 232 of the Civil Procedure Code, and, that being so, I see no irregularity in the decree-holder applying for attachment of the judgment-debtor's property, so that the property might be held in attachment, and protected from alienation pending the ascertainment of wassilat, that is of the precise amount of money due. This, it appears, is precisely what happened in the present case. The enquiry into the amount of wassilat was going on, and the property was held under attachment, and, when the amount of wassilat had been determined, and not until then, notice of sale was issued, and the sale took place The sale, therefore, at any rate, was in satisfaction of a decree for money of which the amount had been by that time ascertained."

To the similar effect Justice Hobhouse says:—

"Then, as to the attachment, I think that this decree was, in reality, a decree for money. It did not and could not have stated the exact amount of money; it did state that a certain amount of wassilat or mesne profits was to be ascertained and obtained. That being so, it was a decree for money, and, being a decree for money under Ss. 232 and 235 of the Civil Procedure Code, an attachment properly followed upon the decree."

In the view taken by the learned Judges, namely, that though the amount of mesne profits, was to be ascertained the decree represented a sum of money and was therefore a decree for money, S. 219 of the Code would be applicable, and that section ran thus:—

"Before granting the order for a general attachment, or at the instance of the plaintiff at any time after judgment, and before complete execution of

1. (1867) 8 W.R. 9.

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the decree, the Court may summon the person against whom the application is made, and examine him as to the property liable to be seized in satisfaction of the judgment. The Court may also of its own motion or at the instance of any person interested in the enquiry, summon any other person whom it may think necessary and examine him in respect to such property, and may require the person summoned to produce all deeds and documents in his possession or power relating to such property"

From the language of the section it is clear that that section can be availed of by a decree-holder after judgment and before complete execution of the decree and in the case of preliminary decrees complete execution cannot be had till the amount is finally fixed. Two years after the decision in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*[1], Sir Barnes Peacock observed that where a decree awarded possession and directed an enquiry as to mesne profits the decree as to mesne profits could not be executed until they were ascertained. (*Haro Sanker Sandyal* v. *Tarak Chandra Bhuttacharjee*[2].) Justice Jackson was a party to this judgment. It was with reference to this view that the legislature in enacting the Code of 1877 replaced Ss. 230 and 231 by Ss. 254 and 255 which ran thus:—

"S. 254.—Every decree or order directing a party to pay money, as compensation or costs, or as the alternative to some other relief granted by the decree or order, or otherwise, may be enforced by the imprisonment of the judgment-debtor, or by the attachment and sale of his property in manner hereafter provided, or by both."

"S. 255.—If the decree be, for mesne profits, or any other matter the amount of which in money is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money."

S. 254, replaced Ss. 201 and 232 of the Code of 1859 and S. 255 has been enacted in accordance with the decision in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*[1]. The use of the word 'ordinary' in S. 255 is significant. The Legislature has used that word to mark the difference between a decree for money simpliciter and a composite decree for possession and mesne profits which would not be strictly a decree for money. Therefore the use of the words "as in the case of an ordinary decree for the payment of money" clearly show that in a case where a decree directs an inquiry as to mesne profits the decree so far as the mesne profits are concerned would be a decree for money though it may not be an ordinary decree for money. In *Viraraghava Aiyangar* v. *Varada Aiyangar*[3], a

1 (1867) 8 W.R. 9.
2. (1869) 3 Beng.L.R, (App. Civ.) 114 at 118 and 119.
3. (1882) I.L.R. 5 Mad. 123.

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question arose whether a decree for mesne profits was a decree for money. The petitioner in that case who held a decree for mesne profits, not yet ascertained, applied on 28th June, 1881, to the Court of the Subordinate Judge of Kumbakonam to stay the sale of the judgment-debtor's land which was being brought in execution of another decree in order that he might attach the land in execution of his decree. This application was rejected on 29th June, on which date the property was also sold. On the same date after the rejection of the application the said petitioner applied to the Court for a rateable distribution of the proceeds of the sale. The question was whether he would be entitled to such a rateable distribution under S. 295 of the Code. Held he would be. The judgment of the Court (Turner, C. J. and Muttuswami Aiyar, J.) was delivered by Turner, C. J., who remarked thus:—

"The decree held by the petitioner for mesne profits was a decree for money. Although the amount was still uncertain, the petitioner had applied to the Court to execute that decree. He had not only petitioned that the mesne profits should be ascertained but he had applied on 1st April, 1881, to attach certain immovable property under S 255. He came within the purview of S. 295."

Therefore the decision is a clear authority for the position that a decree directing an inquiry as to mesne profits is a decree for money within the meaning of Ss. 255 and 295. S. 295 imposes two conditions; the decree-holder who applied for rateable distribution must hold a decree for money and he must have applied for the execution of the said decree. Therefore, the said decision clearly implies that both the conditions were fulfilled in the case thus further implying that the application for attachment under S. 255 would be an application for execution. Of course under the Codes of 1859, 1877 and 1882 an enquiry into unascertained rent or mesne profits was to be had only in execution and therefore it may be taken that the application for attachment was made in the course of the application for the execution of the decree. In this view therefore such a decree-holder can certainly invoke the provisions of S. 267 of the Code of 1877 which replaced S. 219 of the Code of 1859 and which section ran thus:—

"The Court may, of its own motion or on the application of the decree-holder, summon any person whom it thinks necessary, and examine him in respect to any property liable to be seized in satisfaction of the decree, and may require the person summoned to produce any document in his possession or power relating to such property, and before issuing the summons of its

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own motion, shall declare the person on whose behalf the summons is so issued."

It will be seen that this section is very general in its terms. The decision in *Viraraghava Aiyangar* v. *Varada Aiyangar*[1], was followed in *Ramaswami Aiyar* v. *Rama Aiyar*[2], a decision under the Code of 1882. The question there was whether a decree for unascertained mesne profits was a decree for money and might be attached in the mode prescribed by S. 273 of the Code which now corresponds to O. 21, r. 53 of the present Code. The learned Judges (Muttuswami Aiyar and Wilkinson, JJ.) observed thus:—

"As observed by Hobhouse, J., in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*[3], with reference to S. 232, Act VIII of 1859, the decree was a decree for money in the sense that it represented a sum of money to be ascertained hereafter. It was also held in *Viraraghava Aiyangar* v. *Varada Aiyangar*[1], that the holder of a decree for unascertained mesne profits is of a money decree for the purpose of claiming rateable distribution under S. 295."

Therefore up to the passing of the present Code the law is fairly clear that the holder of a decree directing inquiry into mesne profits can apply to the Court to have the judgment-debtor examined in order to ascertain what property he is possessed of for the purpose of effecting an attachment of the property in order to enable him to get satisfaction of his decree. Of course the purpose of the attachment is, as pointed out in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*[3], to serve as a measure of protection to the decree-holder, to prevent the judgment-debtor from alienating the property and to enable the decree-holder to obtain satisfaction of his decree.

The question is, has there been any change in the law under the present Code? O. 21, r. 42 replaces S. 255 of the Code of 1877, 1882 and O. 21, r. 41 replaces S. 267 of the Code of 1877, 1882; the only difference introduced in the Code is that where a decree directs an inquiry into the mesne profits the enquiry is in the suit itself and not by way of execution; but still the principle of S. 255 is retained in enacting O. 21, r. 42. This seems to indicate that a partial execution is permitted in the case of a decree directing an inquiry into mesne profits pending the final ascertainment of the same. But the interpretation adopted under the old Code in regard to a decree for unascertained mesne profits or to a similar relief would

1. (1882) I.L.R. 5 Mad. 123. 2. (1892) 2 M.L.J. 288.
3. (1867) 8 W.R. 9.

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still hold good and that was the view taken by a Bench of this Court (Madhavan Nair and Jackson, JJ.), in a case reported in *Ramasami Aiyar* v. *Vedambal Ammal*[1]. They have followed *Viraraghava Aiyangar* v. *Varada Aiyangar*[2], and held that in spite of the difference in procedure in the ascertainment of mesne profits, a decree directing an inquiry into mesne profits would be a decree for the payment of money within the meaning of O. 21, r. 42 so as to entitle such a decree-holder to obtain a rateable distribution under S. 73 of the present Code. Madhavan Nair, J., who delivered the judgment of the Court referring to O. 21, r. 42 observed thus:—

"This provision, in our opinion, treats the attachment, as a proceeding in execution of the decree and the application for attachment may well therefore be treated as one for execution."

In this view therefore O. 21, r. 41 would be applicable to the case. As pointed out by me in the decision reported in *Bivi Ammal* v. *Union Bank, Ltd.*,[3] the Court is vested with the discretion to give the relief under O. 21, r. 41 or not. In the view taken by the learned Master, I find that he has not gone into that question. I therefore reverse the decision of the learned Master and send the application back to him for considering whether in the circumstances of the case he would exercise his discretion and issue an order for the examination of the judgment-debtor as prayed for by the applicant. The costs of the appeal will abide the result.

K. C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE WADSWORTH.

A. Veeran Kutti .. *Appellant* (1st Respondent)*

v.

P. P. Koya Kutti and others .. *Respondents (Petitioners 1, 2, 4, 5 and 6).*

Veeran Kutti v. Koya Kutti.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Preliminary decree—Appeal against—Final decree pending appeal—Execution of final decree—Limitation—Starting point.

The appellant happened to be the defendant in a mortgage suit in the trial Court. A preliminary decree was passed against him and an appeal was preferred by him. No stay of proceedings was obtained pending the appeal.

1. (1934) 67 M.L.J. 303: I.L.R. 58 Mad. 233.
2. (1882) I.L.R. 5 Mad. 123.
3. A.I.R. 1938 Mad. 771.

* L.P.A. No. 113 of 1936. 18th January, 1939.

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and hence a final decree for sale was subsequently passed by the trial Court. The appeal against the preliminary decree was dismissed subsequently and later, that is, within three years from the date of the appellate decree, the decree-holder applied for execution of the final decree. Objection was taken by the appellant that execution application was filed late and was barred by limitation as it was filed more than three years after the passing of the final decree. Another point raised was that the decree-holders were not entitled to execute the final decree obtained by them before the dismissal of the appeal against the preliminary decree, but should have obtained a fresh final decree after the decision of the appeal against the preliminary decree,

Held, (1) that the execution application was not barred as the period of limitation ran from the date of the appellate decree and not from the date of the final decree in the first court.

Nanduri Sriramachandra Rao v. *Chintamanibhatla Venkateswara Rao*, (1938) 2 M.L.J. 1048, followed.

That a fresh application for a final decree or amendment of the original decree was not necessary.

Gajadhar Singh v. *Kishan Jiwan Lal*, (1917) I.L.R. 39 All. 641 (F.B.) and *Jowad Hussain* v. *Gendan Singh*, (1926) 51 M.L.J. 781 : L.R. 53 I.A. 197 : I.L.R. 6 Pat. 24 (P.C.), distinguished.

Appeal under S. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Venkataramana Rao, dated 26th October, 1936 and passed in A.A.A.O. No. 152 of 1933, preferred to the High Court against the order of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 205 of 1931 (R.E.P. No. 442 of 1930, in O.S. No. 273 of 1924, District Munsif's Court, Parapanangadi).

K. Kuttikrishna Menon for Appellant.

K. P. Krishna Menon for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant was the defendant in a suit on a mortgage filed in the Court of the District Munsif of Parapanangadi. A preliminary decree was passed against him on the 21st July, 1925 and he preferred an appeal. No stay of the proceedings in the trial Court was obtained pending the hearing of this appeal and on the 9th November, 1925, the District Munsif passed a final decree for sale. The appeal against the preliminary decree was dismissed on the 16th March, 1927. On the 15th March, 1930, the decree-holder respondents applied for execution of the final decree. Objection was taken by the appellant on the ground that the application for execution was barred by the law of limitation, as it had been filed more than three years after the passing of the final decree. The District Munsif rejected this contention, but dismissed the application

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because the second defendant had died and his legal representatives had not been brought on the record. The appellant appealed to the Subordinate Judge against the order dismissing the application and the Subordinate Judge sent the case back to the District Munsif for reconsideration. The District Munsif maintained the opinion that the application was within time; but as the legal representatives of the second defendant had still not been brought on the record he again dismissed the petition. The appellant filed an appeal against this order and the Subordinate Judge held that the application was barred by the law of limitation. The decree-holder appealed to this Court and Venkataramana Rao, J., allowed the appeal, agreeing with the view of the District Munsif that the application for execution was in time. A further point was taken before the learned Judge, namely, that the decree-holders were not entitled to execute the final decree obtained by them on the 9th November, 1925 and should have obtained a fresh final decree after the decision of the appeal against the preliminary decree. The learned Judge also decided this question against the present appellant.

When the appeal was before Venkataramana Rao, J., there was a conflict between a decision of this Court and a Bench decision of the Patna High Court. In *Ahammad Kutty* v. *Kottakkat Kuttu*[1], Madhavan Nair, J., held that where during the pendency of an appeal from a preliminary decree in a partition suit, the trial Court passes a final decree in the suit and there is no appeal, the period of limitation for execution of the final decree runs from the date of the final decree and not from the date of the decree of the appellate Court in the appeal from the preliminary decree. In *Somar Singh* v. *Deonandan Prasad Singh*[2], the Patna High Court took the opposite view and Venkataramana Rao, J., accepted the Patna decision. It is not, however, necessary for us to consider whether he was right in so doing because the question has since been decided by a Bench of this Court consisting of King and Krishnaswami Aiyangar, JJ., in *Nanduri Sriramachandra Rao* v. *Chintamanibhatla Venkateswara Rao*[3], where it was held that the period of limitation ran from the date of the appellate decree. In this case there was an application to set aside an *ex parte* decree but

1. (1932) 64 M.L.J. 251 : I.L.R. 56 Mad. 458.
2. (1927) I.L.R. 6 Pat. 780.
3. (1938) 2 M.L.J. 1048.

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this was dismissed. Against the order of dismissal the defendants appealed to the High Court which allowed the appeal, extending its benefits to the defendants who had not appealed on condition that they deposited the decree amount within three months. The deposit was not made and the *ex parte* decree therefore stood as against the defendants who had not appealed. The decree-holder filed his application more than five years after the date of the *ex parte* decree. It was held that it was in time because limitation ran from the date of the appellate decree. This decision governs this case and the question must therefore be decided against the appellant.

With regard to the second contention, namely, that there can be no execution proceedings until a second final decree has been obtained, it falls to be observed that this objection was not taken in the Court of the District Munsif or in the Court of the Subordinate Judge, and as Venkataramana Rao, J., has pointed out, if the objection had been taken it would have been open to the District Munsif to treat the application for execution as an application for a final decree and pass a final decree if it was necessary. Although it was not necessary in these circumstances for the learned Judge to decide the question, he did so and came to the conclusion that a fresh application for a final decree or amendment of the original decree was not necessary. With this conclusion we are in entire agreement. No authority has been quoted to the contrary. The learned Advocate for the appellant has relied on certain observations of Banerji, J. and of Tudball, J., in *Gajadhar Singh* v. *Kishan Jiwan Lal*[1], approved of by their Lordships of the Privy Council in *Jowad Hussain* v. *Gendan Singh*[2], Banerji, J., said:

"It seems to me that this rule,"

that is, the rule regulating application for final decree in mortgage actions,

"contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause."

Tudball, J., said:—

"When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the

1. (1917) I.L.R. 39 All. 641 (F.B.).
2. (1926) 51 M.L.J. 781: L.R. 53 I.A. 197: I.L.R. 6 Pat. 24 (P.C.).

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final decree is the decree of the appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties."

The question now under consideration was not under consideration in those cases. The fact that an appeal was preferred against the preliminary decree did not prevent the Court from passing the final decree. As I have pointed out no order staying proceedings was obtained and it was the duty of the trial Court to proceed to pass the final decree. That decree remains binding and in full force until set aside. The preliminary decree was confirmed on appeal and therefore did not affect the validity of the final decree which had been passed. For the reasons indicated the appeal will be dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE STODART.

The Maharaja of Pittapuram .. *Appellant* (Plaintiff)*

v.

The Secretary of State for India in Council represented by the Collector, East Godavari .. *Respondent (Defendant).*

Maharaja of Pittapuram v. Secretary of State for India in Council.

Madras Survey and Boundaries Act (VIII of 1923), Ss. 11, 12 and 18—Zamin village—Boundaries fixed under previous surveys—How far binding on Government.

Where in the survey of 1902 the boundaries of a Zamin village were laid down under the Survey and Boundaries Act of 1897 and a particular plot of land was included in one village, and in a later survey conducted in 1904 such inclusion was not called in question, but in 1928 at a fresh survey the Government included that item in another village and the Zamindar's claim before the Survey Officer objecting to the inclusion was rejected,

Held, that the Government was bound by the previous surveys, that it was not entitled, except on the ground of change of ownership, to alter the boundary of the village and that the Zamindar's claim should therefore be upheld.

Second appeal against the decree of the Court of the Subordinate Judge of Amalapuram in A. S. No. 1 of 1932 preferred against the decree of the Court of District Munsif of Razole in O. S. No. 139 of 1930.

Ch. Raghava Rao for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

* S. A. No. 580 of 1935. 3rd February, 1939.

Maharaja of Pittapuram v. Secretary of State for India in Council.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He is the Rajah of Pittapuram. The suit is filed in accordance with the provisions of S. 13 of the Madras Survey and Boundaries Act (VIII of 1923). The subject-matter of the suit was 48 cents of land lying on the boundary between the village of Madupalli which is a Government village and Vanapalli which belongs to the plaintiff. At the recent survey completed in 1928 this 48 cents was surveyed in the Ayan Government village Madupalli being included in Survey No. 21 of that village. The Zamindar filed a claim before the Survey Officer and the Survey Officer decided the dispute in favour of the Government. The grounds on which the decision was based have not been exhibited in the Courts below. We have only the decision of the Survey authority to whom the Zamindar appealed. That order contains no details but simply is that "the order of the lower Court is confirmed".

The only point I think which arises for consideration in this second appeal is whether the lower appellate Court was wrong in ignoring the effect of the successive surveys which have been made by the Government. From 1890 to 1906 this Pittapuram Zamindari was in charge of the Court of Wards. In 1893-94 a survey of the adjacent Government villages was made, that is to say, a survey of the villages of the taluk of Amalapuram and in that survey, this 48 cents was included in the Ayan village of Madupalli. In 1902, and following years, presumably at the instance of the Court of Wards, the Zamindari villages were surveyed. *See* G.O. No. 67, Rev., dated 15th of January, 1902. And as a result of that survey the 48 cents was included in the Zamindari village of Vanapalli. Then lastly as I have already said at the re-survey of the Ayan villages in 1928, the 48 cents was surveyed along with the village of Madupalli. In my view the Government whose officer in 1902 or thereabouts laid down the boundaries of the Zamin village under the Survey and Boundaries Act of 1897 then in force is not entitled except on the ground of change of ownership at a later survey to alter that boundary. It is stated, and I believe it to be true that at the 1904 survey of Vanapalli there was no dispute about the boundary in question. Everybody thought that the 48 cents was part of the Vanapalli village. The Survey Officer must have had the survey plan of the adjacent village of Madupalli with him at the time he laid down the common

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boundary between the two villages. In fact it must have been part of his duty to reconcile the boundary as shown in the Government village plan with the boundary claimed on behalf of the Zamindar. The 48 cents therefore must have been claimed on behalf of the Zamindar and the claim cannot have been opposed on behalf of the Government. If it had been and if the Government had been successful the 48 cents now in dispute would not have been included within the boundary of Vanapalli. S. 11 (1) of the Survey and Boundaries Act of 1897 is as follows:—

"If, at the time of survey, a boundary is undisputed, the Survey Officer may order that it shall be laid down as pointed out by the registered holder or his agent"

and sub-S. 2 leaving out unnecessary words is:

"If the registered holder is not present, the Survey Officer shall order it to be laid down as nearly as may be, in accordance with the village records or as ascertained from the village officers and from such other evidence as the Survey Officer may be able to procure"

Then sub-S. 4 is:

"When the survey of any village has been completed in accordance with the orders passed under sub-Ss. 1 and 2, the Survey Officer shall notify the fact as soon as practicable thereafter."

S. 12, sub-S. (1) is:

"Notice of every order passed by the Survey Officer under S. 11 shall be given to all registered holders the boundaries of whose holdings may be affected by the order"

and sub-S. 3 of S. 12 is:

"The order of the Survey Officer shall be final".

The survey of the estate is subject to these rules and these rules have statutory force. *See* S. 18 which is as follows:

"Except as hereinafter provided in Ss. 19 and 20, the conduct of such survey and the proceedings of a survey officer shall, as far as may be, be regulated by the procedure laid down in Chapter II with regard to the survey of Government lands."

Chapter II is the Chapter which contains Ss. 11 and 12 the purport of which I have just set out.

If the survey had been completed in 1904 or thereabouts and no dispute had been raised by the Government as to the boundary as laid down by its own officer and laid down at the instance of the Court of Wards which is a statutory body deriving its authority from the Government, the Zamindar, in my opinion, was entitled to believe that these 48 cents belonged to him. I might add that not only did the Government not

dispute that survey but no objection was raised by any person coming forward as a ryotwari owner of the land directly under the Government. That being the position of affairs then when the new survey of the Government village was made in 1925 and the following years, the Survey Officer, in my opinion, was bound to adhere to the boundary laid down in 1904 when Vanapalli was surveyed. Again I observe that in these disputes no ryotwari owner claiming under the Government has been impleaded and no occupancy tenant claiming under the Zamindar has been impleaded. This dispute is entirely between the Zamindar and Government. The plaintiff, in my opinion, was entitled to succeed on this ground alone and the second appeal by him is therefore allowed with costs both here and in the lower appellate Court. The order giving him costs in the trial Court is restored.

Leave to appeal being asked for is granted.

B. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Sree Mullapudi Venkatarayudu, Zamindar .. *Petitioner* in all (Plaintiff)*

v.

President, District Board, East Godavari, Cocanada and others.. *Respondents (Defendants).*

Inam—Second crop cultivation—Water-tax payable to Zamindar—Nature of claim for recovery—Agreement between Inamdar and cultivating tenants—Whether binding on Zamindar—Suit whether one for recovery of rent from ryot—Jurisdiction of Civil Court—Madras Estates Land Act (I of 1908), S 77.

The Zamindar filed a suit against the Inamdar and his cultivating tenants for recovery of water-tax in respect of the water taken for the second crop to the suit lands. The muchilikas executed by the tenants in favour of the Inamdar provided for a consolidated rent taking into account the possibility of the tenants raising a second crop.

Held, that the Zamindar's claim was not one on a tort but was based on an implied contract to the effect that whenever water was available the Inamdar could take the water on condition of paying for it, and that the Inamdar was equally liable along with the tenants to pay the water-tax. The fact that as between the Inamdar and the tenants, the entire liability was thrown on the tenants was no concern of the Zamindar and he was not bound by any such stipulation. Nor was there any distinction in the application of the principle between a pre-settlement inam and a subsequent inam.

* C. R. P. Nos. 295, 296 and 297 of 1936. 13th February, 1939.

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Held, further, that the suit was not for the recovery of rent from a 'ryot' as defined in S. 77 of the Madras Estates Land Act and that the Zamindar need not file the same in the Revenue Court.

Venkataraju Garu v. *Maharaja of Pittapuram*, (1938) 1 M.L.J 256: I.L.R. (1938) Mad. 381 (F.B.), referred to.

Petitions under S. 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the District Munsif of Kovvur in S. C. S. Nos. 402, 403 and 406 of 1934 respectively.

Ch. Raghava Rao for Petitioner.

T. Satyanarayana and *M. Appa Rao* for Respondents.

The Court delivered the following

JUDGMENT.—These three Revision Petitions arise out of three Small Cause Suits decided by the District Munsif of Kovvur, West Godavari District. In all the three suits, the plaintiff was the Zamindar and the plaints asked that the defendants should pay water-tax in respect of the water taken for the second crop to the suit lands. Of the three suits, the lands involved in Small Cause Suits Nos. 402 and 406 are Pre-settlement Inams and the land involved in Small Cause Suit No. 403 is a subsequent inam, that is, one granted subsequent to the Permanent Settlement. Decrees have been granted in all the three suits against the tenants who cultivated the lands and actually took the water from the plaintiff's tank. The first defendant in each suit is the Inamdar who is also sought to be made liable jointly with the cultivating tenants. The lower Court refused a decree against the first defendant in each suit and these Revision Petitions are directed against the exoneration of the first defendant in each suit from joint liability along with the other defendants.

It is contended by the petitioner that viewed as a claim for damages for wrongful use of the water of the plaintiff's tank, the liability would be one on a tort committed by the defendants and the learned Counsel argues that even if the cultivating tenants took water, they were authorised to do so by the first defendant in each suit and that therefore they are also jointly liable along with the other defendants. It is also argued that viewed as a claim on an implied contract, the contract to be inferred or implied would be one between the Zamindar and the Inamdar that whenever the Inamdar or the person who is let into the land as his cultivating tenant takes water for a second crop, he the Inamdar would pay the water-tax to the

Zamindar. From Ex. D, a judgment in a prior suit in which the Zamindar claimed water-tax under similar circumstances from the Inamdar alone, it appears that the tank was improved considerably by the Zamindar at a cost of over Rs. 10,000. It also appears that it is only by reason of these improvements that water supply was assured for the first crop and also for the second crop. The ordinary jeroyati ryots and the Inamdar have all been benefited and have been taking water for the first crop and also whenever available for the second crop. What is the proper legal basis for a claim by the Zamindar in such cases? After hearing both the learned Advocates, I am of opinion that it is wrong on the facts of this case to view it as a claim on a tort. In such a case, the proper basis, in my opinion, is that there is an implied engagement between the Zamindar and the Inamdar that whenever there is water available, the Inamdar might take the water but on condition of paying for it. The Inamdar in these cases leased the inams to his tenants on the basis of there being a possibility of a second crop whenever there is water available for it. All the parties know that after the extensive repairs effected by the Zamindar, in ordinary seasons there would be enough water for both the first and the second crops and the rent demanded by the Inamdar from his tenants was fixed on the basis that there would be enough water for the first crop and also for a second crop unless rains fail. We have got in this case Exs. 1 to 4 muchilikas executed by the cultivating tenants in favour of the Inamdar for prior Faslis. From those documents, it appears clear that the Inamdar stipulated for a consolidated rent taking into account the possibility of the tenants raising a second crop and the rent was fixed on such basis. There is no reason to suppose that the terms are any different for the suit Faslis. We have also Ex. B in which the Inamdar expressly authorises the tenants to take water for the second crop and to raise a second crop. The true basis of the liability of the Inamdar to the Zamindar being, as I said, an implied engagement or implied contract, it follows that the Inamdar is equally liable along with the tenants to pay for the water tax for the second crop whenever water is taken for such a crop. The fact that as between the Inamdar and the cultivating tenants, the entire liability is thrown on the tenants is no concern of the Zamindar and he is not bound by any such stipulation as between the Inamdar and his tenants. For these

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reasons, I hold that the first defendant in each suit is jointly liable along with the other defendants. There is no distinction in the application of this principle between a pre-settlement and a subsequent Inam. Even in the case of a subsequent Inam, the same result follows because, as I said, it is on the basis of an implied engagement between the Zamindar and the Inamdar that the liability to pay the water tax for the second crop arises.

Another contention which is raised by Mr. Appa Rao, who appears in the case of the subsequent Inam, that is, the land involved in C. R. P. No. 296 of 1936 (S. C. S. No. 403 of 1934) is that the suit ought to be laid in the Revenue Court. The argument is that for the purpose of the Estates Land Act, the expression 'rent' includes what is payable for water taken even unauthorisedly as laid down by the decision of the Full Bench in *Venkataraju Garu* v. *Maharaja of Pittapuram*[1]. The suit here, so far as the Inamdar is concerned is not for recovery of rent from a 'ryot' as defined under S. 77 of the Estates Land Act. S. 77 refers only to suits as against ryots in which case the Zamindar would have to go to the Revenue Courts even for the recovery of water tax for unauthorised user. But the suit here being against the Inamdar, it does not lie in the Revenue Court. The cultivating tenants are not the ryots of Zamindar; they are the ryots of the Inamdar. It may be that, if the Inamdar wants to file a suit as against his cultivating tenants, he may have to go to a Revenue Court but on that question, I do not express any opinion but so far as the suit against the first defendant the Inamdar or against the other tenants who are the cultivating tenants under the first defendant there can be no question of the Zamindar being obliged to resort to a Revenue Court.

These Revision Petitions are accordingly allowed and there will be a decree against the first defendant in each suit jointly along with the other defendants. I am asked by the respondents' counsel to give a direction that the plaintiff should proceed in the first instance against the defendants other than the first defendant and then to proceed against the first defendant. Mr. Raghava Rao is agreeable that such a direction may be given. I order accordingly. Each party will bear his own costs throughout.

B. V. V. —— *Petitions allowed.*

1. (1938) 1 M.L.J. 256: I.L.R. (1938) Mad. 381 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Karumuthu Thiagarajan, Managing Agent and Director of the Sri Minakshi Mills, Ltd., Madura .. *Petitioner** (*Accused*).

Karumuthu Thiagarajan, *In re.*

Indian Companies Act (VII of 1913), Ss. 140 (3) and 138—Manager of a firm refusing to produce books before an Inspector appointed under the Act—Appointment by Provincial Government after date of transfer of functions to Central Government—Appointment whether valid—Conviction unsustainable.

Where the manager of a Firm was convicted under S. 140 (3) of the Indian Companies Act for refusal to produce books and documents before the Inspector appointed under S. 138 of the Act, but the fact was not disputed that the Inspector was appointed by order of the Provincial Government dated 18th August, 1937, subsequent to the transfer of the Local Government's functions, under S. 138 of the Companies Act, to the Central Government by the new Act,

Held, that the authentication of the order of the Provincial Government in the manner specified in the rules framed under S. 59 (2) of the Government of India Act would not make it an order of the Governor under para. 8 (2) of the India and Burma (Transitory Provisions) Order, 1937 and it follows that the Inspector was not validly appointed. Hence the conviction was unsustainable.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Madura Division, in C. A. No. 63 of 1938 preferred against the judgment of the Court of the City First Class Magistrate of Madura in C. C. No. 33 of 1938.

T. R. Venkatarama Sastri for *T. M. Kasturi* for Petitioner.

K. Venkataraghavachari for the Crown.

The Court made the following

ORDER.—The petitioner is the managing agent and director of the Sri Meenakshi Mills, Ltd., Madura, and the petition is to revise his conviction under S. 140 (3) of the Indian Companies Act for refusal to produce the books and documents of the Company before the Inspector appointed under S. 138 of the Act.

The refusal to produce the books and documents of the Company was not disputed in this Court but the Inspector was appointed by the Provincial Government by order dated 18th August, 1937, subsequent to the transfer of the functions of

* Crl. R. C. No. 770 of 1938. (Crl. R. P. No. 733 of 1938). 24th March, 1939.

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the Local Government under S. 138 of the Indian Companies Act to the Central Government by the new Act and these functions were not entrusted to the Provincial Government by the Governor-General under S. 124 (1) of the Government of India Act till 1st April, 1938. Paragraph 8 (2) of the India and Burma (Transitory Provisions) Order, 1937, empowers the Governor and not the Provincial Government to continue to discharge these functions in the interval and the prosecution case hitherto was that the Inspector was appointed by the Provincial Government. The authentication of the order of the Provincial Government in the manner specified in the rules framed under S. 59 (2) of the Government of India Act would not make it an order of the Governor under paragraph 8 (2) of the India and Burma (Transitory Provisions) Order, 1937, and it follows that the Inspector was not validly appointed. The conviction of the petitioner under S. 140 (3) of the Indian Companies Act cannot therefore be sustained and it is unnecessary to consider the contention, that *ex facie* the Inspector was appointed on the report of the Registrar of Joint Stock Companies and not the Assistant Registrar who made the investigation under S. 137 of the Act and the appointment is consequently invalid. The conviction of the petitioner is accordingly set aside and the fine if levied will be refunded.

K/C. —— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD ROMER, LORD PORTER AND SIR GEORGE RANKIN.

Musammat Bhagwati .. *Appellant**

v.

Musammat Ram Kali .. *Respondent.*

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Mt. Bhagwati *v.* Mt. Ram Kali.

Land Acquisition Act (I of 1894), S. 18 (1)—Land acquisition—Title to land, in dispute—Award of compensation—Question as to person entitled to compensation—Reference under S. 18 (1) of Act I of 1894—Decision of Court how far res judicata*—Application for reference—If to be accompanied by particulars of "grounds" under S 18 (1)—Decision of Court contained in two decrees and order for payment out of compensation instead of in one award—Validity of decision if affected.*

Where, in the course of proceedings under the Land Acquisition Act, 1894, a reference to the Court under S. 18 is made for the determination of

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* P. C. Appeal No. 35 of 1937. Allahabad Appeal No. 8 of 1935. 7th March, 1939.

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matters including a dispute as to which of two or more claimants to the property in dispute is entitled to receive the compensation awarded, a decision of that Court renders the question of title to the property *res judicata* as between the rival claimants. *Ramachandra Rao* v. *Ramachandra Rao*, (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.), followed.

S. 18 (1) of the Act requires the application for a reference to be accompanied only by the grounds of objection to the award of compensation, the word "grounds" being referable only to such of the four possible objections specified in the sub-section, as the applicant relies on. The application accordingly does not, in order to be valid, require to be accompanied by actual particulars of the applicant's objections. *Pramatha Nath Mullick* v. *Secretary of State for India*, (1929) 58 M.L.J. 223: L.R. 57 I.A. 100: I.L.R. 57 Cal. 1148 (P.C.), followed.

The decision of the District Judge on a reference to him under the Act of 1894 is not vitiated by the fact that its result is expressed in two decrees and an order for payment out of the compensation money to a specified party, instead of in an award. Although it may be simpler for the Court to follow the provisions of S. 26 (2) and express its decision in the form of an award, even that section does not provide except inferentially for any determination in the award of any dispute with regard to the persons interested.

Appeal from a decision of the High Court, Allahabad, dated 16th January, 1935 (Niamat-ullah and Allsop, JJ.), reversing a decision of the Subordinate Judge, Bulandshahr, dated 27th October, 1930.

The facts and arguments appear fully from the judgment.

Sir Thomas Strangman, K. C. and *A. G. Pullan* for Appellant.

C. S. Rewcastle, K. C. and *S. Hyam* for Respondent.

7th March, 1939. Their Lordships' judgment was delivered by

Lord Porter.

LORD PORTER.—The plaintiff and the defendant in this appeal are the widows of two brothers, the appellant of Sagar Mal and the respondent of Kirpa Ram. The brothers were the sons of Janki Kuar, who died in 1918, and the title under which the property was held by the brothers is in dispute. Kirpa Ram died on the 10th March, 1924, leaving the respondent as his widow. Sagar Mal died on the 18th March, 1924, leaving the appellant as his widow. If the property which prior to their death was admittedly enjoyed by both the brothers was held as joint family property, the appellant as widow of the last survivor would be entitled to the estate. If, on the other hand, as was claimed by the respondent, the property was held by the brothers as tenants in common, it would pass to the two widows in equal shares.

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The appellant asserted that the property was joint family property and that by Hindu law the whole passed to her. The respondent on her part maintained that the property was held by the brothers as tenants in common and that half devolved upon her. She further alleged that, even if this were not so, by a family arrangement made after the death of the two brothers it was agreed that the parties should enter into possession of the shares of their respective husbands. In support of these allegations she relied upon the facts which were admitted that the property was entered in the revenue records in the joint names of the appellant and respondent, and that, though the appellant was recorded as lambardar of the property in the town of Bulandshahr, including the property in dispute, the respondent was recorded as lambardar of other portions of the property. Whatever may have been the arrangement between the parties, they appear to have quarrelled before October, 1925, and by that date a dispute as to their rights in the property had already arisen and extended to their servants to such an extent that criminal proceedings were taken by one of the employees of the respondent against certain employees of the appellant, proceedings which ended in the conviction of the appellant's servants on the 5th February, 1926.

Meanwhile on the 18th December, 1925, certain property in the town of Bulandshahr was notified for acquisition under the Land Acquisition Act, 1894. A portion of this property formed part of the estate the ownership of which is in dispute in the present action.

During the year 1926 the dispute between the parties continued and extended, and on the 13th September, 1926, the appellant instituted a suit in the Court of the First Munsif for rent against certain tenants of the disputed property. In this suit the respondent was joined as defendant and in it the appellant claimed the whole of the rent. The tenancy in question was in respect of land in the town of Bulandshahr. While this suit was proceeding and while the acquisition proceedings were still in progress, the appellant petitioned the Collector in the latter proceedings on the 19th February, 1927, that the whole compensation money should be paid to her to the exclusion of the respondent. In the same month, namely, on the 26th, the First Munsif gave judgment in the tenancy suit in

which he held that neither the plaintiff nor the defendant were entitled to anything, and dismissed the suit with costs.

The appellant thereupon appealed to the Subordinate Judge who on the 31st May, 1927, gave judgment awarding half the rent to the appellant and half to the respondent. From this decision the appellant appealed to the High Court. Just before the decision of the Subordinate Judge, namely, on the 6th April, 1927, some proceedings appear to have taken place in the acquisition matter towards determining the amount payable as compensation. The respondent claimed that an award had been made on that date, but this was denied by the appellant. It is undoubted, however, that on the 29th September, 1927, the Collector made a formal award as to the value of the property and the apportionment of the compensation under the Land Acquisition Act. His award has not been printed in the record. There has been printed, however, the terms of an award dated the 1st November, 1927, which is said by the respondent to be an attempt of the Collector to make a fresh award after he was *functus officio*, and by the appellant to be merely a repetition of the earlier award and explanatory of the details contained therein. Under either award the parties each received in compensation one-half of the value of the land in dispute, the Collector apparently taking the view that they were entitled to the property in equal shares. Notices of each of the awards appear to have been sent to each of the parties.

On the 11th October, 1927, after the receipt of the first notice, the appellant applied under S. 18 of the Land Acquisition Act, 1894, requiring that the matter be referred by the Collector for the determination of the Court, and gave as the objections which she desired to be considered (*a*) what is the correct amount of compensation of the land which should be given to the zamindars? (*b*) what particular person is entitled to what compensation?

On the 31st October, 1927, the respondent also objected to the award, her objection being confined to the insufficiency of the amount of the compensation awarded. One other of the parties interested in the land appears also to have made objection, but solely on the ground of the inadequacy of the compensation.

On the 14th December, the objections were forwarded by the Collector to the District Judge at Bulandshahr in accordance

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with the terms of S. 19 of the Act, and the information required under the provisions of that section was furnished by him. This information was supplemented in a communication from the Collector to the District Judge on the 26th April, 1928. Neither of these documents contained or indeed is required to contain the grounds of objection.

While the reference to the District Judge in the acquisition matter was still undetermined, the second appeal of the appellant from the decision of the Subordinate Judge of Bulandshahr in the tenancy action was heard on the 22nd April, 1929, and determined by the High Court in favour of the appellant. A little more than a month later the District Judge made his award in the matter of the land acquisition. Whatever he may have determined in that award, he framed as his fourth issue the question whether the appellant was entitled to the entire compensation or the respondent was entitled to half. To that question he gave the answer that the appellant was entitled to the entire compensation. The learned Judge also held that the compensation awarded by the Collector was sufficient, and dismissed the objections lodged by the three objectors on this ground. The effect of his answer to the fourth issue must, however, be considered more at length when the issues of the present case have to be determined.

No appeal was made against this award, and on the 31st May, 1929, the learned District Judge passed two decrees, one in respect of the application of the appellant and the other in respect of the application of the respondent to his Court. In each case the order is headed "Application for determination of compensation under Act I of 1894" and contains the words:—"It is ordered that as per judgment on the record of case No. 64 the application be struck off with costs." The judgment referred to is that given on the 31st May by the learned District Judge. No decree or formal award was filed dealing with the dispute between the parties as to their rights to receive the compensation money, but on the 12th August, 1929, the whole sum awarded by the Collector in respect of the land in dispute was paid out to the appellant under a formal instruction of the learned Judge.

No record of the payment of this sum into Court by the Collector is to be found in the record, but it is clear that it was paid in under the provisions of S. 31 (2) of the Act owing to

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the dispute between the appellant and the respondent as to who was entitled to the money.

The compensation having been dealt with in this way, the respondent, who was not content to rest under the decision of the High Court in the rent case or of the District Judge in the acquisition case, brought the present action by plaint dated the 20th March, 1930, in the Court of the Subordinate Judge of Bulandshahr, claiming that she was entitled to half the property on the grounds that have been already set out. To that petition the appellant pleaded that she was entitled under Hindu law to the succession, that there was no family arrangement, and that in any case the dispute had already been determined (1) by the High Court in the rent case, and (2) by the District Judge in the acquisition case, that it was no longer open to question, and that the matter was *res judicata.*

In adjudicating upon these pleas the learned Subordinate Judge who tried the suit now under review held (1) that the two brothers were tenants in common of the property, (2) that a family settlement had been made as alleged by the respondent and was binding upon the parties, but (3) that the matter was *res judicata.* He therefore gave judgment in favour of the appellant by formal decree dated the 27th October, 1930.

From this judgment the respondent appealed to the High Court at Allahabad which, on the 16th January, 1935, reversed the decision of the lower Court, held that the matter was not *res judicata*, found that the brothers held the land as tenants in common, and that in view of this finding it was unnecessary to determine whether a family arrangement had been entered into or not. From this decision the appellant has appealed to His Majesty in Council.

Before their Lordships the question first argued was whether the High Court was right in determining that the matter was not *res judicata* since, if their Lordships were of opinion that they were wrong in that determination their decision would be conclusive of the matter, and it would not be necessary to enter into the other difficult and complicated questions which arose.

In the argument presented to their Lordships' Board it was conceded on behalf of the appellant that the decision of the High Court in the rent case could not be relied upon as decisive

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of the title of the parties to the property in dispute, and that a plea of *res judicata* could not be founded upon it.

Reliance was, however, placed upon the decree of the District Judge in the acquisition case as finally determining the rights of the parties.

In order successfully to establish a plea of *res judicata* or estoppel by record it is necessary to show that in a previous case a Court having jurisdiction to try the question came to a decision necessarily and substantially involving the determination of the matter in issue in the later case.

It was at one time a matter of doubt in India whether the determination of a Court to which a matter has been referred by the Collector under S. 18 of the Land Acquisition Act was such a decision. That doubt was resolved by the judgment of this Board in *Ramachandra Rao* v. *Ramachandra Rao*[1], which decided that, where a dispute as to the title to receive the compensation has been referred to the Court, a decree thereon not appealed from renders the question of title *res judicata* in a suit between the parties to the dispute. In that case some question arose as to whether any appeal lay to His Majesty in Council in a case where the determination of the Judge ended in an award and not in a decree. The Board took the view that where the matter referred was not the adequacy of the amount of compensation awarded, but a dispute between the persons claiming compensation, involving, it might be, difficult questions of title, the resultant decision was not an award but a decree. This particular part of the judgment has, however, become academic, since an appeal to His Majesty in Council is now given by S. 26 (2) of the Land Acquisition Act which was added by amendment in 1921 and enacts:—

> "Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of S. 2, cl. (2), and S. 2, cl. (9), of the Code of Civil Procedure, 1908."

If, then, in a matter referred to him by the Collector in accordance with the provisions of the Land Acquisition Act, a Judge to whom it is referred has in a dispute as to their title to the land between two of the parties claiming compensation, determined that dispute, the matter is *res judicata* and binds the parties in any later suit involving that issue. The difficulty in

1. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).

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the present case arises from the form by which the appellant required the Collector to submit the matter to the Judge, the wording of that reference by the Collector, the terms of the judgment and the final decrees passed by the learned Judge.

For the respondent it was first said that the question of the ownership of the land in dispute had never been put before the District Judge in due form and that he had, therefore, no jurisdiction to decide the matter.

The appellant, it was maintained, had never required that question to be referred for the determination of the Court, and in any case had not, as required by S. 18, sub-S. (2), stated the grounds on which the objection was taken.

S. 18, sub-S. (1), no doubt provides that whether the objection be to (i) the measurement of the land, (ii) the amount of the compensation, (iii) the persons to whom it is payable, or (iv) the apportionment of the compensation among the persons interested, written application may be made for a reference to the Court, and sub-S. (2) provides that the application shall state the grounds on which objection is taken.

So far as is material to the question whether the issue of ownership is *res judicata*, the portion of the application of the 11th October, 1927, upon which the appellant relies in order to show that the dispute between the parties as to their respective titles was submitted to the Court, is contained in the words "What particular person is entitled to what compensation?"

The phraseology is wide enough to embrace two of the four objections mentioned in the sub-section, namely, numbers 3 and 4 and therefore *prima facie* includes a reference as to the persons to whom compensation is payable.

It was argued that there were many potential objectors amongst the zamindars affected, and that the words might merely mean that the Court was called upon first to determine the total sum to be awarded and then to apportion that sum in the proper ratio between each of the persons entitled. But the appellant was primarily concerned with the apportionment to her; she had already in the previous February claimed the whole compensation of the land in question to the exclusion of the respondent, and their Lordships see no reason for giving the words the narrower construction. It was, however, suggested that the requirement was not complete unless particulars of the

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reasons for the objections taken were given. But the Act does not require particulars to be given—it requires only the grounds of objection to be given, and by "grounds," their Lordships think, is meant such of the four grounds mentioned in S. 18 (1) as are relied upon. The same view as to the meaning of the word "grounds" appears to have been entertained by their Lordships' Board in *Pramatha Nath Mullick* v. *Secretary of State for India*[1] and no further particulars are required in order to comply with the terms of the sub-section.

Secondly, it is said that the question of ownership was never submitted by the Collector to the Court. It is true that neither in his letter of the 14th December, 1927, nor in the written information furnished on the 28th April, 1928, does the Collector refer to any question other than that of compensation. But there is no reason why he should do so. His duties in making the reference are set out in S. 19 under the provisions of which the only information required as to the grounds of objection is that contained in sub-S. (2) which requires the attachment of a schedule giving particulars of the notices served upon and of the statements in writing made or delivered by the parties interested respectively. From the information furnished on the 26th April, 1928, it appears that particulars of these notices and of the statement in writing made by the objectors were sent to the District Government Pleader on the 27th February, 1928. The Court, therefore, had before it not only the question of the amount of compensation but also the further question as to the persons to whom compensation was payable.

But it is suggested that even if the question of ownership was submitted to the Court in due form, yet no decision upon that point was given. The judgment itself, it is said, shows that the title of the appellant and the respondent never came in issue, and that the only matter determined by the Court was that it had no jurisdiction to consider the objections; or at any rate it was not clear that any further decision had been come to. The learned Judge, it was argued, held (1) that the award of the 21st September, 1927, had been superseded by that of the 1st November, which had not altered but clarified the earlier document, (2) that no objection had been taken to the later award though objections had been taken to the earlier one, and (3)

1. (1929) 58 M.L.J. 223: L.R. 57 I.A. 100: I.L.R. 57 Cal. 1148 (P.C.).

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that as no objection had been taken, the later award must be confirmed. Indeed the respondent went further and said that it appeared from the judgment that there had been an earlier award on the 6th April, 1927, that that, being the earliest, was the only valid award, and that in considering any other the Judge had exceeded his jurisdiction.

Their Lordships do not so read the learned Judge's words. Both parties were before him and gave and called evidence to establish their respective titles. After hearing them he framed two issues material to the question now under consideration:—

"(3) Has the Court jurisdiction to adjudicate the matter on the basis of the petition presented in respect of award of 21st September, 1927. (4) Whether the applicant is entitled to the entire compensation or Mussamat Ram Kali" (the respondent) "is entitled to half share."

In answer to the fourth issue he found in terms that the appellant was entitled to the entire compensation.

It is, of course, possible that he held himself to have no jurisdiction, but nevertheless determined the other issues in case, but only in case, the matter went further and an appellate Court found his decision as to jurisdiction to be wrong.

This is possible, but there is no indication of such an intention in the judgment itself. The learned Judge gives his findings as to each of the issues framed in the order he framed them as if each must be determined in order to complete the reference.

The language used in the judgment in determining issue 3 might be clearer, but, in their Lordships' opinion, it sufficiently indicates that after some preliminary discussion as to the question of compensation beginning on the 6th April, 1927, an award was made on the 21st September, 1927, showing the amount awarded to each of the parties interested but not distinguishing between the land itself and any buildings, trees, etc., on it. The award of the 1st November did so distinguish but in all other respects was identical with the earlier award, and was a mere specification of it. In both documents Rs. 452-14-0 were awarded to the appellant and the same sum to the respondent.

Without seeing the exact terms of the various documents it is not very easy to follow all the reasoning. The argument of the respondent which the learned Judge rejects, namely, that Rs. 759-2-6 had been awarded by the award of the 21st September, 1927, and the statement by the learned Judge that only the appellant made an application under S. 18 of the Land Acquisi-

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tion Act, and that the third objector and the respondent made no objections, seems to be inaccurate whether his statement refers to the award of the 21st September or that of the 1st November. The fact seems to be that all three objected to the award of the 21st September, and that none of them made any objection to the document of the 1st November. The respondent did not suggest that any award had been made on the 6th April. She referred to the document of the 21st September as the first award and to that of the 1st November as the second award, and argued that the second having superseded the first no valid objection had been made to the final award by her and none could be entertained by the learned Judge. To this argument the learned Judge held that the second award was a mere specification of the first and, as their Lordships think, that any further objections ought to have been taken under the earlier and not the later award.

But whatever the exact meaning to be attributed to the learned Judge's words, it is clear that he did decide that the respondent had no right to the land and that there were not two awards but only one of the 21st September, though it is true that that award had been made more specific on the 1st November.

This, in their Lordships' view, is a clear finding not of want of jurisdiction but that there was a valid award and that the appellant was the owner of the land. It is for the respondent to show that jurisdiction was declined, and she has failed to do so.

Nor is the Court's decision vitiated by the facts that its result is expressed in two decrees, and an order for payment out of the compensation money to the appellant, instead of in an award. No doubt the matter would have been simplified if the Court had followed the provisions of S. 26 (2) of the Land Acquisition Act, and its decision had been expressed in the form of an award, but it is to be observed that even that section does not provide except inferentially for any determination in the award of any dispute as to the persons interested.

In these circumstances it was not unnatural that on the one hand the question of the amount of compensation alone should have been dealt with in the two decrees which, though they in terms refer to the judgment, make no reference to any dispute

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between the appellant and respondent, and are headed "Application for determination of compensation", and that on the other hand the dispute between the parties to the present suit should be settled by a payment out to the one entitled to receive the compensation.

It was suggested on behalf of the respondent that the order for payment out was consistent with a finding that both were entitled to an equal share. The appellant and respondent, it was said, were recorded as joint owners and the appellant had by arrangement with the respondent become lambardar of the land affected. The payment therefore might have been made to the appellant as lambardar of the property concerned or as co-owner and agent for the respondent. There is however no indication of this in the order itself. Moreover a lambardar would not be entitled to receive capital money *virtute officii*, nor would a co-owner be able to give a valid discharge for another owner interested in the land.

For the reasons given their Lordships think that the learned District Judge did determine the question of ownership, his decision is binding upon the parties to this appeal, and the matter is *res judicata*.

Their Lordships will therefore humbly advise His Majesty that the appeal be allowed, the decree of the High Court set aside and the decree of the Subordinate Judge in this suit be restored. The respondent must pay the costs of the hearing in the High Court and before their Lordships' Board.

Solicitors for Appellant: *Douglas, Grant & Dold.*

Solicitors for Respondent: *Barrow, Rogers & Nevill.*

R.C.C. —— *Appeal allowed.*

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Vyapuri Kavandan .. *Petitioner* (1st Accused).*

Vyapuri Kavandan, *In re.*

Madras Prohibition Act (X of 1937), S. 4 (1) (a) and (g)—Offence under—Proof—Distiller of arrack—Possession of arrack—Separate sentences—Propriety.

The accused who was a toddy renter before the introduction of prohibition was convicted of an offence under S. 4 (1) (a) of the Madras Prohibition Act. The evidence of the Sub-Inspector was to the effect that on his way to the house of the accused with a search warrant the accused emptied a pot of

* Crl. R. C. No. 841 of 1938. (Crl. R. P. No. 799 of 1938). 1st March, 1939.

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arrack into his well and on search the pot containing fermented wash, the bottle containing some drops of illicitly distilled arrack, a basket of jaggery and a pot containing velvelan bark and cocoanut flowers were found in the house.

Held, that the accused was properly convicted under S. 4 (1) (*a*) and (*g*) of the Madras Prohibition Act.

Held, however, that as a distiller of arrack will necessarily possess the arrack no separate sentence for such possession of arrack was called for.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Dharmapuri in C. A. No. 88 of 1938 preferred against the judgment of the Court of the Stationery Sub-Magistrate of Dharmapuri in C. C. No. 636 of 1938.

C. S. Swaminathan for Petitioner.

K. Venkataraghavachari for *The Public Prosecutor* (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The petitioner was a toddy renter before the introduction of Prohibition and he has been convicted under S. 4 (1) (*a*) and (*g*) of the Madras Prohibition Act and sentenced to rigorous imprisonment for two months and a fine of Rs. 50 under each sub-clause. The evidence of P. W. 1 the Sub-Inspector shows that on his way to the house of the petitioner with a search warrant the petitioner emptied a pot of arrack into his well and on search M. O. 3 the pot containing fermented wash, M. O. 4 the bottle containing some drops of illicitly distilled arrack, M. O. 5 the basket of jaggery and M. O. 6 the pot containing velvelan bark and cocoanut flowers, were found in the house. P. W. 2 the search witness corroborates P. W. 1 and the denial of the petitioner is worthless. The conviction of the petitioner under S. 4, cl. (1) (*a*) and (*g*) is therefore correct but a distiller of arrack will necessarily possess the arrack and separate sentences are not called for. The sentence of the petitioner is therefore reduced to rigorous imprisonment for two months and a fine of Rs. 50 with rigorous imprisonment in default for one month and otherwise this petition is dismissed. The excess of fine if levied will be refunded.

B. V. V. —— *Sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

A. M. Balakrishna Reddiar .. *Petitioner** (*Petitioner*)

v.

Syed Jalaluddin Sahib and others .. *Respondents* (*Respondents*).

Balakrishna Reddiar *v.* Syed Jalaluddin Sahib.

Criminal Procedure Code (V of 1898), S. 145 (6)—Finding of possession in favour of petitioner—Direction to petitioner to restore cemetries and give access to Mussalmans—Power of magistrate to order.

After a finding and a declaration of possession in favour of the petitioner under S. 145 (6) of the Criminal Procedure Code, it is beyond the powers of the Sub-Divisional Magistrate to direct the petitioner to restore two old cemetries and allow access to Mussalmans if they should desire.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Saidapet dated 24th August, 1938 and made in M. C. No. 33 of 1938.

M. Raghupathi Reddi, A. M. Balakrishna Mudaliar and *F. Jagannathan* for Petitioner.

V. Rajagopalachari and *Basheer Ahmed Sayyad* for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—There is no ground for dissent from the finding of the Sub-Divisional Magistrate that the land in dispute is in the actual possession of the petitioner in Criminal Revision Case No. 689 of 1938 and the declaration of his possession under S. 145 (6) of the Code of Criminal Procedure is correct. But the direction requiring him to restore two old cemetries to their old state and allow access to Mussalmans if they should desire to go near the cemetery to invoke the blessing of God is beyond the powers of the Sub-Divisional Magistrate and it cannot be upheld. The direction is therefore set aside and otherwise the order of the Sub-Divisional Magistrate is confirmed.

K. S. *Order varied and confirmed.*

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* Crl. R. C. Nos. 689 and 931 of 1938. (Crl. R. P. Nos. 655 and 884 of 1938. 7th March, 1939.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Pamidi Vedavalli Thayarammal
by her power-of-attorney agent,
R. Singanna Chetti .. *Appellant** (*Plaintiff*)

v.

Junus Chettiar .. *Respondent* (*Defendant*).

Vedavalli Thayarammal v. Junus Chettiar.

Madras City Tenants' Protection Act (III of 1921), S. 11—Tenant not owner of the superstructure—If can claim notice under S. 11.

The Madras City Tenants' Protection Act, 1921, does not apply to the case of a tenant who is not the owner of the superstructure. Where therefore it is found that a tenant is not the owner of the superstructure on the land, he is governed by the provisions of the Transfer of Property Act, which require only a notice of fifteen days on the footing of a monthly tenancy and cannot claim the three months' notice required by S. 11 of the Act.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Pandrang Row dated 23rd April, 1936 and passed in C. C. C. A. No. 9 of 1935 preferred to the High Court against the decree of the Court of the City Civil Judge of Madras in O. S. No. 220 of 1933.

V. Ramaswami Aiyar for Appellant.

A. M. Krishnaswami Aiyangar for Respondent.

The Court delivered the following

Krishnaswami Aiyangar, J.

JUDGMENTS. *Krishnaswami Aiyangar, J.*—The appellant in this appeal is the owner of a piece of land which was being let to tenants for running a firewood depot from about 1912. It is unnecessary to go into the earlier history of the tenancy. It will be enough to refer to Ex. E, a registered rental agreement executed by two persons V. Ratnavelu Mudaliar and T. Papiah Chetty brother of the respondent, in favour of the appellant on the 30th October, 1922. By that agreement the tenants took over the land which was described as vacant land of the extent of about two manais, on lease for a period of five years from 1st February, 1923, for opening and running a firewood depot 'after constructing a building on the said land' with the permission of the appellant. The agreement winds up by saying that the appellant should take steps for recovering the property in case of default in the regular payment of rent without reference to the period of the lease. This agreement as is clear, was one which was entered

*L. P. A. No. 78 of 1936. 31st January, 1939.

into between the parties after the Madras City Tenants' Protection Act, 1921, came into force which was on the 21st February, 1922. One of the questions argued on behalf of the appellant is that this tenancy agreement being in the nature of a contract entered into after the Act came into force the provisions of the Act cannot apply to it. It is unnecessary to decide this point for there is another and a clearer ground on which we think that the appellant is entitled to succeed.

Vedavalli Thayarammal v. Junus Chettiar.

Krishnaswami Aiyangar, J.

The learned Judge has found that the superstructure on the land does not belong to the respondent. He was inclined to think that that finding made no difference to his decision though at the same time he expressed the opinion, that if it were necessary he would have called for a finding on the question of the true ownership of the superstructure. We may at once say that we are unable to see any reason for taking this course, as both parties were content to have the dispute settled on the documentary evidence placed before the Court without caring to adduce any oral evidence. They had the opportunity, and if they did not avail themselves of it, it is their own fault. So we think that the case ought to be disposed of on the evidence on the record as it stands.

The finding being that the respondent is not the owner of the superstructure the question is whether the appellant was bound before seeking to eject him from the land and the superstructure, to give him the three months' notice required by S. 11 of the Act. The learned Judge is of opinion that it is enough to attract the operation of this section that the respondent is a tenant, and that once it is found that he is a tenant the three months' notice is obligatory irrespective of the question whether the tenant owns the superstructure or not. S. 11 is in these terms:

"No suits in ejectment or applications under S. 41 of the Presidency Small Cause Courts Act, 1882, shall be instituted or presented against a tenant until the expiration of three months' next after notice in writing has been given to him requiring him to surrender possession of the land and building, and offering to pay compensation for the building, and trees, if any, and stating the amount thereof."

It is clear that the notice referred to in this section is one requiring the tenant to surrender possession of the land and building, and offering to pay compensation for the building and trees if any. There is nothing in the section or in the Act which enables the tenant to ask for compensation, when he does

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not own the building. In a case where the tenant is not the owner of the superstructure it is impossible to see how he can ask for compensation in respect of something which does not belong to him, or why the landlord should offer by his notice to pay compensation for a building which he himself owns. The entire scheme of the Act as the preamble shows it, is to afford protection to a tenant who has constructed a building on another's land and not to throw obstacles in the way of a landlord enforcing his rights, even where there are no rights of a tenant to be protected. This is apparent from the language of the section itself, which seems to limit its operation to the case where the tenant is the owner of the superstructure. Where he is not such an owner, the provisions of the Transfer of Property Act which require only a notice of fifteen days on the footing of a monthly tenancy must be held to apply. We are unable to agree that this case is governed by S. 11 of the Act.

In this view it is unnecessary to discuss any other question for the disposal of this appeal. Differing from our learned brother, we must hold that the notice to quit which had been given by the appellant before suit was sufficient. The appeal is allowed with costs here and in the Court below.

Leach, C.J.

The Chief Justice.—I agree.

S. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

The Raja of Vizianagaram (dead) and another .. *Appellants** (*1st Defendant and nil*)

v.

Mudunooru Sanyasiraju .. *Respondent* (*Plaintiff*).

Raja of Vizianagaram v. Sanyasiraju.

Water course—Private estate altering water-course—Change affecting plaintiff—Rights of plaintiff to protection works in case of damage to his property—Controlling authority how far liable.

The duty of the controlling authority when constructing a new work in the interests of irrigation facilities generally is to take such reasonable precautions as are obviously necessary to prevent damage to others. This is not to say that the irrigation authority is *prima facie* liable for the consequence of any escape of water from an irrigation tank owing to an act of God or to some unforeseen and improbable rush of water, but that there is a duty to provide such protection against the ordinarily anticipated flow of water, as

* S.A. No. 245 of 1935. 31st January, 1939.

Raja of Vizianagaram v. Sanyasiraju.

would safeguard third party's lands from damage as a result of the new work of irrigation.

Where an estate diverted the flow of water from a pathway without any precaution to prevent the water from damaging the plaintiff's land which lay adjacent to that pathway,

Held, that the plaintiff had a right to require the estate to construct such protective works as might be necessary to prevent damage to the plaintiff's lands from the flow of water which might ordinarily be expected in the channel and the plaintiff had a right to demand that the pre-existing course of the channel should not be altered except after the completion of the protective works necessary.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam, in A. S. No. 31 of 1934 preferred against the decree of the Court of the District Munsif of Vizianagaram in O. S. No. 339 of 1931.

S. Venkatesa Aiyangar for Appellants.

V. Govindarajachari for Respondent.

The Court delivered the following

JUDGMENT.—This appeal is preferred by the first defendant representing the Vizianagaram Estate against the decision in a suit for an injunction to restrain the first defendant from altering the course of the channel to the detriment of the plaintiff. It seems to be established on the findings of the Courts below that the channel marked DD in the plan attached to the plaint and also in the Commissioner's plan flowing west to east, has been diverted by means of an embankment so that it flows southwards along the path marked EE-1 on the plan and that an incidental consequence of this diversion has been damage to the plaintiff's land which is situated to the west of the diversion. It is contended for the appellant that the duty imposed upon a Zamindar to construct and maintain irrigation works gives him a right to create any new works which he finds to be necessary in the interests of irrigation and imposes an obligation on third parties to construct such protective works as may be necessary to prevent damage to their lands resulting from the new works. It seems to me that this is an overstatement of the legal position of the Zamindar with reference to irrigation. It is true that this Court held in *Gajapathi Krishna Chandra Deo* v. *Raja of Vizianagaram*[1], that the rule in *Rylands* v. *Fletcher*[2], is not applicable to Indian irrigation conditions. The storing of water in an agricultural tank is a

1. (1930) 60 M.L.J. 662. 2. (1868) 3 H L. 330.

Raja of Vizia-nagaram v. Sanyasiraju.

natural and lawful user and is not actionable for damage in the absence of negligence. This is quite another matter from holding that either a Zamindar or Government are entitled to construct new irrigation works so as to damage the lands of others without any liability for the damages so caused. It was held by a Bench of this Court in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*[1] that

> "The rights of Government, in connection with the distribution of water, did not include a right to flood a man's land because, in the opinion of Government, the erection of a work which has this effect is desirable in connection with the general distribution of water for the public benefit."

I know of no principle upon which the rights of a Zamindar can be placed any higher than the rights of the Government with reference to irrigation. It is one thing to say that the Government or the Zamindar has the right to restore an irrigation work to its former condition without regard to the fact that the restoration will result in the submersion of lands which, owing to the disrepair of the work, had for sometime been immune from submersion. It is another thing to say that the controlling authority has the right to construct the new work so as to submerge the lands of third parties not hitherto liable to submersion without compensation for the damage thereby caused.

To my mind it is the duty of the controlling authority when constructing a new work in the interests of irrigation facilities generally to take such reasonable precautions as are obviously necessary to prevent damage to others. This is not to say that the irrigation authority is *prima facie* liable for the consequence of any escape of water from an irrigation tank owing to an act of God or to some unforeseen and improbable rush of water; but that there is a duty to provide such protection against the ordinarily anticipated flow of water, as would safeguard third party's lands from damage as a result of the new work of irrigation. Applying this principle to the present case, it would appear that the estate has diverted the flow of water along a pathway without any precautions to prevent the water from damaging the plaintiff's land which lies adjacent to that pathway. The plaintiff has, in my opinion, a right to require the estate to construct such protective works as may be necessary to prevent damage to the plaintiff's lands from the

1. (1904) 15 M.L.J. 32: I.L.R. 28 Mad. 72.

Raja of Vizia-nagaram v. Sanyasiraju.

flow of water which may ordinarily be expected in the channel and the plaintiff has a right to demand that the pre-existing course of the channel shall not be altered except after the completion of the protective works necessary. I do not think that the plaintiff has the right to require the defendant to maintain the course of the channel for ever in one particular bed. But he has the right to insist that any alterations which the controlling authority may find necessary, shall not work to his detriment. In this view it seems to me that the injunction granted by the lower appellate Court goes too far and requires modification. The modification which I propose to introduce will make it unnecessary to go into the question whether the injunction cannot be granted for want of the presence of the owners of the land through which the old course of the channel passed from the record of the case.

But I observe that the plaintiff asserted that the eighth and ninth defendants were the owners of that land, that this assertion was not traversed in the written statement and that in the absence of an issue regarding non-joinder or of any plea to substantiate such an issue it is not proper to non-suit the plaintiff for want of other parties. In the result the appeal is allowed and the injunction granted will be modified, the first defendant being restrained from damaging the plaintiff's land by the diversion of the course of the channel marked DD in the plaint plan so as to flow along the path marked EE-1 in that plan and the first defendant being required to construct such an embankment as may be sufficient, or so to alter the course of the channel, as to prevent such damage. The appellant having substantially failed will pay the costs of the respondent in this Court.

Leave refused.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

M. Subbiah .. *Petitioner* (Accused)*

v.

T. Ramacharlu .. *Respondent (Complainant).*

Subbiah v. Ramacharlu.

Criminal Procedure Code (V of 1898), S. 197—Judge—Irregularities in Court—Objection to, by party—Judge getting angry and using abusive langu-

* Crl. R. C. No. 851 of 1938. 19th January, 1939.
(Crl. R. P. No. 809 of 1938).

Subbiah v. Ramacharlu.

age, etc.—Complaint against the Judge in respect of such acts—Sanction of Local Government, if necessary—"In the discharge of his official duty"—Meaning of.

Where a complaint against a President of a Panchayat Court alleged that when the complainant objected to the President's clerk dictating the order to be passed in a case before the Panchayat Court in which the complainant was the petitioner, the President abused him (the complainant), slapped him on the cheek and further attempted to beat him with the shoe,

Held, that though the alleged acts are not part of his official duties, yet the President was acting throughout till the very minute when the alleged offences were committed in his official capacity. And therefore sanction under S. 197 of the Criminal Procedure Code is essential before the Court can take cognisance of such an offence. "In the discharge of his official duty" in S. 197 is not to be interpreted in a strict manner so as to include only acts done strictly within the scope of his jurisdiction or authority.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate, Nandyal, dated 21st October, 1938, and made in on the objection petition in C. C. No. 110 of 1938.

J. V. Srinivasa Rao for Petitioner.

A. Gopalacharlu for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—This is a simple case in which the President of a Panchayat Court was complained against in respect of certain acts committed by him while he was in his own Court dealing with a case in which the complainant in the case was a party.

The complaint petition itself says that when the President, that is, the petitioner in the present case, was about to write the Court's order dismissing the complainant's petition, the complainant objected to the dictation by the clerk of the President of the order to be pronounced in the matter and asked the President not to allow the clerk to dictate the judgment as the Court was bound in law to write its own judgment and that it was on account of this objection taken by the complainant that the President of the Court is said to have got up from his seat abusing the complainant and slapped him on the cheek twice. It is also alleged that when the complainant warned the President that he had no business to assault him in open Court, the President unlaced his shoe, took it up in his hand, and raised it saying, "I will beat you with my shoe". No actual beating with the shoe followed because some persons are said to have intervened.

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The question is whether in respect of these acts, sanction is required under S. 197 of the Criminal Procedure Code which says that when any person who is a Judge within the meaning of S. 19 of the Indian Penal Code is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government. In this case no such sanction has been obtained. The Joint Magistrate has nevertheless taken cognizance of the case on the ground that as the objection was raised by the complainant in the case to the procedure adopted by the Court in a perfectly orderly and lawful manner, it was the duty of the Court to answer that objection in an equally orderly and lawful manner and that the alleged use of abusive language and beating and the attempt to beat with a shoe cannot be said to come within the scope of the President's official duties.

The petitioner was acting throughout till the very minute when the alleged offences were committed in his official capacity. It cannot be said that he immediately ceased to be acting in his official capacity, the moment his lips began to utter abusive words. The provocation, so to speak, for the acts complained of had an immediate bearing on the official duties of the accused. It was because objection was taken to something that was being done by him in his official capacity as a Judge that the accused is said to have employed abuse and indulged in assault. These are acts which must be deemed to have been done when he purported to act in discharge of his official duties, though it is not part of his official duties to abuse or assault. If this was part of such official duties, there can be no offence. The question of obtaining the Government sanction arises only where the officer while acting in his official capacity steps beyond the limits of his authority or jurisdiction and does something which constitutes an offence. In such cases it has been enacted as a measure of protection against frivolous or vexatious complaints that complaints against certain officers should not be entertained without the sanction of Government. The section is one meant for protection of the Judge concerned and to interpret the words "in the discharge of his official duty" in a strict manner so as to include only acts done strictly within the scope of his authority or jurisdiction would render any protection unnecessary, because an act which is completely within the scope of

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one's official duties can never be an offence and there would be no necessity to apply the provisions of the section or to afford any protection in respect of such an act. It is only where offences are committed by a Judge that the necessity for protection comes in and the protection is limited to cases where the offences are committed while the Judge purports to act in his official capacity though undoubtedly he has outstepped the limits of his duties. In this case the circumstances clearly show that throughout, the President was acting as a Judge and therefore the protection which is meant to be given to persons in his position must be available to him.

The petition is therefore allowed and the proceedings of the Joint Magistrate are quashed for want of sanction of the Local Government.

S. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AIYANGAR.

Adusumilli Gopalakrishnayya .. *Petitioner** (*Plaintiff*)

v.

Julury Narasimha Rao, minor by guardian Durgamma .. *Respondent* (*Petitioner*).

Gopalakrishnayya v. Narasimha Rao.

Madras Estates Land Act (I of 1908), S. 192—Sale in execution of revenue decree—Sale alleged to be vitiated by fraud and material irregularity—Petition to set aside sale under O. 21, r. 90, Civil Procedure Code—If Collector can entertain the petition.

S. 192 of the Madras Estates Land Act is not to be construed as allowing a person, whose holding is sold in execution of a Revenue decree, to approach the Revenue Court with an application for setting aside the sale under O. 21, r. 90, Civil Procedure Code. His sole remedy is the procedure set forth in Ss. 111 to 131 of the Estates Land Act and he cannot have the sale set aside except under the circumstances specified in S. 131 of that Act.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Sub-Collector of Bezwada dated 5th November, 1936, in E. A. No. 290 of 1935 in E. P. No. 182 of 1934 in S. S. No. 115 of 1931.

A. Lakshmayya for Petitioner.

M. Appa Rao for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision against the order of the Sub-Collector of Bezwada passed on the 5th November, 1936,

* C. R. P. No. 1511 of 1936. 18th January, 1939.

Gopala-krishnayya v. Narasimha Rao.

in a petition filed by a person interested in a holding sold in execution of a revenue decree. His complaint was that the sale is vitiated by fraud and material irregularity, particulars of which are given in paragraph 9 of the affidavit filed in support of the petition. The respondent in that petition was the decree-holder purchaser who took the objection that the Sub-Collector had no jurisdiction to entertain the petition. The objection was overruled and he has now preferred this revision against that order.

I am of opinion that the learned Sub-Collector went wrong in the view he took of the matter. He has taken the view that S. 192 of the Madras Estates Land Act is so worded as to make the procedure of O. 21, r. 90, Civil Procedure Code, by which execution sales affected by material irregularity are allowed to be set aside, available to the respondent in this revision petition. That view is against the ruling of a Bench of this Court reported in *Jagannatha Pillai* v. *Kathaperumal Pillai*[1]. In that case the Court had to decide the question as to whether a suit would lie in a Civil Court to set aside a sale held in execution of a rent decree on the ground of fraud and material irregularity in publishing and conducting the sale. It was held that the suit would lie. In the course of the judgment the learned Judges have held that the suit is not barred either by the provisions of the Estates Land Act or by O. 21, r. 92 (3), Civil Procedure Code. Jackson, J., at page 82 says:

"In the matter of sales in execution of a decree of the Revenue Court, S. 132 lays down that the provisions of Chapter VI shall be applicable. In other words, a ryot whose holding is sold up summarily under S. 77 (ii) and a ryot whose holding is sold up in execution of a decree of a Revenue Court shall each alike undergo the procedure set forth from Ss. 111 to 131."

I read these observations as meaning that S. 192 is not to be construed as allowing a person in the position of the respondent to approach the Revenue Court with an application for setting aside the sale except under the circumstances specified in S. 131. Part B of the Schedule to the Madras Estates Land Act which contains a list of the applications which are triable by a Collector refers only to an application under S. 131 for setting aside the sale of a holding. Further as pointed out by Madhavan Nair, J., in *Ramakrishnayya* v. *Naganna*[2], S. 192

1. (1927) 53 M.L.J. 688: I.L.R. 51 Mad. 76.
2. (1933) 65 M.L.J. 775.

Gopalakrishnayya v Narasimha Rao.

is not to be regarded as conferring a right to institute substantive applications in the Revenue Courts but as one which merely regulates the procedure in respect of matters over which jurisdiction is granted by S. 189. On this view which I consider to be the only correct view to take on the matter, the petition must be allowed and it is accordingly allowed with costs.

S. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GENTLE.

In the matter of The Indian Companies Act VII of 1913 and *In the matter of* The Garland Petroleum Company (Madras), Ltd. (in liquidation).

M. F. R. D. Cruz, a shareholder of the Company abovenamed .. *Petitioner* (Applicant).*

The Garland Petroleum Co (Mad.), Ltd., *In re.*

Company—Winding up—List of contributories—Person included as transferee—Failure to object—Expectation to be included as allottee—Application for removal of name from list of contributories—Maintainability.

If any person whose name is included in the register of shareholders of a company becomes aware that circumstances are such that if proceedings are brought against the company he would succeed in having his name removed and the register rectified, he must do so promptly. He must not stand by and wait and then at a later stage, with knowledge that he has been held out to the public as a shareholder of the company, seek to have his name removed. The fact that after his inclusion as transferee he expected that he would be put in as an allottee and not as transferee will not make any difference as regards his liability to be included in the list of contributories on the company being wound up.

V. Radhakrishnayya for *P. Chandra Reddy* for Petitioner.

K. N. Viswanathan instructed by *C. S. Rajappa* for the Company.

The Court made the following

ORDER.—This is the objection by Contributory No. 93, Mr. D. Balarama Reddi, against his name being included in the list of contributories. There is also an application by him for rectification of the Company's register of members by removal from the register of his name. His name appears in this register as the holder of 4,000 ordinary shares of the nominal value of Rs. 10 each, representing a total of Rs. 40,000. In respect of this, an amount of Rs. 8,000 has been paid and there remains a liability of a sum of Rs. 32,000.

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* Application No. 2373 of 1938 and Application No. 1174 of 1938 in O. P. No. 77 of 1938. 13th December, 1938.

The Garland Petroleum Co. (Mad.), Ltd., *In re.*

The shares of which he is recorded in the register as the holder were not allotted to him. 3,500 shares were originally standing in the name of one R. S. Pillai and 500 in the name of Ranganatha Mudaliar. The objector contends that none of these shares have been legally transferred to him, that he made an application to the Company for allotment by the Company to him of 4,000 shares, and instead of allotment, the managing director has caused his name to be entered in the register as a transferee. That by reason of those facts he is entitled to have his name removed from the list of contributories.

Some time in the early part of the year 1934, it would seem that there were negotiations between the objector and the Company for him to become the Company's district agent for Nellore, Guntur and Cuddapah, the Company proposing to carry on the business of distributing and selling petroleum, motor oil and things of that nature and were contemplating doing this through agents. Negotiations appear to have taken place between the objector and a man named D. Bashiam Naidu. So far as this man is concerned, it was suggested that he was an agent for the objector D. Balarama Reddi; I am however quite satisfied that he was an agent for the Company or for one R. S. Mudaliar who was then its managing director and the guiding authority of the managing agents of the Company. The agreement between the Company and objector is dated 27th June, 1934, under which he is appointed district agent of the districts I mentioned and he is empowered to appoint sub-agents within the territory, and is Ex. A-3. Another document bearing the same date is Ex. A-1, an application form signed by the objector applying for 4,000 ordinary shares in respect of which the application form states that Rs. 2 per share was enclosed. These ordinary shares were payable, as to Rs. 2 on application; Rs. 3 on allotment and the balance in calls of Rs. 2-8-0 each. No shares were ever allotted to him, but his payment of Rs. 8,000 was acknowledged by the Company on 28th June, 1934, by Ex. B-1, a letter addressed to him at his native place in the Nellore District and acknowledges receipt of a cheque for Rs. 7,000 and Rs. 1,000 in cash sent through Mr. D. Bashiam Naidu. The late managing director, Mr. R. S. Mudaliar, and a man named Swaminathan who was an accountant or clerk of the Company, have given evidence. They both say that shortly after receipt by the Company of the application form and the sum of Rs. 8,000, the objector called

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at the Company's premises, and the result of the discussion with Mr. R. S. Mudaliar was that the objector agreed to have transferred to him 4,000 shares instead of the Company allotting to him that number, and Swaminathan adds that the objector himself requested that these shares should be transferred to him. It is now necessary to deal with the origin of these shares. I said earlier that 3,500 shares were standing in the name of one S. Ratnasabhapathi Pillai and 500 in the name of Ranganatha Mudaliar. In regard to the 3,500 block of shares, Mr. R. S. Mudaliar said that the original holder had not the necessary money to pay the application amounts when he obtained these shares. Rs. 2 each in respect of 3,500 shares would amount to Rs. 7,000 and this sum was advanced by him. He also said that he lent to Ranganatha Mudaliar Rs. 1,000 in connection with his 500 shares. The shares of 3,500 were allotted, according to the share registers of the Company, to S. Ratnasabhapathi Pillai in September, 1933, and if Mr. R. S. Mudaliar is correct in his recollection, the loan by him to that gentleman had been outstanding for nearly a year in June, 1934. Mr. R. S. Mudaliar says that when the objector agreed for a transfer of shares to be made in his name instead of shares being allotted, he himself received the Rs. 8,000 which had been sent to the Company and recouped himself in respect of the loans he had made both to S. Rathnasabhapathi Pillai and Ranganatha Mudaliar. Out of these monies, a sum of Rs. 1,500 was paid to D. Bashiam Naidu as commission on the transaction. Ex. A-4 is the receipt dated 3rd June, 1934, acknowledging receipt of that sum. The receipt states: "Received from C. R. Govind", who was the agent of R. S. Mudaliar. It seems very strange that such a large sum of Rs. 1,500 should be paid as commission in respect of a transaction involving Rs. 8,000—amounting to about 20 per cent. In my view, what was happening no doubt was, the objector was applying to the Company for shares and sent cash or its equivalent, as the first payment in respect of 4,000 shares. Mr. R. S. Mudaliar seeing an opportunity to recoup himself, did so by devoting the proceeds to himself and instead of there being any allotment by the Company—in which event of course the Company would have received the Rs. 8,000 and not R. S. Mudaliar—he effected the transfers I mentioned. In regard to the Rs. 3,500 there is a transfer form, Ex. A-5. The body of it is in the handwriting of Swaminathan and purports to bear

date 1st April, 1935, and it is signed by S. Ratnasabhapathi Pillai alone, no witness attesting. There is no signature of the transferee at all, although in the body of the document, the objector's name as transferee appears. Swaminathan and R. S. Mudaliar explain this by saying that no signature was taken since there was already a signature on the application form. There is no transfer form in respect of the remaining 500 shares. Although the transactions regarding the agreement and the payment in respect of 4,000 shares was made in June, 1934, no transfer was then effected, and the objector's name was not entered in the share registers of the Company until the 1st April in the following year. In his evidence, the objector denied entirely what R. S. Mudaliar and Swaminathan said regarding the agreement to accept transferred shares instead of an allotment. He said it was some months following the despatch to the Company of his application form that he first visited the Company's premises. If the matter rested there, since there was no allotment and if the objector was not aware that his name was in the register of shareholders as a member of the Company, there is no doubt he would be entitled to have rectification and his name expunged from the register.

It is contended by the Official Liquidator that the objector did agree to shares being transferred to him. Although the informality of the method of transfer is not in any way defended, to substantiate that he had knowledge of the transfer to him of 4,000 shares and that his name was in the share register other facts are relied on. Firstly, the interview and incidents in October, 1934, three months following the alleged transactions in June, 1934, the objector went to the Company's premises. By that time, he had been appointed the district Agent and he would then be in a position to appoint sub-agents. Ex. A-2 is the counterfoil receipt book of the Company, the receipts bearing the name of the Company imprinted thereon, in which are four counterfoil receipts, Exs. A-2 (1), (2), (3) and (4) and dated 15th October, 1934. In respect of all these, R.S. Mudaliar's and Swaminathan's evidence is as follows: The objector arrived at the Company's premises on 15th October, 1934, and requested that the Company should issue four receipts to three persons in order to give those three persons confidence. The counterfoil receipts, Ex. A-2 (1), (2) purport to record a payment from J.

Sreeramulu of Rs. 200 in respect of each receipt, Ex. A-2 (3) of a like sum from Mr. M. Gopalakrishnamoorthy and Ex. A-2 (4) of the same amount from Mr. D. Subbarama Reddi. There is written on each of the four counterfoils that the sums of Rs. 200 were deposits of Rs. 2 per ordinary share. On the back of each counterfoil in pencil in Swaminathan's handwriting are the words "paid to Mr. Balarama Reddi." The two witnesses said that the objector informed them that he had arranged to transfer some of his 4,000 shares which he had obtained as transferee to the persons named in the receipts. The amounts in these counterfoils were not entered in any book of the Company, and so far as the Company is concerned, they are obviously fictitious documents, assuming the explanation is correct which R. S. Mudaliar and Swaminathan gave. The total amounts to Rs. 800, Rs. 400 from J. Sreeramulu and Rs. 200 each from the other two. The objector denied there was any such interview or that he made the requests as stated by the other two witnesses. He said he did not take away these receipts or share transfer forms as stated by the two witnesses. In answer to some questions I put he admitted he was negotiating with those three persons for them to become sub-agents of the Company and that he had notified the Company of this. He told me that unless and until he had appointed them as sub-agents there would be no need to send any communication to the party of such appointment. He also said that in respect of sub-agents they would each have to become the holders of 100 shares in respect of each taluq area. He had arranged for the appointment of Gopalakrishnamoorthy and Subbarama Reddi as sub-agents in respect of one taluq each, and Sreeramulu was to be the sub-agent for two taluqs. That means that the last named would, according to the objector's evidence, have to be the holder of 200 shares in respect of which he would have to pay Rs. 400 as application money and the others would each be the holders of 100 shares paying Rs. 200. It does seem to me a very strange coincidence that there should appear in the counterfoil receipt books of the Company the entries which I have mentioned, when no entry in respect of them appears in the books. The inference to be drawn is one of two alternatives, either, that the money which is the subject-matter had been stolen by R.S. Mudaliar or Swaminathan, or the explanation which they have both given.

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So far as the first is concerned, if one or other or both these persons intended to rob the Company, I think it most unlikely, to say the least, that they would furnish evidence of this being done by recording in the counterfoil receipts the amounts which had come into their hands and make no entries in the books of the Company, as upon an audit or examination of the books the deficiency would at once become known. It might also be said there is the unlikelihood of receipts being given to persons who have not paid money to the Company but to one of the district agents. I think that the evidence of those two witnesses is corroborated by the evidence given by Mr. Balarama Reddi himself regarding the appointment of sub-agent and that before they could become the sub-agents they would have to obtain 100 shares in respect of each taluq. In the agreement, Ex. A-3, by which the objector was empowered to appoint sub-agents, there is not a word that the sub-agents would have to become shareholders of the Company. There is provision in the agreement for security deposits to be found by those sub-agents and the counterfoil receipts expressly say that the money was paid as Rs. 2 deposit in respect of a number of shares. I think that at this period the objector was trying to pass on some of his shares in order to recoup himself part of the monies he had paid.

Secondly, the next facts relied upon are that throughout the period following the transaction, from June, 1934 to April, 1938, when the winding up order of this Company was made, admittedly the objector never once either wrote or orally made a complaint that he had not been given shares for which he had made an application nor did he ask for the return of the Rs. 8,000 which he had paid. His explanation is that several times he saw R.S. Mudaliar at the Company's offices and spoke to him of the commencement of the Company's business and the provision of oil and petrol and other articles and was always put off by being told that shortly supplies would commence. He never made a single complaint in regard to his Rs. 8,000 being retained and his shares not having been allotted. In evidence, he said, as he expected supplies of oil he thought his Rs. 8,000 would be treated as a deposit against supplies. In considering whether one can accept that explanation, one has to bear in mind that before the winding up order he did not take up the position that he was not a shareholder and that Rs. 8,000 had been paid by way of a deposit against supplies or in respect of

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his agency agreement. Mr. Radhakrishnayya informed me that he was not maintaining that position although this payment of Rs. 8,000 was alleged by the objector to be a deposit in the earlier stages of these proceedings. Rs. 8,000 was paid in the first instance as a first contribution towards the 4,000 shares, namely, Rs. 2 per share. The objector is a man of some position and substance who is accustomed to dealing with and engaging in money transactions. Having sent to the Company an application form for 4,000 shares in June, 1934, and not having had any communication regarding it, one would have expected that he would have written to the company long before the expiration of four years in respect of the money he paid and the non-receipt of shares or non-allotment of shares, unless he had been a party to an arrangement by which he was to have shares transferred to him in place of allotted shares.

Thirdly, the other factors relied upon are that on occasions the objector inspected the share register. I think it most unlikely that he would have inspected it. and I am sure it is more unlikely having inspected it once he would do so on other occasions as it is suggested he did. The objector initiated a prosecution against R.S. Mudaliar. It matters not what it was for, save to mention that it was dismissed. The prosecution was in respect of the payment by the objector of Rs. 8,000, and the matters concerning the transaction were investigated by the Sub-Divisional Magistrate who, on 1st September, 1937, delivered judgment dismissing the prosecution. The objector in evidence said that he obtained a copy of this judgment a few days later. Whilst he gave evidence in a vernacular language, I am quite sure he has a good knowledge of English, one of his letters, at least, has been written in English and all the documents in this case signed by him are also in that language. In the course of his judgment, the Sub-Divisional Magistrate said that the objector had filed this complaint after a long time from the date of Ex. A-3, the agency agreement, to avoid payment of Rs. 32,000, the further liability on the 4,000 shares which stood in the complainant's name in the Company's share register. The objector in evidence said he was unaware that his name appeared in the Company's register as a shareholder. It is quite clear that a day or two following 1st September, 1937, he must certainly have been aware that his name was included as a member of the Company in the share register. In his affidavit

in support of his application to rectify the register, he does not say that he was unaware that his name was in the register. What he does emphasise is, he was unaware that he was in the register as a transferee and not as an allottee of shares. The objector took no proceedings or steps at all for the removal of his name from the list of members of the Company. Learned Counsel on behalf of the objector has said that the Company was in a very bad way from the middle of 1937 onwards and the registered office was difficult to find and for that reason his client took no steps, though he must have known by 1st September, 1937, or shortly after that his name was in the register. If he wished to take proceedings, he could have done so and obtained an order for substituted service of proceedings to rectify the register. He did nothing. The winding up order was made in April, 1938, and in the ordinary course, the Official Liquidator made an application to have the list of contributories settled, So far as the facts are concerned, I think the evidence of R. S. Mudaliar and Swaminathan, with regard to Ex. A-2 series the counter foil receipts, is corroborated by evidence of the objector that he had told the three persons whom he appointed as sub-agents they would have to hold 100 shares of the Company in respect of each taluq coupled with the fact that he took no steps and made no complaint throughout a period of nearly four years. I accept their evidence that there was an arrangement by which shares were to be transferred to the objector instead of being allotted. If nothing had been said and nothing had been done, the objector would not have silently stood by. The fact that he took no steps when the criminal complaint was dismissed was because he was already aware his name was on the register. When the criminal proceedings commenced the previous April, he must have been aware of those facts at that time and in my view, he was aware very shortly after 1st April, 1935. Those being the facts, the question is what is the legal position? The objector has stood by for a long time, in my view, knowing that his name was on the register of shareholders and took no steps to have it rectified and his name removed. When a person knows that his name is included in the register of shareholders of a Company and stands by and allows his name to remain he is holding out to the public that he is a shareholder, and thereby he loses the right to have his name removed. This position has been the subject of consideration in a number of

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English cases. in *Scottish Petroleum Company* In re[1], Baggallay, L.J., at page 434, said:

"The delay of a fortnight in repudiating the shares makes it, to my mind, doubtful whether the repudiation in the case of a going concern would have been in time. No doubt where investigation is necessary some time must be allowed, as in *Central Railway Company of Venezuela* v. *Kisch*[2]. But where as in the present case, the shareholder is at once fully informed of the circumstances, he ought to lose no time in repudiating."

In *Sewell's case*[3], Lord Cairns, L.J., at page 138, in the course of his judgment, said:

"Mr. Sewell, according to the conclusion I have drawn from the facts, did know in the month of May, 1864, that regularly or irregularly, rightly or wrongly, under this authority, he had been put upon the list as a shareholder for 23 shares. If he had any doubt as to the manner in which the authority had been pursued, it was for him to have inquired whether he could have asserted any right against either Mr. Sichel, or Mr. Hankey, or the Company, arising out of the mode in which the authority had been pursued. Whether he could have disclaimed the ownership of these 23 shares may be doubtful, but I assume in his favour that he might have had a case of that kind. It appears to me that not having done so, and being aware that he was held out to the public as the holder of 23 shares, it is too late for him months or years afterwards to enter into that question."

In *Lawrence's case*[4], Lord Cairns, L.J., at page 423, said:

"It thus appears that on the 16th of May Mr. Lawrence and his legal adviser had in their hands the whole of the documents the variance between which is the ground of the motion to remove the name of Mr. Lawrence from the register. If he had at that time a right to repudiate his shares, it was a right which, in my opinion, might be waived; and if asserted, could not be asserted with effect unless asserted promptly and distinctly. No attempt at repudiation took place for upwards of four months, and during this time Mr. Lawrence must be taken, in my opinion, to have known, not merely that his name was on the register, and that he was so held out to the world as a shareholder in and member of the Company, but also that his son was holding communications with, and endeavouring to influence the conduct of, the directors, on the footing of Mr. Lawrence being a shareholder."

From these authorities, it is clear that if any person whose name is included in the register becomes aware that circumstances are such that if proceedings are brought against the Company he would succeed in having his name removed and the register rectified, he must do so promptly. He must not stand by and wait and then at a later stage, with knowledge he has been held out to the public as a shareholder of the Company, seek to have his name removed. In the cases which I have quoted, the grounds were that the contract under which the shares were obtained could be set aside as void. Mr. Radhakrishnayya

1. (1883) 23 Ch. D. 413.
2. (1867) 2 H.L. 99.
3. (1868) 3 Ch. Ap. 131.
4. (1867) 2 Ch. Ap. 412.

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differentiated between the principles in these cases and the present. He contended that the objector applied for 4,000 shares to be allotted to him by the Company and expected to have his name in the share register for that number of shares as allottee. Whilst he might have known that his name was in the register as a shareholder, he thought it was because he was an allottee, and until he received a communication from the Official Liquidator after the winding up started he was unaware that he was a transferee. Since he is on the share register as a transferee and not as an allottee, he is entitled now to have his name removed and the register rectified. In my view, that contention must fail. If he has assented to his name being included amongst the shareholders, then how can he now say:

"Since I expected to be included as an allottee and since I find that I am included in another capacity as transferee, I am entitled to have my name removed."

The position in the present case is, I think, covered by Bowen, L.J., in Ex parte *Sandys*1, where the learned Lord Justice at page 117, said:

"If the case stood there, there would have been an end of the matter. The original contract was not one which could have been enforced, and in giving her the shares without attaching the conditions to them, which she made a portion of her offer, the Company were not giving her what she asked for. But the matter does not rest there, and this is just the point of the case. After her name was placed on the register and after she knew that her name was on the register, she did certain acts which were only consistent with an intention on her part to be treated as a member of the Company, and to treat herself as a member of the Company in respect of these particular shares which had been so appropriated to her. If that is not evidence of an agreement to be a member, I really do not know what is. I order goods of one description from a merchant; he cannot compel me to take goods of a different description, and he does not complete his contract by giving me goods of a different description; but if he sends me goods which are not according to the contract and which are not within the description of the contract, and I nevertheless elect to take them, my act with regard to them is evidence of a new contract, which the law will imply, to pay for that which I have kept. It is not that I promise in so many words to pay; it is that I do acts from which the law will imply in favour of the opposite party a promise. Here it is not that she kept all these new shares promising expressly to release the Company from the original condition and to pay the entire sum, but she consented to allow her name to remain on the register and to keep the shares although they had not been allotted to her in conformity with the condition which she had imposed in her letter of application."

Here, the objector desired to become a member of the Company and to be on the register by having shares allotted to

1. (1889) 42 Ch. D. 98.

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him; he has been included in the register by having shares transferred to him. The contention of the objector fails. In fact, he has in no way been prejudiced because the shares which would have been allotted to him would have had two rupees paid, and that is the position in regard to the share in respect of which he has been included in the register. By reason of the objector standing by in the way he did, I am quite satisfied that it was with full knowledge that his name was on the register by reason of his consent that shares shold be transferred instead of being allotted to him.

The result is, the Official Liquidator's application succeeds and Mr. D. Balarama Reddi will be included in the list of contributories in respect of 4,000 shares. His application for rectification of the register is therefore dismissed. There will be no order for costs.

B. V. V. ——— *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Marudamuthu Mudaliar .. *Petitioner* (Petitioner—1st Defendant)*

v.

N. K. Venkatrama Aiyar .. *Respondent (Decree-holder).*

Marudamuthu Mudaliar v. Venkatarama Aiyar.

Civil Procedure Code (V of 1908), O. 43, r. 1 (j)—Petition under O. 21, r. 90—Petitioner called on to deposit sale amount in cash under proviso to O. 21, r. 90—Petitioner furnishing security only—Rejection of petition—If order appealable as one "refusing to set aside a sale" under O. 43. r. 1 (j).

Where, acting under the power given to the Court by proviso to O. 21, r. 90, Civil Procedure Code, to call upon a petitioner filing a petition under O. 21, r. 90 to furnish security, the Court ordered the petitioner to deposit the sale amount in cash but the petitioner tendered immovable property only as security which the Court refused to accept and accordingly rejected the petition,

Held, the order rejecting the petition is an order "refusing to set aside a sale" within the meaning of O. 43, r. 1 (j), Civil Procedure Code, and therefore appealable.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam dated 20th July, 1938, and made in A. No. 23 of 1938 preferred against the order of the Court of the District Munsif of Kumbakonam dated 10th February, 1938, and made in E. A. No. 64 of 1938 in O. S. No. 43 of 1937.

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* C. R. P. No. 1447 of 1938 16th December, 1938.

T. K. Subramania Pillai for Petitioner.

R. Rajagopala Aiyangar for Respondent.

The Court delivered the following

Marudamuthu Mudaliar v. Venkatrama Aiyar.

JUDGMENT.—This Revision Petition raises a question of some importance turning on the effect of the proviso recently added in this Presidency to O. 21, r. 90, Civil Procedure Code. Under that proviso, the Court to which an application under r. 90 is presented may "before admitting the application call upon the applicant to furnish security." In the present case, the Court ordered the applicant to deposit the sale amount in cash. He tendered a draft bond offering immovable property as security. The Court declined to accept it and accordingly rejected the petition. Against this order the petitioner preferred an appeal to the lower appellate Court and that Court has dismissed the appeal on the ground that the case does not fall within the terms of O. 43, r. 1 (*j*) which gives a right of appeal against an order "refusing to set aside a sale." The learned Judge was of opinion that an order contemplated by this sub-rule was one passed after the Court had entertained the application and not one whereby the Court declined to entertain the application.

There can be little doubt that at the time when the sub-clauses of O. 43, r. 1 were framed, this distinction between an order on the petition and an order declining to entertain the petition could not have been thought of, so far as applications under O. 21, r. 90 are concerned. A distinction was recognised by the Code in the case of plaints; and different provisions were made for appeals against adjudications on the merits and appeal against orders rejecting the plaint. But as the scheme of the Code as it originally stood did not contemplate any such differentiation in respect of an application under r. 90 of O. 21, it is unreasonable to expect any recognition of that distinction in the rules relating to appeals therefrom. When the proviso now in question was recently added to r. 90, the attention of the framers of the rule does not appear to have been specifically directed to the question of appealability. There has indeed been some discussion as to the legality of the proviso itself; but this Court has so far declined to hold the new rule to be *ultra vires*. While I follow that ruling, I do not wish to deprive the petitioner of whatever benefit he may get, even if it be a mere matter of

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accident, out of the language of sub-cl. (*j*) of O. 43, r. 1, as it stands.

The position so far as the present case is concerned is different from what may arise in cases where a right of appeal will be available only by treating any disposal as amounting to a "decree" because in that case the Court has to consider, in view of the definition of the word "decree" whether there has been an *adjudication* determining the *rights* of the parties. An order merely rejecting a plaint will thus not *prima facie* fall within the definition of "decree". But sub-cl. (*j*) of O. 43, r. 1, merely refers to an order "refusing to set aside a sale". The learned Judge thinks that such an order of refusal *prima facie* implies that the petition had been admitted. As I have already pointed out, this question could never have arisen under the scheme of the Code as it formerly stood. I cannot therefore call in aid any argument founded upon the probable intention of the Legislature. I have only to see whether the etymological meaning of the words found in the sub-clause will or will not apply to the case.

If a person applies to have a sale set aside I do not see how a rejection of his petition is any the less a refusal to set aside the sale because the Court passed that order even before admitting the petition. After all, on an appeal against such an order, the appellate Court can only consider the reasonableness or otherwise of the order refusing to admit the petition; and I prefer not to deprive the petitioner of the right to seek the opinion of the appellate Court in the matter, unless it is possible to hold that the language of O. 43, r. 1 (*j*) is clearly incapable of being construed as comprehending the order of rejection.

The lower appellate Court's order is accordingly set aside and the learned Subordinate Judge is directed to deal with the appeal on the merits. But the question is certainly novel and not free from difficulty; I accordingly make no order as to costs.

S. V. V. —— *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR, MR. JUSTICE VARADACHARIAR, MR. JUSTICE WADSWORTH AND MR. JUSTICE LAKSHMANA RAO.

District Magistrate, Trivandrum .. *Petitioner**

v.

K. C. Mammen Mapillai and others .. *Respondents.*

F.B.

District Magistrate, Trivandrum *v.* Mammen Mapillai.

Habeas corpus—*Jurisdiction of High Court to issue writ—English common law whether prevalent in India—Issue of rule* nisi *by single Judge—Validity—Criminal Procedure Code (V of 1898 as amended), S. 491—Effect—Madras High Court Rules, Appellate Side, rr. 2 and 2-A—Whether* ultra vires.

The High Court or any Judge of the High Court cannot issue the writ of *habeas corpus* in cases covered by S. 491 of the Code of Criminal Procedure. Where a Judge of the High Court issues a rule *nisi* purporting to exercise the common law jurisdiction to issue a writ of *habeas corpus* his order is without jurisdiction and is consequently null and void.

Girindra Nath Banerjee v. *Birendra Nath Pal*, (1927) I.L.R. 54 Cal. 727, approved.

In re *Kochunni Elaya Nair*, (1921) 4 M.L.J. 441: I.L.R. 45 Mad. 14 and In re *Govindan Nair*, (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.), overruled.

Eshugbayi Eleko v. *Officer Administering the Government of Nigeria*, (1928) A.C. 459, considered.

Rules 2 and 2-A of the Madras High Court Appellate Side Rules are *intra vires* the Court's powers.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to declare that the orders made by the Hon'ble Mr. Justice Pandrang Row, on the 21st, 24th and 26th days of October, 1938 and passed in Criminal Miscellaneous Petitions Nos. 986, 990† and 985 of 1938 on the file of the High Court have been made without jurisdiction and are void and of no legal effect and that the High Court may further be pleased to quash the said orders and to make an order *nisi* accordingly.

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* Cr. M. P. No. 1003 of 1938. 8th November, 1938.

† The Order of *Pandrang Row, J.*, was as follows:—This is a petition by the Crown Prosecutor, Madras, to vacate the interim order made by me on 21st October, 1938, on a petition for stay of execution of an extradition warrant filed along with another petition for issue of a writ of *habeas corpus* on behalf of four persons who had been arrested in pursuance of the warrants issued by the Political Agent and Resident for the Madras States. As admitted in the present petition the arrests had been effected between 7 P.M. and 10 P.M. on 20th October, 1938, and it was intended to send the

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District Magistrate, Trivandrum v. Mammen Mapillai.

T. R. Venkatarama Sastri and *K. S. Jayarama Aiyar* instructed by *King and Partridge* for Petitioner.

B. Sitarama Rao, V. T. Rangaswami Aiyangar and *T. S. Venkatesa Aiyar* for 2 to 6 Respondents.

The Court (*Burn* and *Stodart, JJ.*) made the following

ORDER OF REFERENCE TO A FULL BENCH.

ORDER.—The determination of this matter involves questions of law and of jurisdiction, including a question whether the decision of a Full Bench of this High Court is rightly decided. We therefore order under r. 2 of the Appellate Side Rules that this matter be referred to a Full Bench.

Our reasons for taking this course will be stated fully later in the day.

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arrested persons who were directors of the Travancore National and Quilon Bank now in liquidation, to the District Magistrate, Trivandrum, in the Trivandrum State by the Shencottah PassengerTrain leaving Egmore Station Madras at about 11 A.M. The petition for issue of writ of *habeas corpus* and the petition for stay were made to me at my residence early in the morning of the 21st October, 1938. As the sittings of the High Court would begin only at 10-45 A.M., that is, only 15 minutes before the train by which the arrested persons were intended to be taken beyond the jurisdiction of the High Court was to leave Madras, I made the following order on the petition for stay:—

"As the matter is extremely urgent the Chief Presidency Magistrate should detain these prisoners in his custody and not send them away from Madras pending further orders of the High Court."

It is this order, which is now sought to be vacated on the sole ground that it is an order made without jurisdiction.

This objection of absence of jurisdiction is formulated in paragraphs 4 and 5 of the present petition. The ground of objection stated in paragraph 5, namely, "it is also doubtful whether the High Court has jurisdiction over proceedings taken in pursuance of the Extradition Act" was not pressed during the learned Crown Prosecutor's argument before me, presumably because his doubt had been resolved before the petition came up for hearing. In any case, there is no substance in the objection; there have been numerous cases arising under the Extradition Act brought up to High Courts by means of applications for issue of writs of *habeas corpus* and decided on their merits. The High Court's jurisdiction to issue such writs has not been removed by any provision in the Extradition Act, and there cannot be any doubt about such jurisdiction. This objection therefore fails.

The objection that was pressed at the hearing was formulated in paragraph 4 as follows: "The Crown apprehends that the order is passed without jurisdiction as any matter relating to the exercise of powers under S. 491, Criminal Procedure Code, could be only (sic) by a Bench of the High Court as per r. 2 (*a*) of the Appellate Side Rules of the High Court". This rule runs as follows: "All applications for a writ of *habeas corpus* shall go

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Criminal Miscellaneous Petition No. 1003 of 1938.—This is an application, purporting to be under S. 561-A of the Code of Criminal Procedure and S. 223 of the Government of India Act, 1935, in which the petitioner prays this Court to declare that the orders made by Mr. Justice Pandrang Row, on the 21st, 24th and 26th October, 1938, are void and of no legal effect and to quash the said orders.

The petitioner is the District Magistrate of Trivandrum, the capital city of the State of Travancore. The petition is supported by an affidavit sworn by a Superintendent of Police in the Criminal Investigation Department, Travancore. The Superintendent of Police alleges that the Political Agent, Madras States, on the requisition of the Travancore Government issued warrants of arrest under S. 7 of the Indian Extradi-

before a Bench of Judges dealing with criminal work". The rule does not in terms prohibit a single Judge from making an interim order for the purpose of ensuring that the application for the writ will be heard by the Bench before it is too late, that is, before the prisoners concerned are removed beyond the jurisdiction of the High Court. There is an inherent jurisdiction to preserve the jurisdiction of the High Court and to prevent evasion thereof. This, however, is an argument of comparatively little significance, unless the rule relied can be said to take away the jurisdiction of a single Judge to entertain and decide applications for a writ of *habeas corpus*. It is obvious that no rule made under the Letters Patent and under the Government of India Acts like R. 2 (*a*) of the Appellate Side Rules can take away or destroy any jurisdiction conferred by the Letters Patent and affirmed by the Government of India Act; further no such rule can be inconsistent with the law as laid down by the highest judicial tribunal, the Judicial Committee of the Privy Council. For instance, if the law is that each Judge of the High Court has jurisdiction to entertain an application for a writ of *habeas corpus* and that he is moreover *bound* to hear and determine the application on its merits, notwithstanding that some other Judge has already refused a similar application, any rule which renders it impossible to perform this duty which the law lays upon the Judge to whom such an application is made must be deemed to be *ultra vires* as being inconsistent with law.

That there is such jurisdiction in each Judge of the High Court of Justice in England and that there is such a duty laid upon him by law are points on which no doubt is possible after the pronouncement of their Lordships of the Judicial Committee in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*, (1928) A.C. 459. The judgment in that case which was delivered by the Lord Chancellor (Lord Hailsham) is of unquestioned and unquestionable authority, and is binding on all High Courts in this country. In that case an application for the issue of a writ of *habeas corpus* was dismissed on the merits by the acting Chief Justice of Nigeria on 12th October, 1925 and a fresh application for the same purpose was made before a Puisne Judge on 8th December, 1925; on objection taken by the Attorney-General that the fresh application could

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tion Act for the arrest of four subjects of H.H. the Maharajah of Travancore, who were at the time in Madras city, on charges of offences for which the said persons were liable to be extradited. The warrants, it is alleged, were issued to the Chief Presidency Magistrate of Madras, and the four persons named were apprehended on the evening of the 20th of October last, and produced before the Chief Presidency Magistrate for the purpose of being escorted to the frontier of Travancore and there handed over to the Travancore State Police. It is further alleged that on the morning of the 21st of October, the four persons moved the Hon'ble Mr. Justice Pandrang Row at his residence, to release them from custody by issuing a *habeas corpus*, and that thereupon the learned Judge ordered the

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not be entertained in view of the dismissal of the previous application by the acting Chief Justice, the Puisne Judge upheld the objection and dismissed the fresh application on that ground. On an appeal from this dismissal the full Court (of Nigeria), in a considered judgment, pronounced on 1st June, 1926, upheld the order of the Puisne Judge and decided that the Puisne Judge had no jurisdiction to entertain the application. On appeal to their Lordships' Board it was contended before their Lordships that, by the common law of England which applies in Nigeria, "it is the right of any imprisoned person to apply successively to every Tribunal competent to issue a writ of *habeas corpus*, and that each Tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of co-ordinate jurisdiction, even if the grounds urged are exactly the same" (page 465). On behalf of the respondents Mr. (now Sir) Stafford Cripps "admitted the existence of the right to make successive applications but he argued that the applications must be to different courts" (page 465). After considering the effect of decided cases quoted on both sides, their Lordships of the Judicial Committee relied on the earlier authorities which showed that the writ was originally issuable out of the court of King's Bench and out of the court of Chancery and on the Habeas Corpus Act of 1640 which expressly recognised the right of the court of Common Pleas to order the writ to issue, and also on subsequent Act of 1679 which provided *inter alia* that "the Lord Chancellor or any one of His Majesty's Justices might grant a *habeas corpus* in vacation and impose heavy penalty upon any Judge who wrongfully refused to entertain the application." It was conceded for the respondent that under the terms of this statute applications could be made in vacation to successive Judges of the same court. This led to the curious result upon the respondent's argument that if application were made in vacation it could be renewed to each Judge of the Court, but that if it were made in term it could only be made once to the court of Chancery and once to each of the three courts of common law." (p. 467). Their Lordships then went on to say that "a far more serious consequence of the respondent's argument would be the effect upon the right to apply for this writ of the Judicature Act of 1873" which combined into one court all these four courts and others as well. Their Lordships say, "If, therefore, the respondent is right in contending that an application for a writ of *habeas corpus* can only be entertained once by any

Chief Presidency Magistrate to detain the prisoners in his custody pending further orders of the High Court. The deponent further states that at the instance of the Provincial Government the Crown Prosecutor of Madras made an application to the High Court to vacate that order, that the Crown Prosecutor's motion was heard by the learned Judge on the 22nd October, and that the learned Judge refused to cancel the order passed by him on the 21st of October.

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one court, it necessarily follows that the effect of the Judicature Act must have been to deprive the subject of the right which he had previously enjoyed of applying successively to the Court of Chancery and to each of the three common law courts and to limit him in future to one application to the Supreme Court of Judicature. Their Lordships would be reluctant to reach such a conclusion unless compelled to do so by clear words. The writ of *habeas corpus* is a high prerogative writ for the protection of the liberty of the subject and it would be a startling result if a statute enacted primarily for simplification of procedure should have materially cut down that protection. But in fact their Lordships do not think that the Judicature Act has had this result or that the contention of the respondent is well founded" (p. 467). I have quoted these observations *in extenso* as they are directly in point in deciding whether r. 2 (*a*) of the Appellate Side Rules is *intra vires* and if so whether it takes away the jurisdiction of each Judge of the High Court to entertain applications for issue of a writ of *habeas corpus* and absolves him from his absolute legal duty of hearing and determining the applications made to him. Their Lordships say in conclusion that in their view *"each Judge is a tribunal to which application can be made within the meaning of the rule and every Judge must hear the application on the merits"* (p. 468). And they add: "It follows that although by the Judicature Act the Courts have been combined in the one High Court of Justice each Judge of that Court still has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other Judge has already refused a similar application. The same principle must apply in the case of the Judges of the Supreme Court of Nigeria. It follows that in the opinion of this Board the learned Judge was wrong in refusing to hear the application in the present case on its merits and the appeal must be allowed (p. 468).

It is well settled that the Judges of this High Court have the same jurisdiction as the Judges of the old Supreme Court which was succeeded by it, and cl. 8 of the Letters Patent of the Supreme Court clearly says that the Chief Justice and the Puisne Judges have such jurisdiction and authority as "our Justices of the King's Bench have and may lawfully exercise" within England. It is sufficient to rely on the authority of the Full Bench decision in *Govindan Nair*, In re, (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.), which approved the judgment of Kumaraswami Sastri, J. In *Kochunni Elaya Nair*, In re, (1921) 41 M.L.J. 441: I.L.R. 45 Mad. 14 and the decisions in *Ameer Khan*, In the matter of, (1870) 6 Beng.L.R. 392 and In re *Nataraja Aiyar*, (1912) 23 M.L.J. 393: I.L.R. 36 Mad. 72. In delivering the judgment of the Full Bench, Schwabe, C. J., observed as follows at pp 925-6: "The law can be stated to be that in every part of the British Empire every

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The deponent says nothing about the order passed by the learned Judge on the 26th of October. Calling for the papers on the 27th of October, when this motion was made before us, we found that on the evening of the 26th the learned Judge had issued a writ *nisi* of *habeas corpus* for the production before him at 10-45 A.M. on the 28th of October of the bodies of the four persons named in the application. These are the three orders passed by our learned brother which the applicant desires us to declare void and to quash.

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person has a right to be protected from illegal imprisonment by the issue of the prerogative writ of *habeas corpus*. The King's Bench in England exercised the power of issuing such writs throughout the British Empire until the statute known as the Habeas Corpus Act, 25 and 26 Vic., c. 20 was passed By that Act the powers of the King's Bench are limited to England and such places outside England which have no local Court competent to exercise the power. It follows that these petitioners must have a right to such a writ, and it is a matter of absolute right either from a Court in this country . . . . . or from the Court of King's Bench sitting in London In our judgment it is fully established that this Court has all necessary powers and is competent to grant writ. . . . This Court has, however, succeeded under the High Courts of Judicature in India Act, 24 and 25 Vic, c 104, and the Letters Patent issued thereunder to all the powers of the Supreme Court of Madras and that Supreme Court had by its Charter of 1800, Art. 8 given to it the powers over 'all the territories which now are or hereafter may be subject to or dependent upon the Government of Madras aforesaid and to have such jurisdiction and authority as our justices of our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England as far as circumstances will admit'. These words give to the Supreme Court the right usually exercised by the King's Bench in England of issuing the writ of *habeas corpus*". The judgment thereupon deals with the question whether Ss.491 and 456, Criminal Procedure Code, have reduced or limited the power of issuing writs of *habeas corpus* and answers it in the negative. This Full Bench decision is binding on me and its authority has not been questioned, so far as I am aware since it was pronounced 16 years ago in this province.

The conjoint effect of this Full Bench decision and of the pronouncements of their Lordships of the Judicial Committee in *Eshugbayi Eleko* v *Officer Administering the Government of Nigeria*, (1928) A.C. 459, is that the law as to the jurisdiction and the duty of each Judge of the High Court to entertain and determine applications for issue of a writ of *habeas corpus* is the same as the law in England and each Judge of this High Court is a tribunal to which such applications can be made and must hear them on the merits. The jurisdiction is thus of a peculiar and exceptional character as every Judge has it, and not merely the High Court of which he forms a part. Further, the Judge has no option in the matter, and cannot lawfully decline jurisdiction or refuse to entertain and determine applications made to him. It would be contrary to his oath of office to do so.

The learned Crown Prosecutor relied on the provisions of S. 108 of the Government of India Act 1915 which confers rule-making power on the High

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As to what happened before our learned brother Pandrang Row, J., on the 21st of October, we take the facts from his order on Criminal Miscellaneous Petition No. 990 of 1938. The petition for issue of a writ of *habeas corpus* and the petition for stay were presented to our learned brother at his residence early in the morning of the 21st of October. As the sittings of the High Court would begin at 10-45 A.M. and as it was proposed to despatch the prisoners to Trivandrum by a train leaving Egmore station at 11 A.M. there was no time to move

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Court in respect of the exercise of jurisdiction by single judges or Division Courts and requires the Chief Justice to determine what judge is to sit alone and which judges are to constitute Division Courts. This does not mean, as contended by the Crown Prosecutor, that either the single judges or the Division Courts derive their jurisdiction from the Chief Justice or that the manner in which they should exercise jurisdiction is determined by the Chief Justice. The jurisdiction is conferred by the Letters Patent and the manner of its exercise is determined by the judges who exercise it according to their own notions of what the law requires them to do. The assignment or allotment of work by the Chief Justice to the judges determines only the cases in which jurisdiction is to be exercised by particular judges. This cannot, however, deprive any judge of his individual jurisdiction to entertain applications for issue of a writ of *habeas corpus*; nor does it absolve him from his individual duty to determine them on the merits. The Crown Prosecutor relied on certain *obiter dicta* of Devadoss, J., in *Kunhammad Hajee, In re*, (1922) 44 M.L.J. 450: I.L.R. 46 Mad. 382 at 397, to the effect that if a judge "who has been asked to do admission work takes it into his head to do sessions work or without being asked to do original side work calls up original side cases of his own accord and disposes of them, he may be said to be acting without jurisdiction." The learned Judge did not expressly refer to applications for issue of a writ of *habeas corpus* and there is no reason to suppose that he had taken them in his mind when he made these observations. The jurisdiction and the duty of each Judge in this matter were declared unmistakably by their Lordships of the Judicial Committee only five years later in 1928; till then it appears to have been hardly realised that the entertainment and determination of *habeas corpus* writ applications by each Judge constituted a peculiar kind of work which has to be done according to law by the judge to whom the applications are made and therefore cannot and need not be assigned by the Chief Justice, this work or case not being of an assignable nature; it has to be taken up, according to law as laid down by the Judicial Committee by the Judge, to whom the application is made and by no other Judge or Judges who no doubt must entertain further similar applications which may be made to them and determine them on the merits. A duty imposed by the law itself on a particular Judge cannot be transferred to another Judge. The jurisdiction and the duty as regards applications for a writ of *habeas corpus* are *sui generis* and do not fall within the frame work of S. 108 of the Government of India Act or any rule framed thereunder. The individual jurisdiction and the individual duty of each Judge in this matter are not affected in any way by any statutory provision or rule. I am, therefore, of opinion r. 2 (*a*) of the Appellate Side Rules is *ultra vires*, because its effect is to take

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the High Court after 10-45 A.M. Our learned brother therefore made the following order on the petition for stay:

"As the matter is extremely urgent the Chief Presidency Magistrate should detain these prisoners in his custody and not send them away from Madras pending further orders of the High Court."

Later in the day the Crown Prosecutor presented a petition (Criminal Miscellaneous Petition No. 990 of 1938) under S. 561-A of the Criminal Procedure Code in which he prayed the High Court to vacate the stay order passed by our learned

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away the individual jurisdiction which each Judge has in this matter and to prevent the performance of his legal duty to determine on the merits any application for issue of a writ of *habeas corpus* made to him. In my opinion, therefore, I had jurisdiction to entertain the application for the issue of a writ of *habeas corpus* and to make the *interim* order; further, it was my legal duty to entertain the application and to determine it on its merits. In my view, the law left me no option in the matter—the law as laid down by the highest tribunal—the Judicial Committee of the Privy Council—which is sufficient warrant for what I have done. As I observed in the course of the hearing, there would have been a failure of duty on my part if I had not exercised jurisdiction in the manner I did. I was of that opinion when I entertained the application for the issue of a writ of *habeas corpus* and made the *interim* order now sought to be vacated on behalf of the Crown and I still adhere to that opinion. The Crown Prosecutor, no doubt, further contended that the application for issue of the writ should not come before one Judge in the first instance and then be posted before a Bench; I expressed my concurrence then and there and I continue to be of the same opinion. But it does not follow from this that there is any absence of jurisdiction in me to entertain and determine the application for issue of the writ.

In short, the jurisdiction and duty of every Judge of the High Court to entertain and determine applications for issue of a writ of *habeas corpus* made to him are, in my opinion, not affected by any statutory enactment or any valid rule made on the authority of any statutory enactment. It is a well-settled rule, as Sundara Aiyar, J., said in In re *R. Nataraja Aiyar*, (1912) 23 M.L.T. 393 at 403: I.L.R. 36 Mad. 72, that the powers of a superior Court can be limited or taken away only by some express provision to that effect and as observed by Sadasiva Aiyar, J., in the same case at page 413 the writs of *habeas corpus* and *certiorari* are high prerogative writs vested in the King's Bench (and also in the Judges of High Courts in India as will be seen from In re *Govindan Nair*, (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.) and *Eshugbayi Eleko* v *Officer Administering the Government of Nigeria*, (1928) A.C. 459, as representing the powers of the Crown to do justice in extraordinary cases. Of all the "high prerogative writs" none is as high as the writ of *habeas corpus* which affords protection to the liberty of the subject and is for that reason issuable by any single Judge of the High Court. In this matter, the subject has the right to invoke any Judge's jurisdiction and thereupon the duty devolves on that Judge to determine on the merits whether a writ shall issue or not. This is the law as I understand it and it follows from this that the objection on the score of jurisdiction fails. No other objection being made to the *interim* order, this petition to vacate it is dismissed.

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brother at his residence. This petition was heard by our learned brother on Saturday, the 22nd of October, and was dismissed by him. In a considered order pronounced by our learned brother on Monday, the 24th of October, his reasons for dismissing the Crown Prosecutor's petition were set forth at length.

Meanwhile the substantive application for a writ had been sent into the registry, of the Court and had been posted for hearing in the ordinary course. According to the rules of the Court it came before the Criminal Bench then sitting which consisted of ourselves. When it came on for hearing it was represented by learned Counsel for the petitioners that the matter was already before our learned brother Pandrang Row, J., and that we could not proceed to hear the application. A copy of the considered order just mentioned which had then been pronounced by our learned brother was placed before us in support of this contention. Learned Counsel for the District Magistrate of Trivandrum contended on the other hand that Pandrang Row, J., had never directed that the substantive petition should be posted before himself, and had never intended to dispose of it sitting as a single Judge. Here was a direct conflict of statement. The tenor of the learned Judge's considered order on the Crown Prosecutor's application appeared to be in favour of the applicant's view although we observe that the application was entitled "In the High Court of Judicature at Madras, under S. 491 of the Criminal Procedure Code". Learned Counsel for the applicants stated categorically in answer to our question that the application was for a Common Law Writ of *Habeas Corpus* and not a petition to the High Court to exercise its powers under S. 491. We resolved the difficulty by referring the matter to our learned brother who replied that the application was pending before himself and that in his view he had power to dispose of it. We then recorded our opinion that we could not go on with the hearing of the application as it was already before another Judge of the Court. Subsequently on the 26th of October, Pandrang Row, J., allowed the application and issued a writ *nisi*, and for the present the matter stands there. The motion before us now is to quash his proceedings on the grounds (1) that a single Judge of the Court has no jurisdiction in such matters and (2) that for all purposes covered by S. 491 of the Code of Criminal Procedure neither the High Court nor any

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Judge has power to issue a Common Law Writ of *Habeas Corpus*.

The motion came on for hearing before us on Thursday, the 27th of October. It was not possible to hear the arguments of the learned Counsel for the prisoners on that day because the arguments of the learned Counsel for the petitioner had not ended till nearly 4 P.M. The matter was urgent the writ having been made returnable at the opening of the Court on the following day, and accordingly at the close of the hearing of the 27th we directed that the operation of the writ *nisi* be suspended, and that further proceedings in the matter of Criminal Miscellaneous Petition No. 985 be stayed till the further orders of this Court. At the request of learned Counsel for the prisoners we adjourned the hearing to the 31st of October.

The chief proposition which the learned Counsel for the petitioner seeks to have established is that the High Court has no jurisdiction to issue the Common Law Writ of *Habeas Corpus* in a case like this. S. 491 of the Code of Criminal Procedure gives the High Court power to issue directions "of the nature of Habeas Corpus" in certain cases and for certain purposes; in those cases and for those purposes, learned Counsel contends, the powers conferred by S. 491 are the only powers the High Court has. In the present case the applicants before our learned brother alleged that the four prisoners had been arrested unjustifiably on warrants issued illegally, and prayed that they be set at liberty. The case is clearly covered by S. 491 (1) (*a*) and (*b*) of the Code of Criminal Procedure, and if this Court has no jurisdiction to issue a Common Law Writ of *Habeas Corpus* in cases to which S. 491 applies, it will follow that our learned brother's order for the issue of a writ *nisi* is without jurisdiction and ought to be quashed.

Secondly learned Counsel for the petitioners has contended that even if this High Court still has power to issue the Common Law Writ of *Habeas Corpus* nevertheless r. 2 of the Appellate Side Rules is *intra vires* and binding on all the Judges of the Court

The third proposition which the Counsel for the petitioners has contended is that even if a single Judge of this High Court has jurisdiction to issue the Common Law Writ of *Habeas Corpus*, the proper procedure for issue of such writ has not been followed in the present case.

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Our learned brother stated in his order of the 24th of October that the contention on behalf of the Crown was that his order of the 21st of October was without jurisdiction, since any matter relating to the exercise of powers under S. 491 of the Criminal Procedure Code could only be disposed of by a Bench of the High Court (*vide* r. 2-A of the Appellate Side Rules). Our learned brother then proceeded to consider whether r. 2-A of the Appellate Side Rules was *intra* or *ultra vires*. On a consideration of the Privy Council case reported in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*[1], the Full Bench case reported in *Govindan Nair*, In re,[2] and the decisions referred to in the latter case, our learned brother held that each single Judge of the High Court has jurisdiction and indeed a duty to entertain an application for a writ of *habeas corpus*. This duty according to our learned brother's view is laid upon him by virtue of his position as a Judge of this Court, and is not affected by any statutory enactment, or any valid rule made on the authority of a statutory enactment. He was therefore of opinion that r. 2-A of the Appellate Side Rules is *ultra vires*, because its effect is to take away the individual jurisdiction which each Judge has in this matter, and to prevent the performance of his legal duty to determine on the merits any application for issue of a writ of *habeas corpus* made to him. "The jurisdiction," our learned brother says:

"Is thus of a peculiar and exceptional character, as every Judge has it, and not merely the High Court of which he forms part. Further that Judge has no option in the matter, and cannot lawfully decline jurisdiction or refuse to determine or entertain applications made to him. It would be contrary to his oath of office to do so."

In paragraph 5 of his order our learned brother refers to the jurisdiction of the Supreme Court, and relies upon cl. 8 of the Letters Patent of the Supreme Court, in which it is stated that the Chief Justice and the puisne Judges have such jurisdiction and authority as "Our Justices of Our Court of King's Bench have and may lawfully exercise" within England. He goes on to point out that under the Indian High Court Act (24 and 25 Vic., Chap. 104) and the Letters Patent issued thereunder the High Court succeeded to all the powers of the "Supreme Court". Learned Counsel for the respondents

1. (1928) A.C. 459.
2. (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.).

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before us relies strongly on these arguments. It has been pointed out however by learned Counsel for the petitioner before us that the reference to the High Courts Act and the Letters Patent issued thereunder is incomplete. In S. 9 of the High Courts Act it is provided that:

"Each of the High Courts to be established under this Act shall have and exercise all such . . . . . jurisdiction original and appellate and all such powers and authority for and in relation to the administration of justice . . . . as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitation as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency town as may be prescribed thereby.

And save as by such Letters Patent may be otherwise directed and subject and without prejudice to the Legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in this Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under this Act at the time of the abolition of such last mentioned Courts."

These provisions are reproduced in the first Letters Patent issued on the 26th of June, 1862. In the Letters Patent issued on the 28th of December, 1865, it was further provided in cl. 44 as follows:—

"And we do further ordain and declare that all provisions of these our Letters Patent are subject to the Legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the 24th and 25th years of our Reign, Chapter 67, and may be in all respects amended and altered thereby."

This clause in the Letters Patent has been continued in the same terms until the present day. It has sometimes been objected that the Legislative powers of the Governor-General in Council are restricted by the proviso to S. 22 of the Indian Councils Act, 1861 (namely, 24 and 25 Vic., Chapter 67). That proviso is to the effect:

"That the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act . . . . . or any provisions of any Act, passed in this present Session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian Territory or the inhabitants thereof."

The Indian High Courts Act was passed in the same Session as the Indian Councils Act. With regard to this contention it is sufficient to point out that the Indian Legislature's powers of modifying or taking away the jurisdiction of the High Court are specially reserved by S. 9 of the High Courts

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Act just cited. Since the High Courts Act was passed later in the Session than the Indian Councils Act it seems probable that this provision was deliberately made in the High Courts Act, in order to prevent any question being raised under S. 22 of the Indian Councils Act as to the power of the Governor in Council or Legislative Council to modify the exercise by the High Court of the powers previously possessed by the Supreme Court, *vide* the remarks of Rankin, C. J., in *Girindra Nath Banerjee* v. *Birendra Nath Pal*[1].

We shall presently give our reasons for holding that the rules made by this Court relating to this matter are not *ultra vires* but on the contrary derive their power from the statute itself and the Letters Patent. Our learned brother's opinion that the powers and authority inherited by the High Court from the Supreme Court are not affected even by any statutory provision, has been strenuously attacked by learned Counsel for the petitioner. His position is that such powers can be so affected. He contends further that the power and authority to issue writs of *habeas corpus* in cases covered by S. 491 of the Criminal Procedure Code has been entirely taken away by valid and binding legislation of the Governor-General in Council.

Mr. Sitarama Rao for the respondents has not attempted to argue that the Governor-General in Legislative Council has no power to abolish the jurisdiction of the High Court to issue the Common Law writ of *habeas corpus*. His contention is that although the Indian Legislature has such power, the High Court's jurisdiction in this matter has not in fact been abolished. We shall proceed to deal with this contention. In S. 82 of the Code of Criminal Procedure, 1872 (Act X of 1872) it is provided that:

> "Neither the High Courts nor any Judge of such High Court shall issue any writ of *habeas corpus* mainprise, *de homine replegiando*, nor any other writ of a like nature beyond the Presidency Town."

In S. 148 of the High Courts Criminal Procedure Act, 1875 (Act X of 1875) it was provided that any of the High Courts at Fort William, Madras and Bombay might in certain cases more particularly described in clauses (*a*) to (*g*) whenever it should think fit, issue directions of the nature of a *habeas corpus*. This section is the fore-runner of S. 491 of the present Code of Criminal Procedure. These directions

1. (1927) I.L.R. 54 Cal. 727 at 749.

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could only be issued to deal with prisoners or defendants within the local limits of the High Court's ordinary original criminal jurisdiction. It is provided further that:

" Neither the High Court nor any Judge thereof shall hereafter issue any writ of *habeas corpus* for any of the above purposes."

It is quite clear that the prisoners in the case before us fall within the description given in clauses (*b*) and (*c*) of S. 148 of Act X of 1875. The position taken on behalf of the petitioner therefore is that by S. 82 of Act X of 1872 the High Court's jurisdiction to issue a writ of *habeas corpus* beyond the presidency town was abolished, and by S. 148 of Act X of 1875 the High Court's jurisdiction to issue such a writ within the presidency town for any of the purposes indicated in that section was abolished. When the Code of Criminal Procedure was revised in Act X of 1882 it was provided in S. 2 that certain enactments mentioned in the first schedule should be repealed. Act X of 1872 and Act X of 1875, except S. 144 and portions of S. 146, are found in Sch. I and it follows therefore that the sections we have already referred to in Acts X of 1872 and X of 1875 were repealed. But it is provided in S. 2 of Act X of 1882 that the repeal shall not " restore any jurisdiction or form of procedure not then existing or followed."

The same provision is repeated in S. 2 (1) of the Code of Criminal Procedure, 1898 (Act V of 1898). These sections enunciate the general principle formulated in Ss. 6 and 7 of the General Clauses Act (X of 1897). Mr. Sitarama Rao put forward in a half-hearted manner a proposition that the legislature in Acts X of 1872 and 1875 did not purport to abolish the jurisdiction of the High Courts or the Judges thereof to issue the Common Law writ of *habeas corpus*. He suggested that these Acts left the High Courts' jurisdiction unimpaired but merely restricted their power to exercise it in certain cases and that Act V of 1882, when it did not re-enact the said restriction, restored that power in its entirety. The distinction between taking away the High Courts' powers and forbidding the High Court hereafter to use such powers is one which we are not able to appreciate. We are quite satisfied that the legislature in 1872 and 1875 intended and purported to take away altogether the High Courts' power to issue writs of *habeas corpus* (*a*) in the mofussal for any purpose and (*b*) in the presidency towns for the purposes indicated in S. 148 of

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Act X of 1875. But even if the distinction suggested by Mr. Sitarama Rao were a real distinction it would not help him because S. 2 of Act V of 1882 prohibits the restoration of "any form of procedure" not existing or followed on the first day of January, 1883. With all respect to our learned brother, we think it is quite clear that the jurisdiction of the High Court in the cases and for the purposes described in S. 491 of the Criminal Procedure Code must be exercised under the provisions of that section and not otherwise. Now by cl. 2 of S. 491 it is provided that the High Court may from time to time frame rules to regulate the procedure in cases under this section. The Appellate Side Rules have as we have shown been framed in the exercise of this power and we can see no reason for believing that they are *ultra vires*. It is in our view very clear that any application for directions under S. 491 of the Code of Criminal Procedure cannot be heard by a single Judge but may only be heard by a Bench of two Judges.

It was no doubt for this reason that the learned Advocate for the respondents when the matter first came before us on the 24th of October stated that the application made on behalf of the prisoners was an application for a Common Law writ of *habeas corpus* and not an application under S. 491 of the Code of Criminal Procedure. In r. 2 (4) (*c*) it is provided that applications "for the issue of a writ of *habeas corpus*" may be heard by a Bench of two Judges and r. 2-A directs that all applications for writ of *habeas corpus* shall go before a Bench of Judges dealing with criminal work. The expression "writ of *habeas corpus*" in these rules is merely a compendious description of the relief to be granted under S. 491. R. 2 (4) (*c*) in its present form was made in 1923 after the enactment of S. 491 with the modifications introduced by Act XII of 1923, by which the power to issue directions under S. 491 was extended from the Presidency towns to the limits of High Court's Appellate Jurisdiction. The rule which corresponded to this before 1923 provided for the disposal of applications:

"By a European British subject detained in custody alleged by him to be illegal for an order that he be brought before the High Court."

R. 2-A was introduced in 1929, under the powers conferred by S. 491 (2) and S. 108 of the Government of India Act, 1915. *See* the High Court's notification P. Dis. 511 of 1929 The use of the expression "writ of *habeas corpus*" in rr. 2 and 2-A

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does not imply that this High Court or any Judge has power to issue a Common Law writ.

We observe in passing that in reported cases of this Court, Benches of Judges dealing with applications under S. 491 describe them as applications for writs of *habeas corpus*. See In re *Kochunni Elaya Nair*[1] and more particularly the observations of Spencer, J., at page 19. Considered in this light it is clear we think that r. 2 of the Appellate Side Rules is not *ultra vires*.

Our learned brother appears to have thought that r. 2 of the Appellate Side Rules was *ultra vires* merely because it was made in the exercise of powers conferred by S. 108 of the Government of India Act, 1915. Our learned brother says:

> "The jurisdiction and the duty as regards applications for a writ of *habeas corpus* are *sui generis* and do not fall within the framework of S. 108 of the Government of India Act or of any rule framed thereunder. The individual jurisdiction and the individual duty of each Judge in this matter are not affected in any way by any statutory provision or rule. I am therefore of opinion that r. 2-A of the Appellate Side Rules is *ultra vires* because its effect is to take away the individual jurisdiction which each Judge has in this matter and to prevent the performance of his legal duty to determine on the merits any application for the issue of a writ of *habeas corpus* made to him."

It does not appear to have been brought to the notice of our learned brother that the High Court's power to provide for the exercise of jurisdiction by single Judges or Division Courts is derived from S. 13 of the High Courts Act itself. S. 13 of the Indian High Courts Act is as follows:—

> "Subject to any law or regulations which may be made by the Governor-General in Council, the High Court established in any presidency under this Act may by its own rule provide for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court, of the Original and Appellate Jurisdiction vested in such Courts in such manner as may appear to such Courts to be convenient for the due administration of justice."

The Appellate Side Rules have been made in the exercise of these powers which are confirmed by S. 108 (1) of the Government of India Act, 1915 and continued in the Government of India Act, 1935, S. 223. Rules made in the exercise of these powers have statutory force and therefore are binding on the High Court and on the Judges. Therefore even if the High Court had retained the powers of the Supreme Court to issue

1. (1921) 41 M.L.J. 441: I.L.R. 45 Mad. 14.

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writs of *habeas corpus* r. 2-A would nevertheless in our view have been *intra vires* and binding. We may note that in cl. 36 of the Charters of 1862 and 1865 it is declared:

"That any function which is hereby directed to be performed by the said High Court of Judicature at Madras, in the exercise of its Original or Appellate Jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose under the provisions of the 13th section of the aforesaid Act of the 24th and 25th years of our Reign."

Thus the rule-making power of the High Court is inherent in its constitution from the beginning and regulates the exercise of the jurisdiction which it inherited from the Supreme Court. It follows, in our opinion, that the second proposition put forward by learned Counsel for the petitioner is well founded.

Our learned brother has considered himself bound by the decision of the Privy Council in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*[1], in which it was laid down that each Judge of the High Court of Justice established by the Judicature Act, 1873, has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation, and is bound to hear and determine the application on its merits notwithstanding that some other Judge has already refused a similar application. Their Lordships also laid it down that the same principle applies in the case of Judges of the Supreme Court of Nigeria. With all respect, for the reasons we have already given, we do not think that this judgment can have any application to this High Court or the Judges of this Court. There is no indication in their Lordships' judgment that the Supreme High Court of Nigeria was established and is governed by legislative enactments similar to those by which this High Court has been constituted.

Our learned brother has stated in his order of the 24th of October that he was bound by the decision of the Full Bench in *Govindan Nair*, In re[2]. It is necessary we think to point out that that was a case in which application was made for a writ of *habeas corpus* to be issued to the Jailor of the Camp Jail of Bellary. The decision of the Full Bench is that the power to issue a writ of *habeas corpus* to places outside the Presidency town still continued in High Court. It does not

1. (1928) A.C. 459.
2. (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.).

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deal expressly with the case of an application for a writ to run in the Presidency town. It must be borne in mind that this judgment was pronounced on 4th May, 1922. At that time S. 491 of the Code of Criminal Procedure gave the High Court power to issue directions of the nature of *habeas corpus* in respect of persons within the limits of its Ordinary Original Civil Jurisdiction. It was only in 1923 that these powers were extended to the limits of the Appellate Criminal Jurisdiction (S. 30, Criminal Law Amendment Act, 1923). The learned Chief Justice who pronounced the judgment of the Court in *Govindan Nair,* In re[1], recognised that the Code of Criminal Procedure made provision for the exercise in the Presidency town of powers similar to the power of issuing a writ. It was urged by the learned Crown Prosecutor that after the enactment of S. 491, it must be taken to have been the intention of the legislature to confine the powers of the Court to such cases and that the power to issue the writ in the muffassal which had been established in *Ameerkhan's case*[2], must be taken to have been impliedly taken away. The learned Chief Justice held that this contention was not sound. He observes (page 927):

> "S. 491 merely substitutes or adds for the Presidency town a different form of procedure less cumbersome than the granting of a writ of *habeas corpus.*"

The learned Chief Justice went on to observe:

> "Secondly the right which had been established was a substantive right and it could hardly have been the intention of the legislature to take that right away by making rules of procedure or giving adjective rights for the exercise of similar powers. It is the sort of case where it can be fairly argued that if the legislature intended to take away such an important right from a subject it must use plain and unambiguous language."

This language we think it must be conceded does imply that in the opinion of the Court the power to issue a writ of *habeas corpus* still exists, or may exist even in the Presidency town alongside of the remedy provided by S. 491.

In the face of this ruling it is clearly not possible for us to hold that our learned brother's view of the law on this point was wrong. In our opinion, however, there are substantial grounds for believing that the decision in *Govindan Nair,* In re[1], requires

1. (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.).
2. (1870) 6 Beng. L.R. 392.

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reconsideration. It is obvious from the arguments addressed to the Court on that occasion and from the terms in which the order was pronounced that the attention of the Court was never drawn to Act X of 1872 or Act X of 1875. Learned Counsel for the petitioner has drawn our attention to the decision of a Bench of the Calcutta High Court in *Girindra Nath Banerjee* v. *Birendra Nath Pal*[1]. The learned Chief Justice of Calcutta has pointed out on page 731 that there is no question here of the legislature using ambiguous or doubtful language. The learned Chief Justice says:

> " I observe that it has been stated in certain cases that if there is to be any question of the abolition of this right then the legislature must say so in the most specific terms. Whether that is a correct view in a matter of procedure of this kind need not be discussed for the legislature has used the most specific terms: and it is plain that the Indian Legislature never intended that the Courts in giving relief of this character should for any of the purposes mentioned in S. 491 be at liberty to act under it or under the old procedure "

Since it is clear that the Judges who heard the case in *Govindan Nair*, In re[2], omitted to consider the provisions of Act X of 1872 and Act X of 1875, we think it is not only desirable but necessary that this decision should be reconsidered.

We have still to consider the third proposition put forward by the learned Counsel for the petitioners. In support of his contentions on this point learned Counsel has referred us to the rules of the Crown office in force in the King's Bench Division. In r. 219 (*vide* Short and Mellor, 2nd edition, page 321) it is provided that no application for a writ of *habeas corpus* on a warrant of extradition shall be made to a Judge at chambers during the sittings. This is a proviso to r. 216, that an application for a writ of *habeas corpus ad subjiciendum* may be made to the Court or the Judge. It follows therefore that even according to the procedure of the High Court in England the application made to our learned brother was irregularly made. Moreover learned Counsel for the petitioner has shown us that the practice in the High Court in England when a writ is issued by a Judge in chambers is to make it returnable in the Court during term time and not before a single Judge. There appears to be no case in which a single Judge during term time has issued a writ of *habeas corpus* returnable before himself. It

1. (1927) I.L.R 54 Cal. 727.
2. (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.).

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appears to us therefore with all respect to our learned brother that even if a single Judge of this High Court can issue a writ of *habeas corpus*, it must be made returnable in the Court, and that his order directing the return of the writ to himself is *ultra vires* and without jurisdiction. It appears to us that if the Judges of this Court can exercise the powers of the Judges of the High Court in England they can only do so in accordance with the rules by the Judges of the High Court in England are governed.

Learned Counsel for the respondents has challenged our power to interfere in any way with the orders passed by our learned brother. He points out that this is a criminal matter in which under Cl. 24 of the Letters Patent there is no right of appeal. He has relied on the case reported in In re *Tadi Soma Naidu*[1]. But we considered that this case is really an authority against him. It was a case in which a single Judge passed orders enhancing a sentence of imprisonment, without giving notice to the accused. The learned Judge afterwards *suo motu* purported to set his own order aside, and directed the case to be posted later on the question of enhancement. The case then came on before Waller, J., who referred it to a Divisional Bench since the Public Prosecutor proposed to argue that the learned Judge had no power to vacate his own order. The decision of the learned Judges (Odgers and Wallace) was that the order of Krishnan, J., enhancing the sentence without notice to the accused was a nullity and void and they therefore proceeded to deal themselves with the revision petition. In substance we can see no difference between a declaration that a certain order is void and direction that it should be quashed. We do not consider that we are being moved to exercise any appellate or revisional jurisdiction, but we do consider that if the order of our learned brother was passed without jurisdiction, this High Court has inherent powers to set aside his order. This Court's inherent powers to make such orders as may be necessary to prevent abuse of process of any Court or otherwise to secure the ends of justice are saved by S. 561-A of the Criminal Procedure Code.

We may observe that even if our learned brother is right in holding that a single Judge of this Court can issue a writ of

1. (1923) 46 M.L.J. 456: I.L.R. 47 Mad. 428.

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habeas corpus, his order can be quashed by the Court if it is shown that the writ was issued improvidently. This is fully established by *Crawford's case*[1]. That was a case in which Patterson, J., issued a writ to the keeper of Her Majesty's Jail Castle Rushen in Isle of Man. A motion was then made to quash the writ and after hearing arguments the Bench made absolute the rule *nisi* for setting aside the writ. On such a motion, it was stated by Erle, J., the question in effect was whether the writ if it had never issued ought to go. The decision of the Court being that the writ ought not to have issued the order that the writ should be set aside followed as a matter of course. We have also been referred to a very interesting case from Canada reported in Canada Supreme Court Reports, Vol. 12, page 140, where a writ issued by a single Judge of the Supreme Court was quashed by a Full Bench.

The last objection taken on behalf of the respondents before us is that the District Magistrate, Trivandrum, not having been a party to the application for the writ has no *locus standi* and ought not to be heard. Since the extradition proceedings appear to have been initiated at the instance of the District Magistrate of Trivandrum we do not consider that this objection can be sustained.

It is clear the matter before us involves a decision of three important questions:

(1) Can this High Court or any Judge of it issue the Common Law Writ of *Habeas Corpus* in any of the cases covered by S. 491 of the Criminal Procedure Code?

(2) Can an application for a Common Law Writ of *Habeas Corpus* or for directions under S. 491 of the Criminal Procedure Code, be heard and disposed of by a single Judge of this Court? In other words are rr. 2 and 2-A of the Appellate Side Rules *intra* or *ultra vires*?

(3) If a single Judge has power to issue the Common Law Writ of *Habeas Corpus*, is the writ issued by our learned brother Pandrang Row, J., on the 26th of October liable to be quashed by this Court for the reason that it has been issued in contravention of the rules in force in the High Court in England?

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1 (1849) 13 Q.B. 613.

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These questions are of such importance that we think this matter ought to be referred to a Full Bench, and under r. 2 of the Appellate Side Rules we refer it accordingly.

This petition coming on for hearing on Thursday and Friday, the 3rd and 4th days of November, 1938, in pursuance of the aforesaid Order of Reference to a Full Bench upon perusing the petition, the orders of the Hon'ble Mr. Justice Pandrang Row dated the 21st, 24th and 26th days of October, 1938 and made in Criminal Miscellaneous Petition Nos. 986, 990 and 985 of 1938 respectively on the file of the High Court, and the said Order of Reference of a Full Bench, the Court made the following

ORDER.—We will state the reasons for our judgment later. We hold:—

(1) The Common Law Writ of *Habeas Corpus* does not run in British India in a case like this. Assuming that the Court formerly had the power to issue a writ of *Habeas Corpus* in a case like this that power has been taken away and the powers conferred by S. 491 of the Code of Criminal Procedure substituted.

(2) Rr. 2 and 2-A of the Appellate Side of this Court are *intra vires* the Court's powers.

(3) Mr. Justice Pandrang Row's order issuing a rule *nisi* was passed without jurisdiction and is consequently null and void.

(4) The position therefore is that the application filed by the respondents under S. 491 of the Code of Criminal Procedure must be dealt with in accordance with the rules of the Court which means that it must be dealt with by the Criminal Bench.

As Chief Justice I direct that the application under S. 491 be placed before the Criminal Bench next Monday.

The judgment of the Full Bench was as follows:

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The Chief Justice.—This Full Bench has been constituted to decide a matter referred under r. 2 of the Rules applying to this Court in its appellate jurisdiction by Burn and Stodart, JJ., sitting as a Bench dealing with criminal cases. The matter involves the important question whether this Court has the power to issue a writ of *habeas corpus* as known to the English

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Common Law or whether its powers are confined in this respect to those conferred by S. 491 of the Code of Criminal Procedure, which gives authority to issue directions "of the nature of a *habeas corpus*". There are other questions involved in the reference and for their proper appreciation it is necessary to set out the course of events.

The respondents are the directors of the Travancore National and Quilon Bank, Limited, a company registered under the laws of the State of Travancore. A petition for the compulsory winding up of the company was recently granted by this Court and official liquidators have been appointed. On the night of the 20th October, 1938, the respondents were arrested in Madras in pursuance of extradition warrants issued under S. 7 of the Indian Extradition Act, 1903, for their arrest and surrender to the police of the Travancore State for production before the District Magistrate, Trivandrum, which is the capital of the State. It was alleged that the respondents had committed within the State of Travancore offences under the sections of the Travancore Penal Code corresponding to Ss. 409, 418, 420, 477-A, 109 and 114 of the Indian Penal Code and the District Magistrate at Trivandrum ordered their arrest. The extradition warrants were directed to the Chief Presidency Magistrate, Madras, and under his orders the Assistant Commissioner of Police, Crime Branch, Madras, arrested the respondents. The respondents were produced before the Chief Presidency Magistrate at 8-30 A.M. on the 21st October and the intention was to send them under arrest to the frontier of the Travancore State by the train leaving Madras at 11 A.M. Before the respondents were brought before the Chief Presidency Magistrate an application had been made to Pandrang Row, J., for the issue of a writ of *habeas corpus* and for an interim order prohibiting their removal from Madras. The application was made under S. 491 of the Code of Criminal Procedure as the heading of the petition shows. The matter being urgent the learned Judge granted the interim order asked for and directed the Chief Presidency Magistrate to detain the respondents in his custody pending the further orders of the High Court, which meant pending the hearing of the main application. The interim order was served on the Chief Presidency Magistrate and the respondents were detained in accordance with the order. Later in the day the Crown Prosecutor presented a petition asking

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that the interim order be vacated on the ground that it had been passed without jurisdiction and was therefore null and void. The petition having been filed the Crown Prosecutor applied to me in Chambers to hear it. As I considered that sitting alone I had no power to deal with the matter I declined to do so. The Crown Prosecutor then applied to Pandrang Row, J., to vacate his own order. The learned Judge heard the arguments the next morning, the 22nd October, but refused to withdraw the interim order, intimating that he would give his reasons on Monday, the 24th October. The main application was in the list for that day of Burn and Stodart, JJ., who composed the Bench dealing with criminal matters. R. 2-A of the Rules of this Court in its appellate jurisdiction requires an application for a writ of *habeas corpus* to be placed before the Bench dealing with criminal matters. The Court usually sits at 10-45 A.M., but Pandrang Row, J., delivered his judgment at 10-30 A.M. on the 24th October. Not only did he refuse to vacate the interim order but he held that r. 2-A of the Appellate Side Rules was *ultra vires* and that he alone had power to deal with the main application, which he treated as an application for the issue of the prerogative writ of *habeas corpus* and not as an application under S. 491 of the Code of Criminal Procedure. He considered that he had power to issue a writ of *habeas corpus* as known to the Common Law and based this decision on *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*[1] and on *Govindan Nair*, In re[2]. In the first case the Privy Council held that each Judge of the High Court of Justice established by the Judicature Act, 1873, has jurisdiction to issue a writ of *habeas corpus* and is bound to hear and determine the application on its merits, even when another Judge has refused a similar application. The same principle applied in the case of Judges of the Supreme Court of Nigeria. In the second case a Full Bench of this Court (Schwabe, C.J., Oldfield and Coutts-Trotter, JJ.) held that this Court had power to issue a writ of *habeas corpus* outside Madras.

When the main application was called for hearing before Burn and Stodart, JJ., counsel for the respondents took the objection that the Court had no power to deal with the matter as Pandrang Row, J., was seized of it and a copy of the judgment

1. (1928) A.C. 459.
2. (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.).

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of Pandrang Row, J., was produced. Counsel who appeared for the District Magistrate of Trivandrum on the other hand contended that Pandrang Row, J., had never directed that the substantive petition should be placed before him and he had never intended to dispose of it sitting alone. In view of the conflicting contentions, Burn and Stodart, JJ., communicated with Pandrang Row, J., with a view to ascertaining how the matter really stood. Pandrang Row, J., replied that the main application was pending before him and that in his view he had power to dispose of it. In these circumstances the learned Judges who formed the Bench decided that they could not go on with the hearing of the application as it was already before another Judge. On the 26th October, Pandrang Row, J., ordered that a writ of *habeas corpus* should issue to the Chief Presidency Magistrate directing him to produce the respondents before him at 10-45 A.M. on the 28th October. In view of this order the District Magistrate of Trivandrum filed an application asking the Court to declare that the orders passed by Pandrang Row, J., on the 21st, 24th and 26th October had been passed without jurisdiction and were void and of no legal effect and to quash them. The application was placed in the list for the 27th October of Burn and Stodart, JJ., who still composed the Bench dealing with criminal matters. The hearing commenced that day but as there was no time to hear the arguments advanced on behalf of the respondents and as Pandrang Row, J., had made the writ returnable the next day the Court directed that the operation of the writ should be stayed till the further orders of the Court. At the request of Counsel for the respondents the Bench adjourned the further hearing of the case until the 31st October. The hearing was concluded on the 1st November.

It was contended on behalf of the District Magistrate that the issue of a writ of *habeas corpus* was without jurisdiction. The Legislature had taken away the right of the Court to issue a writ of *habeas corpus* and the powers of the Court were confined to those conferred by S. 491 of the Code of Criminal Procedure. If the Court had power to issue a Common Law Writ of *Habeas Corpus*, r. 2-A of the Appellate Side Rules was nevertheless *intra vires* the power of the Court and binding on all the Judges. It was further contended that even if a single Judge had power to issue a Common Law writ the proper procedure had not been followed in the present case. The

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learned Judges were satisfied that the Legislature had taken away the power of the Court to issue a writ of *habeas corpus* in a case like the present one and were also satisfied that r. 2-A of the Appellate Side Rules was *intra vires*, but as they were bound by *Govindan Nair's case*[1] and as the matter involved a decision on three important questions, they referred the application for decision by a Full Bench under r. 2 of the Appellate Side Rules. In their judgment referring the matter the learned Judges stated the three questions as follows:—

"1. Can this High Court or any Judge of it issue the Common Law Writ of *Habeas Corpus* in any of the cases covered by S. 491 of the Criminal Procedure Code?

"2. Can an application for a Common Law Writ of *Habeas Corpus* or for directions under S. 491 of the Criminal Procedure Code be heard and disposed of by a single Judge of this Court. In other words are rr. 2 and 2-A of the Appellate Side Rules *intra* or *ultra vires*?

"3. If a single Judge has power to issue a Common Law Writ of *Habeas Corpus*, is the writ issued by our learned brother Pandrang Row, J, on the 26th October liable to be quashed by this Court for the reason that it has been issued in contravention of the rules in force in the High Court in England?"

The answers to the first two questions depend upon the interpretation to be placed on legislation in England and in India and in view of the judgment in *Govindan Nair's case*[1] and other decisions of this Court I propose to examine the various enactments in some detail.

In 1861 the Parliament passed an Act (24 and 25 Vict., c. 104) authorising the establishment of High Courts of Judicature in India. S. 1 declared it to be lawful for the Crown, by Letters Patent under the great seal of the United Kingdom, to erect and establish High Courts at Fort William in Bengal, Madras and Bombay for the respective Presidencies. S. 9 of the Act stated that each of the High Courts to be established under the Act:

"Shall have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, Original and Appellate, and all such powers and authority for and in relation to the Administration of Justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of Original, Civil and Criminal Jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby; and, save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the

1. (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.).

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legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts."

The Supreme Court at Madras which had been created by Letters Patent granted on the 26th December, 1800, was abolished and the High Court was constituted under Letters Patent issued under the Act on the 26th June, 1862. The preamble to the Letters Patent followed the provisions of S. 9 of the Act and the operative clauses were also in accordance with the statute. On the 28th December, 1865, fresh Letters Patent were issued to the Court. They embodied the provisions of the original Letters Patent but contained this further cl. (44) :—

"And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the Legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of Our Reign, chapter sixty-seven, and may be in all respects amended and altered thereby."

It is manifest that the Court was given the same jurisdiction, power and authority which the Supreme Court possessed, but subject and without prejudice to the legislative powers of the Governor-General in Council. Counsel who appears for the first respondent would have the Court hold that the Indian High Courts Act does not contemplate the abolition of the right to issue prerogative writs, but only confers the power of regulating the issue. This contention ignores the express words of the statute and of the Letters Patent, and therefore is obviously fallacious. It is not necessary for the purpose of deciding the present application to consider whether the Supreme Court did in fact possess the power of issuing prerogative writs and I will assume that it had.

S. 81 of the Code of Criminal Procedure of 1872 provided that any European British subject who was detained in custody by any person, and who considered such detention unlawful, might apply to the High Court for an order directing the person detaining him to bring him before the Court to abide such further order as might be made by it. The section also provided that the High Court might issue such orders throughout the territories over which it had jurisdiction, and over such other places as the Governor-General in Council might

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direct. The section, however, only applied to European British subjects. S. 82 prohibited a High Court or any Judge thereof issuing a writ of *habeas corpus*, mainprise, *de homine replegiando*, or any other writ of the like nature, beyond the Presidency towns. The section was inserted as the result of the decision of Norman, J., in In the matter of *Ameer Khan*1, that the Supreme Court at Calcutta had power to issue writs of *habeas corpus* to persons in the mofussil and that the same power was continued to the High Court. In inserting S. 82 the Legislature wished to make sure that prerogative writs should not issue beyond Presidency towns.

The Criminal Procedure Code of 1872 was followed by the Criminal Procedure Code of 1875. In that year the High Courts were empowered to issue directions of the nature of a *habeas corpus*. The section conferring these powers was S. 148 and as it has a very important bearing I will quote it in full. It read as follows:—

" Any of the High Courts of Judicature at Fort William, Madras, and Bombay may, whenever it thinks fit, direct:—

(*a*) that a prisoner, legally committed and within the local limits of its ordinary original criminal jurisdiction be brought before it to be bailed;

(*b*) that a person within such limits be brought up before the Court to be dealt with according to law;

(*c*) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;

(*d*) that a prisoner detained in any gaol situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;

(*e*) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners acting under the authority of any commission from the Governor-General in Council, for trial, or to be examined touching any matter depending before such Court-martial or Commissioners respectively;

(*f*) that a prisoner within such limits be removed from one custody to another for the purpose of trial;

(*g*) that the body of a defendant within such limits may be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment;

and neither the High Court nor any Judge thereof shall hereafter issue any writ of *habeas corpus* for any of the above purposes.

Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure in cases under this section; and till such rules are framed, the practice of such Courts as to the obtaining, granting and serving of writs of *habeas corpus*, and as to the returns thereto, shall apply in such cases.

1. (1870) 6 Beng. L.R. 392.

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Nothing in this section applies to persons detained under Bengal Regulation III of 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, or the Acts of the Governor-General in Council No. XXXIV of 1850 or No. III of 1858."

It will be observed here that the power of the High Court or any Judge to issue a writ of *habeas corpus* for any of the purposes mentioned in the section was expressly taken away and the High Courts were given legislative authority to frame rules to regulate the procedure contemplated by the section. Cls. (*b*) and (*c*) correspond to cls. (*a*) and (*b*) of S. 491 of the Code now in force.

The Criminal Procedure Code of 1882 omitted the prohibition against the writ of *habeas corpus* and also made the rule making clause read:

" Each of the said High Courts may from time to time frame rules to regulate the procedure in cases under this section."

In other respects S. 148 of the Act was reproduced. The omission of the words:

" Neither the High Court nor any Judge thereof shall hereafter issue any writ of *habeas corpus* for any of the above purposes"

did not, however, alter the law. S. 2 of the Act provided that the enactments mentioned in the first schedule should be repealed to the extent specified,

" but not so as to restore any jurisdiction or form of procedure not then existing or followed or to render unlawful the continuance of any confinement which is then lawful."

The whole of the Act of 1875 was repealed except S. 144 and so much of S. 146 as related to informations, but by virtue of S. 2 of the new Act the repeal of S. 148 did not restore any former jurisdiction or procedure and in effect continued the prohibition in the Act of 1875 against the issue of prerogative writs.

The Criminal Procedure Code of 1898 repealed the Code of 1882 but reproduced S. 491 as it stood in the Code of 1882 and S. 2 was to the same effect as S. 2 of the earlier Code. S. 2 of the Code of 1898 has since been repealed but the prohibition against the issue of prerogative writs contained in the Code of 1875 still continues. S. 6 of the General Clauses Act of 1897 provides that where the Act, or any Act of the Governor-General in Council or Regulation made after the commencement of the Act, repeals any enactment the repeal shall not revive anything not in force or existing at the time at which the

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repeal takes effect unless a different intention appears and S. 7 says that in any Act of the Governor-General in Council or Regulation made after the commencement of the General Clauses Act, it shall be necessary for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, expressly to state that purpose. S. 7 applies also to all Acts of the Governor-General in Council made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887. S. 2 of the Code of Criminal Procedure of 1898 was repealed by the Amending and Repealing Act of 1914, but S. 4 provided that the repeal should not affect the existing position. The object of the repeal of S. 2 of the Code of 1898 was to remove from the statute book a redundant provision. The effect of the General Clauses Act and the Repealing and Amending Act of 1914 is therefore to keep in operation the prohibition of the Code of 1875.

By S. 30 of the Criminal Law Amendment Act of 1923, sub-S. (1) and cl. (*a*) of S. 491 of the Code of 1898 were altered to read as follows:—

"Any High Court may, whenever it thinks fit, direct:

(*a*) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law."

Previously, cl. (*a*) only referred to the ordinary original civil jurisdiction of the High Court. The Act of 1923 extended the clause to cover its appellate criminal jurisdiction. The effect is that any High Court can now give directions of the nature of *habeas corpus* throughout the whole of its jurisdiction. The Act of 1923 also did away with the distinction between European and British Indian subjects in such matters.

The High Courts Act of 1861 authorised the legislature if it thought fit to take away the powers which this Court obtained as the successor of the Supreme Court and Acts of the Legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the legislature has taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by S. 491 of the Code of Criminal Procedure of 1893. Rankin, C.J. and Majumdar, J., came to the same conclusion in *Girindra Nath Banerjee* v. *Birendra Nath Pal*[1] and I respectfully agree with them that the Legislature has used the most

1. (1927) I.L.R. 54 Cal 727.

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specific terms in carrying out its intention. The respondents have their remedy under the Code of Criminal Procedure and it is admitted that their case comes within cl. (*a*) or cl. (*b*) of S. 491.

Before I leave the question of the powers of the Legislature, I must refer to a further argument advanced by the learned Advocate for the first respondent in this connection. He says that, inasmuch as the last proviso to S. 22 of the Indian Councils Act of 1861 prohibits the Governor-General in Council making laws which may affect any part of the unwritten laws of constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown, the Legislature has no power to abolish the prerogative writ of *habeas corpus*. The abolition of the right to issue a prerogative writ is not a matter which can be deemed to affect allegiance to the Crown. This provision only refers to laws,

"which directly affect the allegiance of the subject to the Crown as by a transfer or qualification of the allegiance, or a modification of the obligations thereby imposed".

The words which I have quoted are taken from the decision of the Privy Council in *Bugga* v. *King-Emperor*[1], where a similar argument was advanced. The learned Advocate has not advanced before us the argument which was raised before Burn and Stodart, JJ., that the penultimate proviso to S. 22 of the Indian Councils Act restricted the powers of the Legislature and affected its right to abolish the prerogative writ of *habeas corpus*. The argument was not accepted by the learned Judges and their answer has evidently satisfied the respondents. I agree with what the learned Judges say and have only to add that the argument was negatived by the Privy Council in *Empress* v. *Burah*[2].

The decision of the Judicial Committee in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*[3] on which Pandrang Row, J., so much relied in holding that he had jurisdiction in the matter has in our opinion no application. The decision in that case would, of course, be binding upon this Court if the position were the same in British India as it is in Nigeria. In Nigeria the right to issue the prerogative writ of

1. (1920) 39 M.L.J. 1: I.L.R. 1 Lah. 326 (P.C.).
2. (1878) L.R. 5 I.A. 178: I.L.R. 4 Cal. 172 (P.C.). 3. (1928) A.C. 459.

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habeas corpus still exists, but here the right has been taken away. *Govindan Nair's case*[1] on which the learned Judge also relied was binding on him, but I consider that it was wrongly decided and should be overruled. The attention of the learned Judges who decided *Govindan Nair's case*[1] was not drawn to the provisions of the Code of 1872, and the succeeding enactments which affected the question under consideration. If attention had been drawn I have no doubt that the decision would have been a different one, but be that as it may, the decision cannot be allowed to stand in the light of the statutory prohibition which exists against the issue of the writ. The same objection applies to In re *Kochunni Elaya Nair*[2] and *Mahomedalli Allabux* v. *Ismailji Abdulali*[3] as Rankin, C.J., pointed out in *Girindra Nath Banerjee* v. *Birendra Nath Pal*[4].

This brings me to the question whether rr. 2 and 2-A of the Appellate Side Rules are *ultra vires*. R. 2 provides that certain matters which are set out in the rule may be heard and determined by a Bench of two Judges, provided that if both Judges agree that the determination involves a question of law they may order that the matter, or the question of law, be referred to a Full Bench. The rule expressly includes an application for the issue of a writ of *habeas corpus*. As in my view the Court has no power to issue a prerogative writ of *habeas corpus* in a matter such as is now before us the rule must be deemed to refer to an application for directions of the nature of *habeas corpus*, and this observation applies to r. 2-A. The right to make rules cannot be doubted. S. 13 of the High Courts Act of 1861 empowered a High Court established under the Act to make its own rules and provide for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges, or the original and appellate jurisdiction vested in the Court. S. 14 provided that the Chief Justice should from time to time determine what Judge in each case should sit alone, and what Judge of the Court whether with or without the Chief Justice should constitute the several Division Courts. Similar provisions are embodied in S. 108 of the Government of India Act, 1915, and the provisions of that section remain in force by

1. (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.).
2. (1921) 41 M.L.J. 441: I.L.R. 45 Mad. 14.
3. (1926) I.L.R. 50 Bom. 616.
4. (1927) I.L.R. 54 Cal. 727.

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virtue of S. 223 of the Government of India Act, 1935. Moreover rule-making powers were conferred upon the High Court in matters of the nature of *habeas corpus* by the Code of 1875 and succeeding Codes have continued the powers. If the right to issue the prerogative writ has been taken away there can be no question that the rules are *intra vires* but even if the right has not been abolished the Legislature can regulate the procedure which governs its issue. The argument advanced by Counsel for the first respondent when dealing with the High Courts Act of 1861 in effect recognised this. The rule-making powers conferred on the High Court by Legislature are wide and are sufficiently wide to entitle the Court to say that even an application for a prerogative writ shall go before two Judges. The English rules in fact recognise the right to place restrictions. In order of reference it is pointed out that in England no application for a writ of *habeas corpus* on a warrant of extradition shall be made to a Judge in Chambers during the sittings. I would hold that both rules are *intra vires* the powers of the Court and in these circumstances it is not necessary to enter upon a discussion of the question whether the writ issued by Pandrang Row, J., on the 26th October, 1938, is liable to be quashed on the ground that it has been issued in contravention of the rules in force in England.

Counsel for the first respondent has advanced an argument based on the provisions of the English Extradition Act, 1870. This Act contemplates the right to apply for a writ of *habeas corpus* in certain circumstances and S. 17 (4) directs that a Judge of any Court exercising the like powers as the Court of King's Bench exercises in England may exercise the power of discharging a criminal in the circumstances contemplated by the section. It is said that this Act applies to India and therefore a Judge of this Court has the same powers as a Judge of the King's Bench when it is the question of the issue of a writ of *habeas corpus* in an extradition matter. The Act can only come into operation where an arrangement has been made by the Crown with a foreign state with respect to the surrender to such state of fugitive criminals. By virtue of the provisions of S. 18, a law passed by a British possession may be incorporated in the Act, and S. 23 saves the power of the Governor-General of India in Council to make treaties for the extradition of criminals with Indian Native States and to carry into execution

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the provisions of such treaties. India has its own Extradition Act, namely, Act XV of 1903, which has been drafted on the assumption that the Native States in India are not foreign within the meaning of the English Act of 1870. The Indian Act contains no reference to *habeas corpus* and only Chapter II which deals with the surrender of fugitive criminals in the case of Foreign States has been incorporated in the English Act, *vide* the notification published in the Gazette of India, dated 14th May, 1904. Chapter III of the Indian Act relates to surrender of fugitive criminals in case of States other than Foreign States, and is intended to apply only to the surrender of fugitive criminals to Native States in India. The present case falls under Chapter III and as this chapter has not been made part of the English Act under S. 18 of the English Act, the English Act cannot be deemed to apply here.

Counsel for respondents 2 to 4 has advanced the argument that this Court has no power to quash the order of Pandrang Row, J., inasmuch as it was passed in the exercise of criminal jurisdiction and the order of a Judge sitting alone in criminal matters cannot be the subject of an appeal or revision. There is authority for the granting of a motion to quash a writ of *habeas corpus* wrongly issued—In re *The Justices of the Supreme Court of Judicature at Bombay*[1] and In the matter of *John Crawford*[2]—but as I hold that the Common Law Writ of *Habeas Corpus* does not run inBritish India it is not necessary for me to discuss this point. The question has to be approached from the point of view of an application under S. 491 of the Code of Criminal Procedure and the answer is that the order passed has been passed without jurisdiction and can be disregarded. If authority for this is wanted it is to be gathered from the decisions in In the matter of *Abdool Sobhan*[3], In re *Kunhammad Haji*[4], In re *Tadi Soma Naidu*[5] and *Narayan Vithal Samant* v. *Jankibai*[6].

As the order of Pandrang Rao, J., directing a writ of *habeas corpus* to be issued was an order passed without jurisdiction it must be disregarded and the application which the respondents have filed under S. 491 of the Code of Criminal

1. (1829) 1 Knapp's Rep. 1: 12 E.R. 222.
2. (1849) 13 Q.B. 613.
3. (1881) I.L.R. 8 Cal. 63.
4. (1922) 44 M.L.J. 450: I.L.R. 46 Mad. 382.
5. (1923) 46 M.L.J. 456: I.L.R. 47 Mad. 428.
6. (1915) I.L.R. 39 Bom. 604 (F.B.).

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Procedure must be dealt with by the Bench dealing with criminal matters. As it is within my authority to do so I direct that the application be placed before that Bench on Monday, the 7th November, 1938.

Madhavan Nair, J.—I agree.

Varadachariar, J.—I agree.

Wadsworth, J.—I agree.

Lakshmana Rao, J.—I agree.

B. V. V. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

In the matter of C. P. Mathen and others.

Poulose Mathen and another .. *Petitioners.**

In the matter of C.P. Mathen.

Criminal Procedure Code (V of 1898), S. 491—" Illegally or improperly detained "—Meaning of—Warrant issued by Political Agent in Native State under Ch. III, Extradition Act, for arrest of person in Presidency Town - Warrant merely stating commission of offence by person named—Arrested person in British India at the time of commission of offence alleged—Arrested person directed to be handed over at Frontier Police Station—No date on the order and no specific place or officer named for surrender of arrested person—Effect on legality of warrant—Arrest and detention under such warrant—If illegal or improper—Right of arrested person to be set at liberty —Extradition Act, Chs. II and III, Ss. 7 and 8-A.

In the case of a warrant issued by a Political Agent, it is only right to presume that the Political Agent has complied with all the rules before issuing the warrant. The fact that the warrant does not state or show on the face of it that the rules framed for the purpose have been obeyed or that the warrant merely states in general that so and so stands charged with offences is no ground for presuming that the rules have not been duly complied with or that no enquiry as prescribed by the rules has been made. A person arrested and detained under such a warrant cannot be said to be illegally or improperly detained within the meaning of S. 491, Criminal Procedure Code, so as to entitle him to be set at liberty.

When a warrant issued by the Political Agent, under S. 7 of the Extradition Act, is sent to the Chief Presidency Magistrate of a Presidency Town, the latter has no option in the matter but to execute the warrant. He is obliged to order the arrest of the person for whom the warrant is issued, and his custody of such person is perfectly legal and proper. The fact that there are defects in the warrant, namely, that it is not dated, that the direction in it is to surrender the prisoner to the Frontier Police Station in the Native State, without definitely naming a specific place, or that it does not indicate the officer to whom the prisoner is to be handed over, is not a matter of importance so as to render the warrant or the arrest and detention thereunder illegal or improper, though they might be points on which the Magistrate might make a reference and report to the Government under S. 8-A of the Extradition Act.

* Crl. M. P. No. 985 of 1938. 7th November, 1938.

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If it is proved that the arrested person was in British India at the time at which the offence with which he is charged is said to have been committed, that would be a good defence to the charge. It is not, however, relevant to the question whether the custody in which he is detained is legal or illegal. The arrested person cannot on that ground claim to be set at liberty as being illegally or improperly detained.

Petition under S. 491, Criminal Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *habeas corpus* directing that the abovenamed four persons, namely, C. P. Mathen, K. C. Mammen Mapillai, K. M. Eapen and K. V. Verghese be directed to be released from custody and produced before the High Court for being dealt with according to law.

K. Bhashyam Aiyangar and *V. T. Rangaswami Aiyangar* for Petitioners.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—This is an application under S. 491, Criminal Procedure Code, on behalf of four persons who have been arrested on the warrants issued by the Resident, Madras States. S. 491 (1) empowers this High Court, whenever it thinks fit, to direct (*a*) that a person within the limits of its Appellate Criminal Jurisdiction be brought up before the Court to be dealt with according to law and (*b*) that persons illegally or improperly detained in public or private custody within such limits be set at liberty. The contention on behalf of the four prisoners is that they have been illegally or improperly detained in custody and that therefore they should be brought up before this Court in order that they may be released. This application was made on the 21st October, 1938, and was supported by an affidavit sworn by Poulose Mathen, son of one of the prisoners, in these terms:—

I Poulose Mathen, son of Mr. C. P. Mathen, aged 21, residing at Marble Hall, 25, Sterling Road, Nungambakkam, Madras, do make oath and say as follows:

1. I am the first petitioner herein, and the second petitioner is the son of Mr. K. C. Mammen Mapillai.

2. I state that the present application has been filed for the issue of a writ of *habeas corpus* in respect of my father (1) Mr. C. P. Mathen, second petitioner's father; (2) Mr. K. C. Mammen Mapillai; (3) Mr. K. M. Eapen; and (4) Mr. K. V. Verghese who have been served last evening with an extradition warrant from Travancore, charging them with certain

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offences under the Penal Code, and I state that in pursuance of such a warrant, they have been arrested and are now in the custody of the Chief Presidency Magistrate, Madras and are to be taken to Travancore by the Shencottah Passenger leaving Egmore Station at 11 A.M.

3. I state that the warrant issued, apparently for a criminal offence as that would be the only medium through which such a course could be taken, is really for a political offence and I am advised that for a political offence no warrant could be issued for extradition from British India where the arrested persons have been living.

4. I state that purpose for which the warrant appears to have been issued is alleged offences under the Penal Code, Travancore, in connection with the winding up proceedings relating to the Travancore National and Quilon Bank, Ltd., of which my father was the Managing Director and Mr. Mapillai was the Chairman, Board of Directors.

5. I state that this alleged purpose is only a makebelieve inasmuch as it has been openly proclaimed in the Travancore State Press Communication issued that the Travancore National Bank is aiding the Travancore State Congress and in fact a circular had been issued in the State itself to that effect.

6. Further, I state that on 25th April, 1938, a circular was issued under the authority of the Commissioner of Police, Travancore, that Mr. C. P. Mathen is a Political to be watched inside and outside the State. Moreover, Mr. Mammen Mapillai is the Proprietor of the Malayalam paper, 'Manorama', which had been forfeited for publishing articles of a political nature, and the press has been forfeited, the licence having been cancelled.

7. I state that the abovesaid circumstances would abundantly prove that the warrant of extradition is only with a view to bring the four arrested persons within the state limits so that they may be charged for alleged political offences and exposed to all kinds of humiliation and disgrace besides personal ill-treatment such as to endanger health and safety.

8. I state that the political conditions in the Travancore State are such that no one charged or alleged to be concerned in any political offences is safe and that anything may happen to them.

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9. I state that the alleged charge that they have wrongly dealt with a sum of one crore of rupees is obviously untenable and unfounded, and they have absolutely no idea of evading the law and they will subject themselves to such examination as soon as normal conditions of peace are restored, especially as they are sought to be politically involved.

10. I state that Mr. K. C. Mammen Mapillai is aged 65 and is having serious trouble with piles and is not at all in a fit position to stand travel and was under treatment when he was suddenly arrested.

11. I state that the issue of a warrant and the arrest are not justifiable nor are they done in the interests of public justice but with a view to clap them in jail for political offences and the Travancore Government are bent upon bringing them to trouble by securing their physical presence within the State.

12. I state that in the Madras High Court in connection with the proceedings relating to the Bank it had been found by His Lordship Mr. Justice Venkataramana Rao that a major portion of the assets as ascertained by the liquidators is good and that the consideration of re-starting the Bank is worthy of attention.

13. I state that the arrest and detention of the four persons in custody are contrary to law and it is necessary that they should in the interests of their personal safety and health be ordered to be brought before this Hon'ble Court for orders.

14. It is, therefore, just and necessary that this Hon'ble Court should be pleased to order the issue of a writ directing that Messrs. C.P. Mathen, K.C. Mammen Mapillai, K. M. Eapen and K. V. Verghese now within the limits of this Hon'ble Court arrested by the Chief Presidency Magistrate, Egmore, under an extradition warrant issued by the Travancore State and kept under his custody at Egmore be ordered to be brought up to this Hon'ble Court for being dealt with according to law and directing them to be set at liberty and that such other orders be passed as may be necessary in the interests of justice, as otherwise, the petitioner will be put to considerable loss and hardship. (Signed) C. M. Poulose.

Solemnly affirmed at Royapettah this 21st day of October, 1938, and signed his name in my presence.

(Signed) A. V. Ramalingam Aiyar,
Dewan Bahadur.

No attempt has been made before us to prove the allegations made in the affidavit to the effect that these proceedings have been taken for the extradition of these four prisoners for a political offence. There is nothing in this affidavit to indicate that the prisoners are being illegally or improperly detained in custody. In a further affidavit sworn on the 26th October, the same deponent stated as follows:—

I, Poulose Mathen, son of C. P. Mathen, aged 21 years, residing at "Marble Hall", 25, Sterling Road, Nungambakkam, Madras, do make oath and say as follows:—

1. I am the petitioner herein and I have filed the application praying for the issue of a writ of *habeas corpus* in respect of my father, (1) C. P. Mathen, (2) Mr. K. C. Mammen Mapillai, (3) Mr. K. M. Eapen and (4) K. V. Verghese.

2. I state that the aforesaid four persons were arrested on the night of 20th October, 1938, by the police at the instance of the Chief Presidency Magistrate, Madras, to whom an extradition warrant has been issued bv the Resident, Travancore State, directing that they be apprehended and handed over to the Frontier Police of Trivandrum for production before the District Magistrate, Trivandrum. The warrants were not, however, even shown to the arrested persons, and the substance thereof was ascertained only next morning in the office of the Chief Presidency Magistrate.

3. I state that the extradition warrant issued by the Resident purported to state, in so far as I have been able to gather, that charges have been laid as against them for having committed offences of breach of trust by bankers, falsification of accounts, cheating and abetment thereof as directors of the Travancore National and Quilon Bank, Ltd., now in liquidation.

4. I state that the fourth person is not at all a Director of the Bank and the offences with which they are charged are made to appear as if they have been committed in Travancore.

5. I state that the Travancore National Bank was no doubt incorporated in Travancore in 1912, and the Quilon Bank in 1919, but the latter went into voluntary liquidation and both the Banks were amalgamated in September, 1937, under the name and style of the Travancore National and Quilon Bank, Ltd., till it went into liquidation.

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6. I state that even though it was incorporated in Travancore State, Madras was the central place of business and the branches were all controlled from Madras only where all the Bank's accounts were kept. In fact in the application now pending in this Hon'ble Court for re-construction of the Bank it was observed by his Lordship Mr. Justice Venkataramana Rao as follows:—

"The policy of the Bank was directed from the central office (at Madras) as aforesaid and from the affidavit filed by Mr. K. M Eapen, the centre of administrative control was in Madras, all the branches including the branches in Travancore and other states have to send their statements of accounts and other returns to the central office at Madras and they have to take orders from the central office for all matters connected with the business in their respective branches. All the information regarding the assets and liabilities of all the branches was available at Madras and only those books which were statutorily required to be kept under Travancore Companies Regulation were kept at the Registered Office at Quilon."

7. I further state that of the 80 branches of the Bank, 40 branches existed in the Madras Presidency, 18 in the Travancore State and the remaining were situated in Bombay, Ceylon, and other places. The bulk of the business was in the Madras Presidency and about $1\frac{1}{3}$ Crores of rupees represents the assets outside the Travancore State.

8. I state that the liquidation and winding up proceedings have been filed in this Hon'ble Court and Official Liquidators having been appointed, their first report shows that about 88 per cent. of the assets is good.

9. I state that under those circumstances no offence of any of the kinds above referred to, such as criminal breach of trust, falsification of accounts or, cheating could have been committed by the aforesaid four persons in the Travancore State and the warrant is illegal. They have ever since the beginning of 1937 come over to Madras and have been permanently staying with their families at Madras only with a view to have direct supervision over all the branches, and for discharging their functions in connection with other institutions as well.

10. I state that in any view the offences could at all be alleged to have been committed in Madras only within the jurisdiction of British Indian Courts and no offence could be said to have been committed in the Travancore State justifying issue of the extradition warrants. I state that neither the complaint nor any materials on which the charges are said to have been laid are available and in the absence of any reference

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thereto I state that the issue of the warrant itself is illegal and contrary to the statute, as there is nothing to indicate how the offences are said to have been committed in the Travancore State before demanding extradition. On account of the secrecy of the entire proceedings and rush of events I have not been able to ascertain the particulars on which the offence or offences could be said to have been committed within the jurisdiction of the Native State.

11. I state that the warrant itself is defective and is not in conformity with the provisions of the statute under which it purports to have been issued.

12. I further state that the political situation at present in Travancore is tense, and the Bank is somehow or other sought to be connected with the Travancore State Congress as is apparent from a circular issued by the State and my father, Mr. C. P. Mathen, was by a circular dated 25th April, 1938, declared to be a political to be watched inside and outside the State while the Malayalam paper "Manorama" run by the second of the arrested persons was forfeited for publishing articles of a political nature and the press itself has been confiscated and the licence cancelled.

13. I state that under the above circumstances it is not proper to issue the extradition warrant as, if under colour of such a warrant they are taken to the State limits, they would be arrested for alleged political offences and exposed to the greatest and most humiliating hardships both for their person as well as for their reputation. They have absolutely no intention to evade law and will be ready to answer any charge if lawfully made.

14. I state that the issue of an extradition warrant in the light of the above state of facts is not only illegal but is also improper. In fact the learned Advocate-General of this Hon'ble Court on behalf of the Official Liquidator, Quilon, had requested for a month's time to send a report as regards the conditions and affairs of the Bank and time was granted till 7th November, 1938, and without any report or examination of the 4th of the arrested persons who had attended Court, the criminal charges have been levelled and they were to have been removed with dramatic speed.

15. I further state that the second of the arrested persons Mr. K. C. Mammen Mapillai is aged 65 and is suffering from

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strangulated piles and is confined in the General Hospital, Madras, and the Doctor has advised that he may have to remain there for some time.

16. I applied for the issue of a writ of ***habeas corpus*** at a time when none of us had any idea of the nature and scope of the warrants of extradition. In fact, the Official Liquidator, Quilon, has been here to find out if any information could be available from the liquidators appointed by this Hon'ble Court inasmuch as there were no materials available to him from the records there to bring home any offence against the arrested persons.

17. I further state that owing to the strong and powerful influence of the Dewan of Travancore who is bent on bringing the arrested persons to trouble on account of their supposed connection with the State Congress which is considered as a disloyal and subversive political organisation formed to secure the removal of the Dewan and question the supreme authority of the State, the Resident has either been persuaded or induced to believe that offences had been committed by the arrested persons without any definite or reliable particulars before him.

18. I further have every reason to believe that none of the essential conditions necessary to be observed before issuing the warrants under the Act has been complied with or even shown to have been taken into account, and that the warrants were got issued on account of the peculiar position he was placed in, in relation to the State and the governing authorities.

19. It is therefore apparent that considerations other than legal or proper have weighed with the Resident in issuing the warrants and if the true state of affairs or real and tangible particulars have been placed before him without any other consideration the warrants would not have been issued as against the arrested persons who are respectable and law-abiding citizens holding responsible position in life.

20. I further state that if the charges relating to their connection with the Bank of which Madras was the central source should be levelled against them and tried in any Court of British India, they are ready and willing to vindicate their position and I am advised that they could be tried only in Courts of British India and not in the State for any consequences that could have ensued thereby. I apprehend that no justice would

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be available to them from Courts subordinate to the State which has been apparently taking direct interest in the case.

21. Further, there are ample provisions in the Penal Code of British India for punishing the offenders for all or any of the offences they are charged with and the atmosphere that has been sedulously created in the Travancore State against the arrested persons leaves no ray of hope that there will be justice meted out to them, and the Resident being perfectly aware of all the circumstances and being in touch with the State acted improperly in ordering the issue of the warrant for extradition.

22. It is therefore just and necessary that this Hon'ble Court should be pleased to call for all the records relating to extradition and to order the issue of a writ of *habeas corpus* directing that Messrs. C. P. Mathen, K. C. Mammen Mapillai, K. M. Eapen and K. V. Verghese arrested by and in the custody of the Chief Presidency Magistrate, Egmore, under Extradition warrants issued by the Resident, Travancore State, be ordered to be brought up and set at liberty and that such other orders may be passed in the interests of justice, as otherwise, I will be put to serious loss and hardship.

The only allegation in this affidavit which, we think, requires notice is that in paragraph 11 in which it is stated that the warrant itself is defective and is not in conformity with the provisions of the Statute under which it purports to have been issued. The other allegations are, in our opinion, irrelevant for the present purpose. If it is proved, for example, that the prisoners have been in British India at the time at which the offences with which they are charged are said to have been committed, that would be a good defence to the charges. It is not, however, relevant to the question whether the custody in which they are now detained is legal or illegal. The allegations about the political situation in Travancore are also quite irrelevant.

The warrants upon which the prisoners have been arrested have been produced before us and Mr. Bashyam Aiyangar for the prisoners has invited us to say that an examination of the warrants will show that they have been illegally or improperly issued. The warrants are all in the same form and they run as follows:—

"Whereas . . . . Director of the Travancore National and Quilon Bank, Ltd., which is now under liquidation, who is now reported

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to be residing at . . . . stands charged with offences punishable under Ss. 410, 419, 421, 480 and also Ss. 99 and 104 of the Travancore Penal Code corresponding to Ss. 409, 418, 420, 477-A, 109 and 114 of the Indian Penal Code committed in the Travancore State, you are hereby directed to apprehend the said . . . . . . and surrender him to the Frontier Police Station, Travancore State, for production before the District Magistrate of Trivandrum.

Herein fail not.

(Signed)

Resident for the Madras States."

These warrants have been issued under S. 7 of the Extradition Act of 1903, Travancore being a State which is not a Foreign State and the allegations being that the persons whose arrest is required are in British India. Mr. Bashyam Aiyangar has pointed out that Chapter 2 of the Extradition Act which deals with the surrender of fugitive criminals in case of Foreign States, there is provision made for a preliminary enquiry by the Magistrate in British India before extradition is ordered. The Magistrate is obliged to hold an enquiry in the same manner as if the case were one triable by the Court of Session or the High Court; he is obliged, if he thinks that a *prima facie* case is made out to commit the criminal to prison to await the orders of the Government of India. He is obliged also to report the result of his enquiry to the Government of India and await their orders. In Chap. III, there is no such provision for an enquiry by a Magistrate in British India. It is, however, provided in the rules made under the Act which by S. 22, sub-S. (3) have effect as if enacted by the Act that in such cases as the present, the Political Agent (*vide* r. 4) shall in all cases before issuing the warrant under S. 7 satisfy himself by preliminary enquiry that there is a *prima facie* case against the accused person. By r. 5 the Political Agent is required before issuing the warrant under S. 7, to decide whether the warrant shall provide for the delivery of the accused persons to the Political Agent or to a British Officer subordinate to him with a view to his trial by the Political Agent, or to an authority of the State with a view to his trial by the State Courts. Sub-r. (2) of r. 5 requires the Political Agent to take certain matters into consideration before coming to a decision. By r. 7 the Political Agent is required to satisfy himself in the case of an accused person who has been made over for trial to the Court of the State that the accused person receives a fair trial and that the

punishment inflicted on conviction is not excessive or barbarous and if he is not so satisfied he shall demand the restoration of the person to his custody pending orders of the Governor-General in Council. It is clear therefore that this procedure before the Political Agent in cases falling under Chap. III takes the place of the preliminary enquiry and other proceedings provided in Chap. II in the case of criminals whose extradition to foreign states is required. The warrants issued in this case do not show that the Political Agent has obeyed the rules framed for his procedure under the Act. Mr. Bashyam Aiyangar invites us to hold that the Political Agent or some-one else on his behalf should be called upon to satisfy us that everything required by the rules has been done. He even contends that the form of the warrants shows that the Political Agent has not complied with the rules. The warrant merely states that so and so stands charged with offences. Mr. Bashyam Aiyangar suggests that this implies that the Political Agent has not made an enquiry such as is prescribed under r. 4 already alluded to. We do not think we shall be justified in making any such presumption. On the contrary since the rules have the force of law, we think it is right to presume that the Political Agent has complied with the rules before issuing the warrants. The warrants do not in our opinion show that the rules have not been complied with.

The question which we have to consider is whether the prisoners are being illegally or improperly detained in the custody of the Chief Presidency Magistrate. This we think is a simple question in this case. S. 7 of the Extradition Act, sub-S. (1) says that:

"Where an extradition offence has been committed or is supposed to have been committed by a person not being a European British subject in the territories of any State not being a Foreign State and such person escapes into or is in British India and the Political Agent in or for such State issue a warrant addressed to the District Magistrate of any District in which such person is believed to be or if such person is believed to be in any Presidency Town to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly."

In the face of this provision of law, it is clear to us that the Chief Presidency Magistrate has no option in the matter. When he receives the Political Agent's warrant, he is obliged to act in pursuance of it and to obey it. It has been pointed

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out by Mr. Bashyam Aiyangar for the prisoners that in S. 8-A there is a provision made for the accused person who is arrested making a statement to the Chief Presidency Magistrate and provision is made that the Magistrate if he thinks fit, may, before proceeding further report the case to the Central Government and pending the receipt of orders on such report, may detain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required. In the report made by the learned Chief Presidency Magistrate to the writ *nisi* issued by Mr. Justice Pandrang Row, he has reported that the four prisoners were produced before him at 9 A.M. on 21st October, 1938. He says further that Mr. V. Rajagopalachariar who appeared for the arrested persons wanted him to make a reference under S. 8-A of the Indian Extradition Act to the Local Government (in accordance with the Adaptation of Indian Laws Order, the word "Central" must now be substituted for the word "Local" in S. 8-A) and pending reference to enlarge the prisoners in custody on bail. This application was opposed by Mr. Jayarama Aiyar who appeared on behalf of the Travancore Government. While the learned Magistrate was hearing the petition, Rao Bahadur V. T. Rangaswami Aiyangar produced the order passed by Mr. Justice Pandrang Row, directing the Magistrate to keep the prisoners in his custody and not to send them away. The Magistrate, therefore, remanded three of the four prisoners to the Penitentiary and one who was said to be suffering from strangulated piles to the General Hospital. It is clear therefore that the learned Magistrate was interrupted by our learned brother's stay order while he was considering the desirability or otherwise of making a reference to the Government under S. 8-A. The learned Magistrate expressed the view that under S. 7 he had no option but to execute the warrants and that he had acted so far in strict conformity with the provision of law. In this we support the learned Magistrate. We consider that he was obliged to order the arrest of the persons for whom warrants were issued and that his custody of them is perfectly legal and proper.

The only criticisms of the warrants of which we feel obliged to take any notice are, firstly, that the warrants are not dated and secondly that the direction in the warrants to surrender the prisoners to the Frontier Police Station of the

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Travancore State, is somewhat indefinite. It is represented by Mr. Bashyam Aiyangar for the prisoners and we think it is highly probable that there is more than one Police Station on the Frontier between British India and the Travancore State. The warrant does not instruct the Magistrate in terms with regard to the particular Frontier Police Station at which the prisoners should be delivered nor does it indicate the officer to whom they are to be handed over. But we have already pointed out that the learned Magistrate when his proceedings were interrupted by the service upon him of our learned brother's stay order, was considering an application for making a reference under S. 8-A of the Act and it is quite conceivable, we think, that this is a point upon which the Magistrate might have thought it necessary to make a report to the Government. We note, however, that the warrants require the prisoners to be surrendered at the Frontier Police Station for production before the District Magistrate of Trivandrum. For all practical purposes it seems to us that this indefiniteness with regard to the Frontier Police Station is not a matter of any importance.

On the only point, that is material, namely, whether the custody in which the prisoners are, is illegal or improper we are quite clear that his custody of them was legal and proper *prima facie*, and we see no reason to suppose that there is any illegality or impropriety connected with the issue of the warrants for the arrest of these prisoners. We therefore dismiss this application under S. 491.

S. V. V. —— *Application dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD ROMER, LORD PORTER AND SIR GEORGE RANKIN.

Bhaya Mohammad Azim Khan and others .. *Appellants**

v.

Raja Saadat Ali Khan and others .. *Respondents.*

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Procedure—Oudh Chief Court—Decision in Original Jurisdiction—Whether appeal lies direct to His Majesty in Council—Prerogative of His Majesty in Council to receive or reject appeals—Code of Civil Procedure (V of 1908), Ss. 105, 110, 111 and 112—Oudh Courts Act—U. P. Act (IV of 1925), S. 12 (1)—Effect.

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* P. C. Appeal No. 70 of 1935. 17th March, 1939.
Oudh Appeals Nos. 18 and 19 of 1931.

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The plaintiffs brought actions against the defendants within the jurisdiction of the Chief Court of Oudh in respect of matters involving, apart from extensive disputes of fact, a number of important legal questions. The actions having been heard and dismissed by the Chief Court in its original jurisdiction, the plaintiffs applied to that Court under Ss. 109 and 110 of the Code of Civil Procedure for a certificate that the case was a fit one for appeal to His Majesty in Council. That application having been refused, the plaintiffs petitioned His Majesty in Council for special leave to appeal to His Majesty, on the ground that S. 12 (1) of the U. P Act (IV of 1925) gave a right of appeal under S. 109 (*b*) of the Code. The defendants were not represented on the hearing of the petition, and the Board gave leave to appeal with liberty to the defendant-respondents to take the preliminary objection that special leave to appeal ought not to have been given. On presentation of the appeal, on the respondents raising the preliminary objection,

Held, that the Board had a full discretion to hold, as it did hold, that special leave ought not to have been given, and that they had that discretion notwithstanding the undoubted right of the provincial legislature to give powers to, or to withhold them from, the new Chief Court, and having regard to the interests of the administration of justice in the province, which interests would be detrimentally affected by any procedure under which the appellate functions of the Chief Court were ignored.

It is not to be regarded as either orderly or practicable that an unsuccessful litigant before the Chief Court of Oudh in its original jurisdiction should have the optional right to appeal to His Majesty in Council under Ss. 109 and 110 of the Code of Civil Procedure either after first appealing to an appellate bench of that Court or by omitting that tribunal as he chooses, and it was not the intention of the provincial legislature by the Oudh Courts Act, 1925, to introduce any such system. The effect of Ss. 109 and 110 of the Code of Civil Procedure taken together seems to be to provide an appeal to His Majesty where no further appeal lies in India. The Indian legislature was not claiming by the terms of the Code to abridge or to extend the prerogative, and the discretion which S. 112, Civil Procedure Code, affirms applies to the rejecting as well as to the receiving of appeals, the prerogative not being finally concluded for either purpose by S. 109.

Quaere, whether the expression "an appeal shall lie" merely signifies authority to appeal to the named tribunal or implies a prohibition against appealing to any other tribunal.

Appeal by special leave from two decrees dated 22nd December, 1930, of the Chief Court of Oudh in its original civil jurisdiction (Nanavutty, J.).

[The facts are sufficiently set out in the judgment.]

The respondents raised the preliminary objection that special leave ought not to have been given.

R. F. Roxburgh, K.C. and *S. Hyam*, for the respondent Raja Saadat.—Special leave to appeal to the Board ought, it is submited, not to have been granted. There is certainly no appeal as of right direct to His Majesty in Council from the decision of a single judge of the Chief Court, Oudh and it would be undesirable that such a course should be allowed. [Counsel reviewed the

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relevant statutory provisions: S. 80-A of the Government of India Act, 1915, the Oudh Courts Act, 1925, and Ss. 4 (1), 109, 111, 112 of the Code of Civil Procedure.]

It is impossible to define exhaustively the prerogative to grant or refuse leave to appeal. (Counsel referred to Safford and Wheeler's Privy Council Practice at p. 732.) But where an appeal lies to an appellate Court in India, the implication, it is submitted, is that appeal direct to the Privy Council should not be permitted.

J. P. Eddy, K.C., T.F.R. McDonnell and *Rashid*, for the legal representatives of Mumtaz Ali Khan, referred to *Barker* v. *Edger*[1], *Nicolle* v. *Nicolle*[2] and *Sadar Ali* v. *Dalimuddin*[3].

Dunne, K. C. and *Wallach* for Appellants.—The fact that S. 12 of the Oudh Courts Act, 1925, gives a right of appeal to an appellate bench of the Chief Court does not mean that there may not be other concurrent rights of appeal. At the material date, S. 12 began with the words "except as otherwise provided by any enactment for the time being in force", the effect of which was to preserve the effect of S. 109 of the Code of Civil Procedure. That latter section expressly provides for appeal direct to the Privy Council from a decision of a High Court given in its original jurisdiction. The Chief Court, Oudh, is a High Court within the meaning of that term in S. 3 (24) of the General Clauses Act, 1897.

Roxburgh, K.C., in reply.

17th March, 1939. Their Lordships' judgment was delivered by

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SIR GEORGE RANKIN.—This appeal is brought from two decrees of the 22nd December, 1930, made in the exercise of the original jurisdiction conferred upon the Chief Court of Oudh by S. 7 of the Oudh Courts Act, 1925, an Act of the Local Legislature of the United Provinces of Agra and Oudh. By these decrees Nanavutty, J., as trial Judge, after a protracted hearing, dismissed two suits (numbered respectively 11 and 12 of 1928), which had been instituted on the 2nd November, 1928. The two suits were tried together, and one judgment was given covering the issues in both. They came on for hearing on the 15th July, 1929. Evidence both oral and documentary was adduced in great quantity; the hearing continued until the 2nd August, 1929, when the case was postponed until the 13th

1. (1898) A.C. 748 at 754. 2. (1922) 1 A.C. 284.
3. (1928) I.L.R. 56 Cal. 512 (S.B.).

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February, 1930; thereafter the case was heard on a number of dates in February, March and April of that year. Sixteen issues in one case and fourteen in the other had been framed, and in a lengthy judgment the learned Judge considered and decided a number of important and difficult questions both of fact and of law.

Suit No. 11 was brought by 16 persons, now appellants, and may be summarily described as brought to establish the right of the first plaintiff to the taluqdari estate of Nanpara, and the rights of some or all of the plaintiffs to certain non-taluqdari property—villages, houses and movables—in succession to Raja Mohammad Siddique Khan, who had died on the 30th December, 1907 (and who is herein referred to as the late Raja). The first defendant in that suit (now respondent No. 1) was Raja Saadat Ali Khan; he was a son of the late Raja's sister, but he claimed to have been adopted by one of the late Raja's widows, Saltanat Begum, under the Oudh Estates Act (I of 1869) and in accordance with the provisions of the late Raja's will, whereby he left successive life estates and power of adoption to each of his four widows in a certain order. In November, 1925, the Court of Wards had given possession of the Nanpara estate to this defendant. The second defendant, Mumtaz Ali Khan (who died in 1934 while these suits were pending) was Raja of Utraula (another taluqdari estate); he had married Mohammad Kaniz Begum, sister to the late Raja of Nanpara, and on her death in 1919 had come into possession of some of the suit properties under a compromise made in 1910 which need not here be detailed. The third defendant was Rani Quamar Zamani Begum, who had been the first of five ladies whom the late Raja of Nanpara had married and who had been given a certain interest in his estate for her life by the compromise already mentioned.

In this suit the plaintiffs' case involved several different inquiries. In the first place, they had to displace the adoption of Saadat Ali. In the second place, they had to prove their pedigree so as to connect themselves with the admitted pedigree of the late Raja of Nanpara. This required that they should establish that an ancestor of the late Raja of Nanpara called Jehan Khan who lived in the middle of the seventeenth century, had besides his eldest son Mohammad Khan a second son called Mahmud Khan, and that this second son was father to one

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Mahabat Khan, ancestor of the plaintiffs. Thirdly, the plaintiffs had to show that certain specified individuals among them were the persons entitled to succeed on an intestacy, by proving that there was a custom of male lineal primogeniture or a custom to exclude females from succession. On all these points, and on others, the learned trial Judge found against the plaintiffs.

Suit No. 12 was brought by the same 16 plaintiffs together with two other persons of whom no mention need here be made. The first defendant was Mumtaz Ali Khan, Raja of Utraula, and Saadat Ali Khan was the second defendant. The plaintiffs' claim in this suit was laid as the nearest male agnates of Mohammad Kaniz Begum, the first defendant's wife, who had died in 1919. The claim was that the plaintiffs were entitled, as her heirs under the Oudh Estates Act (I of 1869), to 17 villages, part of the taluqdari estate of Utraula which had been transferred to her by her husband, the first defendant; also that three pattis which had been purchased by her had descended to one or other of the plaintiffs as non-taluqdari property governed by a custom of male lineal primogeniture. The main defences in this case were four, *first,* that the deeds of gift executed in his wife's favour by the Raja of Utraula had been purely *benami* and colourable transactions not intended by either party to be operative but only to shield the property from creditors; *secondly,* that the pedigree put forward by the plaintiffs to connect themselves with the lady was false; *thirdly,* that none of the plaintiffs was her heir; and *fourthly,* limitation. On these points the finding of the trial Judge was against the plaintiffs.

It is not necessary to set out in any fuller detail the circumstances or subject-matter of the litigation in order to make clear that it covered a wide area of disputed fact, and that unless the plaintiffs' claims could be dismissed on facts *in limine* they involved a number of important legal questions both as regards the application to Muslims of the right of adoption conferred by the Oudh Estates Act and other aspects of the law and custom of succession.

The first question for consideration by the Board is presented by the fact that their Lordships are asked to act as a Court of first appeal from the decision of a learned Judge of the Chief Court sitting at first instance. In a case of importance and complexity involving fact and law special to the

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province of Oudh, the experience and judgment of an appellate Bench of the Chief Court would contribute greatly to clarify the matter in dispute and the principles of law applicable to Oudh families and taluqdari estates; indeed it is only to be expected that some at least of the issues of fact would have been settled by concurrent findings of the Indian Courts.

The learned trial Judge having pronounced judgment on the 22nd December, 1930, and signed the two decrees on the 16th February, 1931, the plaintiffs on the 18th May, 1931, filed in the Chief Court applications under Ss. 109 and 110 and O. 45 of the Code of Civil Procedure asking for a certificate that the case was fit to be taken on appeal to His Majesty in Council. Two days later (20th May, 1931), they presented to the Chief Court a further application asking that if the Court should hold that their request for a certificate could not be granted their application therefor might be treated as a memorandum of appeal to an appellate Bench of the Chief Court. On the 21st September, 1931, a Bench of the Chief Court (Wazir Hasan, C.J. and Srivastava, J.), refused the certificate on the ground that an appeal to His Majesty from the decree of the trial Judge did not lie under S. 109 of the Code, and on the application of the 20th May, 1931, an order was passed in the following terms: "This application is not pressed and is therefore rejected." The next step taken by the plaintiffs was to apply for special leave by a petition lodged on the 9th March, 1932, where it was contended that the opening words of sub-S. (1) of S. 12 of the Oudh Courts Act, 1925—"except as otherwise provided by any enactment for the time being in force"—gave them a right to appeal from the trial Judge direct to His Majesty under S. 109 (*b*) of the Civil Procedure Code, and that in any event the former Act, being an Act of a local legislature, could not repeal the rights given by an Act passed by the Indian legislature. This petition having been heard by the Board on the 5th April, 1932, in the absence of anyone appearing for the respondents, though not without notice to them, by an Order in Council dated the 9th April, 1932, it was ordered that leave ought to be given to the petitioners to enter and prosecute their appeal and that the respondents ought to be at liberty upon the hearing of the appeal to take the objection that special leave to appeal ought not to have been granted. Their Lordships have before them a

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transcript of a few observations made at the conclusion of the hearing of the application for leave, but they are unable to interpret these as intended to restrict the discretion of the present Board after hearing full argument upon the effect of the Indian enactments. Indeed they are not of opinion that the question whether special leave ought to have been granted can be confined to a bare question of jurisdiction or can otherwise be regarded as made up of separate and distinct questions of which some are, but others are not, before the present Board. They observe, however, with some concern, that though this preliminary point was specially reserved by the Order in Council some seven years ago, no party took any steps to bring it expeditiously as a preliminary point before the Board so as to avoid useless expenditure of time and money in preparing the case for hearing on the merits, should the Board be of opinion that special leave should not have been granted. This failure to take such steps is, in their Lordships' opinion, difficult to justify and much to be regretted, and it cannot be permitted to influence the decision of the Board on the question whether special leave ought to bave been granted.

The definition of "High Court" given by cl. (24) of S. 3 of the General Clauses Act (X of 1897) and Ss. 4 (1), 109, 110, 111 and 112 (1) of the Civil Procedure Code are as follows:—

"3.—(24) 'High Court,' used with reference to civil proceedings, shall mean the highest Civil Court of appeal in the part of British India in which the Act or Regulation containing the expression operates.

(C.P.C.) "4.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

"109. Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

"(*a*) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction;

"(*b*) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and

"(*c*) from any decree or order, when the case, as herein after provided, is certified to be a fit one for appeal to His Majesty in Council.

"110. In each of the cases mentioned in clauses (*a*) and (*b*) of S. 109, the amount or value of the subject-matter of the suit in the Court of first

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instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

"111. Notwithstanding anything contained in S. 109, no appeal shall lie to His Majesty in Council—

"(a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

"(b) from any decree from which under S. 102 no second appeal lies.

"112.—(1) Nothing contained in this Code shall be deemed—

"(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

"(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee."

The Oudh Courts Act (U. P. Act IV of 1925) was passed to amend and consolidate the law relating to the Courts in Oudh. Before 1925 the highest Court in Oudh was the Court of the Judicial Commissioner; the system of land tenure obtaining in the province under the Oudh Estates Act (I of 1869) gave rise to complex litigation, and suits to establish rights of succession to valuable taluqdari estates were tried at first instance by a Subordinate Judge and went on appeal to two judges of the Judicial Commissioner's Court. By the Act of 1925 the legislature of the province set up a Chief Court. It gave to the new Court jurisdiction as the highest civil and criminal court of appeal and revision (Ss. 8 and 9), thus making it a High Court within the definition clause of S. 3 of the General Clauses Act. It also conferred upon the new Court an exclusive original jurisdiction which might be exercised by a single Judge, unless statute or rule otherwise provided. This original jurisdiction was not a local jurisdiction confined to the precincts of the chief town or any other town, but was a jurisdiction over all suits valued at five lakhs of rupees or over. It was not confined to suits in respect of taluqdari estates; on the other hand it is not in doubt that these

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were the suits for which the new jurisdiction was mainly designed.

By the Lower Burma Courts Act, 1900 (VI of 1900), the Indian legislature had established a Chief Court for Lower Burma with original jurisdiction within the town of Rangoon. Ss. 14 and 15 of that Act, which were followed in their wording by Ss. 12 and 13 of the Oudh Act of 1925, began with the same opening words—"except as otherwise provided by any enactment for the time being in force". The Punjab legislature used the same opening phrase in the parallel sections. (9 and 10) of the Punjab Courts Act, 1914 [Punjab Act III of 1914]. S. 12 (1) of the Oudh Act was a condensed version of its predecessors, and S. 13 introduced little variation save for the reference to S. 98 of the Code which was new.

"Lower Burma Courts Act, 1900 (Lower Burma Act VI of 1900).

14. Except as otherwise provided by any enactment for the time being in force, an appeal from any decree made by a single Judge of the Chief Court or from any order made by a single Judge of the Chief Court when an appeal from such order is permitted by any law for the time being in force—

(*a*) in the exercise of its original jurisdiction as the principal Civil Court of original jurisdiction for the Rangoon Town, or

(*b*) in the exercise of its original jurisdiction with respect to insolvent debtors and their creditors, or

(*c*) in the exercise of its original jurisdiction in cases withdrawn from other Courts under S. 25 of the Code of Civil Procedure, or

(*d*) in the exercise of any other original jurisdiction of a civil nature to which the Chief Court may by rule extend this section,

shall lie to a bench of the Chief Court consisting of two other Judges of the Chief Court.

15. Except as otherwise provided by any enactment for the time being in force—

(*a*) where there is a difference of opinion among the Judges composing any bench of the Chief Court, the decision shall be in accordance with the opinion of the majority of those Judges;

(*b*) if there is no such majority, then—

(*i*) if the bench is a Full Bench, the decision shall be in accordance with the opinion of the Senior Judge of the bench;

(*ii*) in other cases, the bench before which the difference has arisen shall refer it to a Full Bench, and shall dispose of the case in accordance with the decision of the Full Bench.

"Punjab Courts Act, 1914 (Punjab Act III of 1914).

9. Except as otherwise provided by any enactment for the time being in force, an appeal from any decree or order made by the Chief Court—

10. Except as otherwise provided by any enactment for the time being in force—

(1) when there is a difference of

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(a) in exercise of its original jurisdiction in cases withdrawn from other Courts under S. 24 of the Code of Civil Procedure or S. 48 of this Act, or

(b) in exercise of any other original jurisdiction of a civil nature to which the Chief Court may by rule extend this section,

shall lie in the cases and in manner following (that is to say):—

(1) if the decree or order is made by a single Judge, the appeal shall lie either to a bench consisting of two other Judges, or to a FullBench, as the Court may, by general rule or special order, direct;

(2) if the decree or order is made by a bench of Judges not being a Full Bench, and the Judges differ in opinion, the appeal shall lie to a Full Bench.

opinion among the Judges composing any bench of the Chief Court the decision shall be in accordance with the opinion of the majority of those Judges;

(2) if there is no such majority, then—

(a) if the bench is a Full Bench, or is exercising original civil jurisdiction, the decision shall be in accordance with the opinion of the Senior Judge;

(b) in other cases the bench before which the question has arisen shall refer the question to a Full Bench, and shall dispose of the case in accordance with the decision of the Full Bench.

" *Oudh Courts Act, 1925* (*U. P. Act IV of 1925*).

12.—(1) Except as otherwise provided by any enactment for the time being in force, an appeal from any original decree or from any order against which an appeal is permitted by any law for the time being in force, made by a single Judge of the Chief Court, shall lie to a Bench consisting of two other Judges of the Chief Court.

(2) Except as otherwise provided by any enactment for the time being in force, an appeal from any appellate decree made by a single Judge of the Chief Court shall lie to a Bench consisting of two other Judges of the Chief Court, if the Judge who made the decree declares that the case is a fit one for appeal."

13. Except as otherwise provided by S. 98 of the Code of Civil Procedure, 1908, or any other enactment for the time being in force—

(i) where there is a difference of opinion among the Judges composing any Bench of the Chief Court the decision shall be in accordance with the opinion of the majority of those Judges;

(ii) if there is no such majority then—

(a) if the Bench is a Full Bench, the decision shall be in accordance with the opinion of the senior Judge;

(b) in other cases the Bench before which the difference has arisen shall either refer the question to a Full Bench and dispose of the case in accordance with the decision of the Full Bench or refer the whole case for decision to a Full Bench "

No decisions on these sections of the Acts of 1900 or 1914 have been cited in argument, and their Lordships have no knowledge of any difficulty having been occasioned in Burma or the Punjab by their terms in the years before 1922 and 1919 respectively when the Chief Courts became High Courts; or of

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any attempt to claim that the duties of a court of first appeal from original decrees were thereby cast upon the prerogative whether exclusively or at the option of the appellant in each case. The Civil Procedure Code of 1882 applied to British Burma in 1900 and the Code of 1908 applied to the Punjab in 1914, but it does not follow that the effect of the words of exception as they appear in the three Acts was necessarily the same, and their Lordships will make no assumption on that point. In any case the words of exception which introduce each part of S. 12 and S. 13 of the Act of 1925 were found in Oudh to produce somewhat surprising results. They nullified altogether the meaning of S. 13, and gave rise to contentions upon S. 12 that rent suits as a class were outside sub-S. (2), and that appeals, notwithstanding sub-S. (1), lay direct to His Majesty from the decisions of a single judge. Accordingly at the instance of the Chief Court a bill was introduced into the local legislature in 1934 and passed (U. P. Act XIV of 1934) to substitute for the words of exception words of different and indeed contrary significance. "Notwithstanding any provision to the contrary contained in any enactment for the time being in force" are now the opening words of both sub-sections of S. 12, and S. 13 now begins: "Notwithstanding anything contained in S. 98 of the Code of Civil Procedure, 1908, or in any other enactment for the time being in force." It does not appear, however, that there is anything in the Act of 1934 to say that it should operate retrospectively, nor is it clear whether S. 219 of the Government of India Act, 1935, has any effect to bring the Chief Court of Oudh under the provisions of S. 111 of the Code.

Apart from the Federal Court established by the Government of India Act, 1935, there is no Court in India having jurisdiction over the courts of the various provinces in a manner comparable to the jurisdiction of the Supreme Court of Canada over the Provinces of Canada or the High Court of Australia over the States of Australia. Moreover, from the decisions of the Supreme Court or High Court on appeal from the courts of a Province or State an appeal to His Majesty does not lie save by special leave. The alternative right to appeal either to His Majesty in Council or to the Supreme or High Court of the Dominion or Commonwealth affords no parallel whatever to the right which would accrue to an appel-

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lant from Oudh if he could come under Ss. 109 and 110 of the Code either after going first on appeal to an appellate bench or by omitting that tribunal as he chose.

Indeed it is only with great difficulty that such a state of things could be regarded in India as either orderly or practicable. In the particular circumstances of Oudh, apart altogether from Act XIV of 1934, the intention to introduce such a system could hardly without paradox be imputed to a provincial legislature. That this should be held to be within the intendment of general words of saving is yet more difficult. If intended at all it must have been intended as a new departure and a noticeable deviation from accepted methods.

Their Lordships, however, have to construe the Act of 1925 as it stood originally. Many cases not affected by Act XIV of 1934 have been decided by an appellate Bench on appeal, and a substantial number have thereafter come before the Board. Their Lordships were not asked by learned counsel for the appellants to hold that an appeal to an appellate Bench would be incompetent in a case, such as the present, where the requirements of S. 110 of the Code as to value are satisfied; and they think it right to state expressly that they cast no doubt upon the competence of such an appeal. The opening clause of sub-S. 1 of S. 12 makes the section give way only to a provision which negatives in the particular case either (*a*) the existence of any right to appeal or (*b*) the right to go to the particular tribunal mentioned, namely, a Bench of the Chief Court.

Where the Code or the Oudh Act says "an appeal shall lie" to a named tribunal, it is not easy to say with confidence whether a negative implication is or is not part of the intention of the phrase—that is, whether the phrase means only that an appellant can go to the named tribunal or that if he appeals at all he must go to that tribunal and to no other. If no other appeal be provided there can be no difficulty. Hitherto alternative or optional jurisdiction in appeal has never been a feature of the Indian system of judicature. On the other hand their Lordships have difficulty in regarding Ss. 109 and 110 of the Code as directed to prohibiting an appeal being brought within a Chief Court in like manner as a Letters Patent appeal is brought within a Chartered High Court. The two sections taken together seem rather to be intended to provide an appeal to His

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Majesty on the footing that no further appeal in India is provided. Moreover, if these sections negative any other forum of appeal save that mentioned therein, the opening words of S. 12 of the Oudh Act must either be taken with some unexpressed qualification or they lead in effect to the result that the appeal provided for within the Chief Court is limited in the case of original decrees and final orders to cases under Rs. 10,000 in value. It is not, of course, impossible that in a suit valued at five lakhs—even a suit claiming a taluq—an appeal may be brought over some matter that is in value under Rs. 10,000, but whatever is meant by S. 12 it is not, in their Lordships' view, an attempt to provide for that.

This may indeed be further demonstrated by a reference to clause (*c*) in S. 109 of the Code and to the passage in the middle of S. 110: "or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value".

There is nothing in the objection that an Act of the Local Legislature could not repeal a provision of the Code [*cf.* S. 80-A of the Government of India Act], and this objection was not repeated at the hearing of the appeal; but their Lordships do not propose to base the advice which they will tender to His Majesty upon any decision to the effect that the language of S. 12 is effective to exclude the provisions of S. 109 of the Code. They wish to minimise neither the difficulty which the opening words of S. 12 place in the way of any reliance upon sub-S. (1) of S. 4 of the Code nor the ambiguity which lurks in the phrase "an appeal shall lie." They have to give effect in a matter of practical and indeed constitutional importance to general words of exception which have been used by the provincial legislature in circumstances which make it difficult to define their scope with complete exactness.

If the right to appeal to an appellate Bench of the Chief Court has by this provincial legislation been given to the appellants without excluding them from the terms of S. 109 or bringing them within S. 111, their Lordships, before advising that His Majesty in Council should at the appellants' option assume the duties of a concurrent court of first appeal for the province of Oudh as regards cases brought in the Chief Court, may reasonably be expected to examine with some care the nature of the right asserted to have been vested in the appel-

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lants by S. 109 of the Code. To define the jurisdiction vested in His Majesty in Council and expound the principles which govern the exercise of the prerogative in reviewing the decisions of the Courts in different parts of the Empire is a task not lightly to be undertaken; and as the appellants stand upon the terms of S. 109 it will suffice for their Lordships to call attention to the fact that this section is qualified, not only by its opening words and by S. 111, but also by S. 112. It is plain from the terms of the Code that the Indian legislature was not claiming or proposing to abridge or extend the prerogative, and their Lordships have no reason to suppose that the legislature of the United Provinces was not fully aware in 1925 of the constitutional position when it was setting up a Chief Court for Oudh. The discretion which S. 112 affirms and maintains applies to the rejecting as well as to the receiving of appeals, and the prerogative is not wholly or finally concluded for either purpose by the provisions of S. 109. Their Lordships would certainly be more slow to impair than to extend provisions of this character; but the former power can be evoked by an occasion which requires it. By the express statement of the right which they assert the appellants are disabled from maintaining that His Majesty in Council is obliged at their option to function as a concurrent court of first appeal from the Chief Court of Oudh; and before such new obligations are accepted their Lordships have a duty to see that a proper exercise of the prerogative requires them to be accepted. In the present case they consider that they have a full discretion in the matter, and they have considered the circumstances of the case with due regard to the undoubted right of the provincial legislature to give powers to the new Chief Court or withhold them, and to the interests of the administration of justice in the province, which in their Lordships' view would be detrimentally affected by any procedure under which the appellate functions of the Chief Court were eliminated or ignored.

By the terms of the Order in Council of 9th April, 1932, they have to consider whether special leave to appeal ought to have been granted, and upon an examination of the various enactments they have reached a conclusion adverse to the appellants. If the appellants can still claim to come before an appellate Bench of the Chief Court nothing is here said to prejudice their claim, but their Lordships must humbly advise

His Majesty that special leave to appeal to His Majesty in Council ought not to have been granted, and that this consolidated appeal should accordingly be dismissed. The appellants must pay one set of costs to be divided equally between Raja Saadat Ali Khan and Raja Mumtaz Ali Khan's representatives.

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Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Barrow, Rogers, Nevill and Nehra & Co.*

R. C. C. / K. S. *Preliminary objection upheld and appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. MADHAVAN NAIR, *Officiating Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Bhattiprole Hanumantha Rao .. *Appellant** (*Plaintiff*)

v.

Kondrakota Sitharamayya and others .. *Respondents* (*Defendants 2 to 11*).

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Specific Relief Act (I of 1877), S. 41—Decree setting aside sale deeds executed by plaintiff during minority and giving possession—Power to order refund of the consideration.

The statutory discretion vested in the Courts of this country by S. 41 of the Specific Relief Act is of wider amplitude than the corresponding rule of equity administered in England, where there is no such statutory counterpart. Once it is found that the requirements of the section are satisfied and there exist circumstances which call for the exercise of the discretion the Court is bound to afford relief without being hampered by reference to the limitations which surround the corresponding rule of equity as administered elsewhere.

Mallacheruvu Raghavayya v. *Mallacheruvu Subbayya*, (1917) 7 L.W. 124, followed.

Even where there is neither knowledge of minority on the part of the alienee nor misrepresentation on the part of the minor the Court has power under S. 41 to order a refund of the consideration received by the minor. The question whether S. 41 can afford relief only in a case where the minor as plaintiff seeks the assistance of the Court and is inapplicable if he happens to be merely a defendant, was left open.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla dated 31st December, 1929 and passed in O. S. No. 143 of 1925.

Ch. Raghava Rao for Appellant.

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* Appeal No. 412 of 1931. 9th August, 1938.

V. Govindarajachari, P. Satyanarayana Rao, S. Vepa and *K. Viswanatha Sastri* for Respondents.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.—This appeal arises out of a suit by the appellant to set aside a number of sale deeds executed by him during his minority and to recover the properties sold together with mesne profits. The defendants 1, 2, 4 and 5 were the purchasers under different sale deeds, all of which have been set aside by the trial Court. But the decree for possession has been made conditional on the appellant refunding to the several purchasers the amounts of the consideration received from them. The first defendant died after the institution of the suit and his legal representatives are defendants 10 and 11. The main object of the appeal is to get rid of the condition imposed on the appellant to repay the purchase moneys.

The Subordinate Judge has found that the appellant was a minor when he executed the several deeds of sale, that he did not make any misrepresentation as to his age. He has not found that any of the purchasers except the fourth defendant had knowledge that the appellant was a minor when the sales were made. As regards the fourth defendant, however, he came to the conclusion that he must have [illegible] of the appellant's minority at the time of the sale in his favour. These findings of fact have not been challenged in appeal.

The learned Judge has held that the appellant was not estopped from pleading that the sales were void, a point concluded by authority and very properly not questioned before us. It was however urged on behalf of the appellant that the learned Judge was in error in imposing the condition referred to above, as neither S. 65 of the Indian Contract Act nor S. 41 of the Specific Relief Act justifies it. It is unnecessary for us, in this appeal to consider the scope of S. 65 of the Contract Act, as the first respondent's advocate has not chosen to support the judgment by reference to that section but took his stand on S. 41 of the Specific Relief Act, which according to him is sufficient to justify the conclusion of the trial Court. This argument has found favour with the Subordinate Judge, and we also are of opinion that it is sound.

S. 41 runs as follows:—

"On adjudging the cancellation of instrument, the Court may require

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the party to whom such relief is granted to make any compensation to the other which justice may require "

Read in the light of S. 39 which authorises the cancellation of a written instrument, whether void or voidable, S. 41 cannot be understood as limited in its operation to void instruments only, and accordingly it was conceded before us that that section is applicable to both classes of instruments. What is however urged is that though such may be the effect of the section, it must be deemed merely to embody the familiar rule of equity that he who seeks equity must do equity but limited and circumscribed by the qualification laid down in *Thurstan* v. *Nottingham Permanent Benefit Building Society*[1], namely:

"That a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature has declared to be void."

So qualified, the rule would seem to preclude Courts from granting compensation in all cases of void transactions, for we cannot see any difference in principle or reason, between transactions void by statute and those void under the general law. An argument of the kind proves too much, runs counter to the concession made earlier by the appellant's counsel and is, in our opinion, against the plain intendment of the section and must accordingly be rejected. In our judgment the statutory discretion vested in the Courts of this country by S. 41 is of wider amplitude than the corresponding rule of equity administered in England, where there is no such statutory counterpart. That discretion is of course not to be arbitrary but sound and reasonable and guided by well-settled judicial principles. But once it is found that the requirements of the section are satisfied and there exist circumstances which call for the exercise of the discretion, the Court is bound to afford relief without being hampered by reference to the limitations which surround the corresponding rule of equity as administered elsewhere. We think we are bound to give effect to the plain words of the section and are not at liberty to import into it, considerations derived from the English or any other system of jurisprudence. It is scarcely necessary to add that the exercise of such a power is not to invent a new head of equity, but merely to act in obedience to a statutory injunction. The view here expressed is, we think, supported by a decision of a Bench of this Court in *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*[2], where

1. (1902) 1 Ch. 1 at 13.
2. (1917) 7 L.W. 124.

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the facts were almost on all fours with those found in the present case. Coutts-Trotter, J., as he then was, expressed himself in favour of a wider interpretation of the section. After referring to the English decisions he said:

"But it is clear that in this country we have a statutory right to impose conditions by S. 41 of the Specific Relief Act, and that right is clearly recognised in *Mohori Bibee* v. *Dharmodas Ghose*[1]. I regard this as a proper course for exercising that discretion and make it a condition that the plaintiffs shall repay. . . . before recovering possession of the property."

The passage in the judgment of the Privy Council in the above case to which the learned Judge apparently alluded is obviously the one at the top of page 549:

"Another enactment relied upon as a reason why the mortgage money should be returned, is S. 41 of the Specific Relief Act (I of 1877) which is as follows."

After setting out the terms of the section their Lordships proceed:

"S. 38 provides in similar terms for a case of rescission of a contract. *These sections no doubt do give a discretion to the Court*, but the Court of first instance and subsequently the appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised."

The italics are ours and the italicised portion points unmistakably to the correctness of the wider interpretation of this section. The appellant's Counsel repeated before us an argument presented before the learned Judges who decided the case in *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*[2] and rejected by them after full consideration. That argument is that in the very next passage their Lordships equated the principle enacted in the section to the rule of equity in England to which reference has been made. The passage is this:

"It was also contended that one who seeks equity must do equity. But this is the last point over again and does not require further notice, except by referring to a recent decision of the Court of Appeal in *Thurstan* v. *Nottingham Permanent Benefit Building Society*"[3]

To appeal to the limited rule of equity after the refusal of remedy under the ampler rule of the statute may not inappropriately perhaps be described as an attempt to argue the same point over again. However that may be we find that the point

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1. (1903) L.R. 30 I.A. 114 I.L.R. 30 Cal. 539: (P.C.).
2. (1917) 7 L.W. 124.
3. (1902) 1 Ch. 1; (1903) A.C. 6.

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has been directly dealt with and answered in the judgment of Seshagiri Aiyar, J., in the same case. He said at page 129:

"The learned Vakil for the appellant contended that this succeeding paragraph" (the reference is to the second paragraph at page 549 in *Mohori Bibee* v. *Dharmodas Ghose*[1] referred to above), "must be taken to have given the final answer to the contention as to compensation. I do not think so. In my opinion, the two paragraphs are consistent with each other. In the second paragraph their Lordships must be taken to have held that if the matter rested purely on principles of equity, they would not be prepared to order compensation as that claim was negatived under similar circumstances by the House of Lords in *Nottingham Permanent Benefit Building Society* v. *Thurstan*[2]. Their Lordships should not be taken to have held that the statutory rule contained in S. 41 of the Specific Relief Act should not be given effect to as it only contained a rule of equity. The net import of the two paragraphs is to declare that the statutory discretion as to compensation does exist and can be exercised by the Courts, but that if relief is claimed on general equitable grounds apart from the statute, such a claim is inadmissible as that would be opposed to the principles laid down by the House of Lords."

We are in substantial agreement with this view of the judgment of the Privy Council the more so as we find that it is in consonance with our understanding of what we regard as the plain language of the section. The decision in *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*[3] has not only not been challenged since, but has been cited in several subsequent cases without dissent. (See *Rahima Bee* v. *Mannan Bee*[4], *Abdul Majid* v. *Ramiza Bibi*[5] and *Guruswamy Pantulu* v. *Lall Khajanchee*[6].) We must therefore repel the plea for the narrower interpretation of the section contended for by the appellant. Before finally leaving this subject, we must also notice a further submission on behalf of the appellant that the decision in *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*[3] is in conflict with an earlier Bench decision of this Court in *Vaikuntarama Pillai* v. *Athimoolam Chettiar*[7] and that the latter must be followed in preference to the former or that the conflict must be resolved by a reference to a Full Bench. It is to be observed that the ruling in *Vaikuntarama Pillai* v. *Athimoolam Chettiar*[7] was cited and relied upon in *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*[3],

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1. (1903) L.R. 30 I.A. 114: I.L.R. 30 Cal. 539 (P.C.).
2. (1903) A.C. 6.
3. (1917) 7 L.W. 124.
4. A.I.R. 1936 Mad. 140.
5. A.I.R. 1931 Mad. 468.
6. (1919) 10 L.W. 225.
7. (1914) 26 M.L.J. 612: I.L.R. 38 Mad. 1071.

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but was held to be either inapplicable, distinguishable or untenable. It is enough to point out that the question of repayment did not arise for direct decision in *Vaikuntarama Pillai* v. *Athimoolam Chettiar*[1], but arose only incidentally for the purpose of deciding whether the plaintiff an assignee of a mortgage by a minor could be regarded as fulfilling the character of a creditor so that he might sue under S. 53 of the Transfer of Property Act to set aside a subsequent settlement by the mortgagor. Secondly, S. 41 is not referred to at all in the judgment, much less its language considered for a comparison of the statutory rule with the pure rule of equity of the English Law. We do not therefore feel obliged to follow the one course or the other suggested by the appellant.

Holding as we do that the learned Subordinate Judge had power under S. 41 of the Specific Relief Act to order a refund of the consideration received by the appellant, it still remains for us to consider whether the power was properly exercised on the facts found in the present case. It is settled law that where the alienee chose to advance the money to a minor with knowledge of the minority, it would be improper to order a refund. It is equally settled that where an innocent purchaser or alienee was induced to part with money to a minor by a misrepresentation as to his age, an order for refund would be made almost as a matter of course. Where, however, there is neither knowledge of minority on the part of the alienee, nor misrepresentation on the part of the minor the answer is not quite so easy. Cases of this type have been somewhat rare, for, our attention has not been drawn to any of the decisions than those in *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*[2] and *Vaikuntarama Pillai* v. *Athimoolam Chettiar*[1]. The appellant's argument is that no order for refund could be made against a minor except when the money was paid to him as result of a fraud practised upon or a fraudulent misrepresentation made to, the person who was thereby induced to part with the money. There are no doubt dicta in *Vaikuntarama Pillai* v. *Athimoolam Chettiar*[1], which seem to lend colour to such an argument, but we must on this point again be guided by the clear pronouncement contained in the later case.

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1. (1914) 26 M.L.J. 612: I.L.R. 38 Mad. 1071.
2. (1917) 7 L.W. 124.

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Reference may finally be made to an argument of the respondent's advocate that the observations in *Vaikuntarama Pillai* v. *Athimoolam Chettiar*[1] are explicable on the footing that the minor in that case was a defendant. According to him, S. 41 is framed so as to afford relief only in a case where the minor himself as plaintiff seeks the assistance of the Court and the section is inapplicable if he happens to be merely a defendant in a suit by the person who dealt with him when he was a minor. On the soundness of this argument, it is unnecessary to express a final opinion as in this case the minor has come into Court as plaintiff seeking the assistance of the Court as such. When the question arises, it would be a matter for consideration whether such a marked difference in the substantive rights of parties could have been intended to be based on the accident of the claimant being a plaintiff or defendant and whether there is not implicit in the language of the section a rule of wider significance affording under proper circumstances relief to a purchaser or alienee irrespective of his being a plaintiff or defendant.

We are therefore of opinion that the learned Judge in the Court below was right in invoking the provisions of S. 41 of the Specific Relief Act for imposing the condition inserted in the decree, except as against the fourth defendant who is the third respondent in the appeal. The Subordinate Judge has found that he must have known of the appellant's minority when he took the sale. Nobody has appeared on his behalf to challenge the correctness of this finding which we must therefore accept. By reason of this finding he is disentitled to claim a refund and we do not understand why in spite of it, the Subordinate Judge has directed a refund to him also, along with the other defendants mentioned in the decree. The decree must be modified by omitting the fourth defendant from among the persons for whose benefit the condition for repayment has been inserted. As against him there will be decree for recovery of possession together with mesne profits from the date when he took possession till the date of the recovery of possession. The appeal is dismissed with the costs of the first respondent and as against all other respondents except the fourth. As against the third respondent the appeal is allowed and the condition for repayment

1. (1914) 26 M.L.J. 612: I.L.R. 38 Mad. 1071.

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so far as he is concerned will be deleted. He will pay the costs of the appellant here and in the Court below on the value of the claim against him and bear his own costs throughout. The Subordinate Judge will now make the enquiry regarding the mesne profits payable by the fourth defendant who is the third respondent here.

The memo. of objections is not pressed. Dismissed. No costs.

K. S. *Appeal and memo. of objections dismissed except as against the third respondent.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Velu Naicken and another .. *Appellants.**

Velu Naicken, *In re.*

Indian Evidence Act (I of 1872), S. 30—Incriminating statement made for the first time at the preliminary enquiry by one of several accused being jointly tried—If can be taken into account as against the other accused.

Where a confession is made by one of several accused being jointly tried, for the first time, at the preliminary enquiry at the dock, and in the presence of the other accused and the verbatim record of it by the Magistrate is filed at the sessions trial in proof of it, the other accused are not prejudiced as they had as much opportunity of explaining or rebutting it as if it had been made before the preliminary enquiry and proved at that enquiry and it can be taken into account against the other accused.

Trial referred by the Court of Session of the North Arcot division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 39 of 1938 on 21st December, 1938 and appeals by the prisoners against the said sentences.

R. Sadasivam Pillai for Appellants.

A. S. Sivakaminathan for *The Public Prosecutor* (*V. L. Ethiraj*) for the Crown.

The judgment of the Court was delivered by

Stodart, J.

Stodart, J.—The two accused who are cousins have been convicted of the murder of Thayarammal and sentenced to death. They have filed separate appeals both numbered as Criminal Appeal No. 17 of 1939.

(His Lordship after a narration of facts and evidence continued.)

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* R. T. No. 12 of 1939. (Crl. App. No. 17 of 1939). 9th March, 1939.

Velu Naicken, *In re.*

Stodart, J.

On the 13th July, Srinivasalu Naicken made a long statement, to the Sub-Magistrate admitting the crime and stating that he and first and second accused had murdered the woman by throttling her at the threshing floor where she slept on the night of the 27th June to guard her paddy. He said that they put the body into a gunny bag which was there and carried it to a distant field and buried it at the place which he had subsequently shown to the police. He said that before burying it they had removed the jewels and that he had been given a gold coin which he calls a quarter sovereign and one of the trinkets from the tali which he sold at a shop in Arkonam. P.W. 17 a shroff of Arkonam deposed that on the 30th June Srinivasalu Naicken sold him a quarter sovereign. He said he had melted this before the police questioned him about it. There is an entry in his accounts Ex. K-1, that gold weighing 9 pagodas was sold to him by Pallur Srinivasalu Naicken on 30th June. On the 13th July also Muniammal, P.W. 28, the second wife of the first accused made a statement on oath to the Sub-Magistrate about the jewels which she had produced before the police. That statement is Ex. T.

On the 12th August Srinivasalu Naicken reiterated his confession in a long statement to the District Magistrate and a pardon was tendered to him on that day which he accepted. He has been examined as P.W. 6 in the committing Magistrate's Court and as P.W. 1 at the Sessions.

The proof of the case against these two accused consisted principally in the evidence of this approver Srinivasalu Naicken. He was corroborated in a material particular by the fact that the murdered woman's jewels were found in the possession of the first accused's wife, Muniammal. Muniammal examined as P.W. 28 did not deny that she produced the jewels to the police on the 8th July the day the body was exhumed but she said that a head constable gave them to her first. Then she was confronted with Ex. T the sworn statement she had made to the Magistrate under S. 164, Criminal Procedure Code, on the 13th July. She there deposed that at daybreak on the morning of 28th June the first and second accused had roused her from sleep and the second accused had given her a little cloth bundle. Her husband told her it contained jewels and that she was to keep it safe until he asked for it. At the trial Muniammal did not deny making this statement but she said that she

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made it because she was told to do so by P.W. 14 and a head constable. It was filed in evidence to contradict her under S. 145 of the Indian Evidence Act.

P.W. 14 is a man called Vajravelu Asari. He is not a reputable witness having been convicted once of receiving stolen property. He deposed that on the Amavasai night at about 8 P.M. when he was in the street near the house of the approver Srinivasalu Naicken P.W.1, accused 1 and 2 came in company and called out to P.W. 1 and P.W. 1 replied that he was still at his meal. P.W. 15 deposed that on that same night he saw the two accused pass along the street together and he commented on this to a neighbour, P.W. 16, as he thought it strange that these two who were enemies should be together. It will be remembered that it was on information given by P. W. 14 and P.W. 15 to the head constable that the approver was first suspected and detained by him for examination on the night of the 7th July.

All this evidence was placed before the committing Magistrate and when the accused were examined under S. 209, Criminal Procedure Code, for the purpose of enabling them to explain the evidence against them there took place a dramatic and somewhat unusual incident. The first accused had made a fairly long statement which had been read out to him and which he had attested by his thumb mark. He admitted that he had gone to the threshing floor that night but said that when he reached it, Thayarammal who had been there all day had gone. He said he had slept there all night and returned home at 8 in the morning. He admitted that the jewels produced in the case belonged to Thayarammal and were on her person when she was at the threshing floor but said that he did not know how they came to be found out. He denied all complicity in the crime. Then the second accused made his statement giving at length the history of his quarrels with Thayarammal and ending up with the assertion that the approver had implicated him out of enmity, the enmity arising out of the fact that on a certain occasion in May, 1937, when the first accused was away from home he had found him, the approver, in bed with first accused's wife and quarrelled with him on that account. At the conclusion of this statement the first accused turned to the second accused in the dock and said: "It was you who put your foot on her neck and pressed it"

and turning to the Magistrate against him saying that the second accused's accusation against his wife was made out of spite because he had had to warn the second accused, to keep away from his house in his absence and when his wife's sister was absent. And the first accused still speaking to the Magistrate requested him to put it on record that he the first accused and the second accused and Srinivasalu Naicken had murdered Thayarammal and taken her jewels and buried her. The Magistrate warned the first accused that this very statement would be sufficient to hang him and then asked the accused to repeat what he had said and the accused said:

"Srinivasalu Naicken, Singara Naicken (second accused) and myself, the three of us together committed the murder. It was Singara Naicken that placed his foot on her neck and pressed it. It was Srinivasalu Naicken who tied the fibre cord round the neck. We put her into the gunny bag, tied it up, took it, dug a pit, and buried it. It was Srinivasalu Naicken and Singara Naicken who removed the jewels. I dug the pit. After burying her we took the jewels and came home At the bund of the tank Singara Naicken gave Srinivasalu a quarter sovereign and an amulet. After that I went away to the threshing floor. I do not know to whom Singara Naicken took the jewels and gave them."

Examined at the Sessions when this statement was filed under S. 287, Criminal Procedure Code, the first accused merely said that he never made it.

The evidence of the approver and the statement just referred to made to the Magistrate at the preliminary enquiry by the first accused is that the deceased was killed by throttling. First, as she lay asleep, one of the murderers placed his foot on her throat and pressed on it. Then when she struggled, another of the murderers throttled her with his hands while his accomplices held her legs and arms. The approver says that she died when he was tying the cord round her neck and therefore he did not tie it tight. This is borne out by the medical evidence. The sub-assistant surgeon found no mark of the cord on the neck. It was tied to the neck when the body was found but that was probably due to the fact that the neck had swollen through decomposition. The body was too far advanced in decomposition to afford any evidence of the cause of death. But the fact that the deceased was apparently well and active when she was last seen alive and that her body was found bundled up in a sack and buried in the ground strongly supports the inference that she was murdered.

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It is argued here as it was argued in the lower court that if the deceased was killed in the manner stated by the approver and by first accused there would have been injury to the neck which would have been visible at the *post-mortem*; for instance fracture of the hyoid bone. But if the object which is employed to compress the windpipe is broad and pliable there need be no injury to the bony structures of the neck. Pressure by the sole of the foot or by the palm of the hand placed across the neck of an unresisting victim would cause death by asphyxia without necessarily causing injury to the bones or tissues of the neck. The absence of such injury does not therefore indicate that the approver is not telling the truth, when he says that the accused was throttled.

The principal argument addressed to us is that the learned Sessions Judge was wrong in holding that the evidence of the approver was corroborated in material particulars not only bearing on the facts of the crime but upon the accused's implication in it. *See* the Privy Council decision in *Mahadeo* v. *The King*[1]. But here we find that as regards the facts of the crime the approver is corroborated by the circumstances in which the body was found and by the statement of the first accused in the committing Magistrate's Court. As for the first accused's part in the crime there is in addition to the said statement the fact that the deceased's jewels were in the possession of his second wife Muniammal. Against the second accused there is the confession made by the first accused in open Court at the time of the preliminary enquiry. We think that not only may that confession be taken into consideration against the second accused but also that having regard to the circumstances in which it was made it has considerable probative value. The first accused had just made a statement denying all knowledge of the crime. But when the second accused in his turn made his statement and incidentally made the allegation of adultery against first accused's wife, the first accused, voluntarily and in spite of the Magistrate's warning withdrew his former statement, confessed the crime and implicated the second accused. He deliberately made himself liable to the extreme penalty of the law in order that the second accused should suffer too.

1. (1936) M.W.N. 889: 1936 P.C. 242 (P.C.).

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Learned counsel contends on behalf of the second appellant that this incriminating statement made by the first accused at the preliminary enquiry cannot be taken into account as against the second accused. His argument is that a confession made by one of several accused who are being tried jointly is governed by S. 30 of the Indian Evidence Act and that S. 30 refers only to confessions made before the enquiry begins and proved at the enquiry. S. 30 is:

"When more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

We do not think there is any force in this argument. It is true that the confession was made for the first time at the preliminary enquiry. But it was made in the dock in the presence of the second accused and there was no question of its having to be proved at that stage. Then at the Sessions trial two months later it was proved under S. 287, Criminal Procedure Code, by the Magistrate's verbatim record of it. The second accused was in no way prejudiced. He had as much opportunity of explaining or rebutting it as if it had been made before the preliminary enquiry and proved at that enquiry.

We think that the case is established against the second accused equally as against the first accused. The principal fact proved apart from the evidence of the approver is the recovery of the jewels from the first accused's second wife. She stated both at the preliminary enquiry and at the trial that they were foisted on her by the police. But that is not only inherently improbable for where could the police have got them but also is contradicted by the statement made by her to the Magistrate on the 8th July under S. 164, Criminal Procedure Code, in which she gave an entirely different version of how she came into possession of them. Then against the second accused we have the first accused's dock confession which substantially corroborates the evidence of the approver.

And lastly against both the accused there is the evidence of P. W. 14 that these accused came to the approver's house about 8 P.M. on the night of the 27th June, and of P.W. 15 that he saw the two accused going in company along the street about the same time. This evidence is of some importance. The approver says that he and the accused met together at his

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house at Pallur before proceeding to the scene of crime. The evidence of these two witnesses corroborates him in that particular.

We agree with the learned Sessions Judge that the approver's evidence is credible and acceptable and that it is corroborated in material particulars bearing on the accused's complicity in the crime. These two accused had a powerful motive to get rid of the deceased. In our opinion there can be no doubt that they murdered her on the night of the 27th June last. We dismiss their appeals. As for the sentence imposed by the learned Sessions Judge it was eminently justified. The sentence of death on the accused is confirmed.

K. S. —— *Sentence confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE ABDUR RAHMAN.

Kathoom Bi .. *Appellant** (*Plaintiff*)

v.

Abdul Wahab Sahib and others.. *Respondents* (*Defendants*).

Kathoom Bi v. Abdul Wahab Sahib.

Indian Trusts Act (II of 1882), Ss. 88 and 90—Co-owner and guardian in possession of minor's property—Liability to account in full.

The appellant was entitled to a half share of her father's estate. Her father's three brothers—respondents 1 to 3—after her father's death took charge of all his assets including the business which they continued to carry on. The appellant claimed that she is entitled to a half share in these properties and in all the accretions to the estate arising from the business.

Held, respondents 1 to 3 were guardians of the appellant and the minor's property being in their hands they must account in full. The fact that they were co-owners of the estate of the appellant's father does not affect their liability as guardians and their relationship was essentially a fiduciary one.

Muhammad Abdul Rahim Baig Saheb v. *Muhammad Abdul Hakim Baig Saheb*, (1930) 61 M.L.J. 139: I.L.R. 54 Mad. 543, relied on.

On appeal from the decree and judgment of the Hon'ble Mr. Justice Lakshmana Rao, dated 7th April, 1936 and passed in C. S. No. 145 of 1930 on the file of the High Court in its Ordinary Original Civil Jurisdiction.

G. Ramakrishna Aiyar for Appellant.

Srinivasaraghavan, *Thyagarajan*, *S. Nagaraja Aiyar* and *R. Swaminatha Aiyar* for Respondents.

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*O. S. A. No. 53 of 1936. 14th September, 1938.

The Court delivered the following

JUDGMENT.—The question involved in this appeal is whether respondents 1 to 3 at times material to the suit stood in a fiduciary position with regard to the appellant. The appellant is the only daughter of one Abdul Rahiman Sahib, who died on the 18th June, 1921, when she was about six years of age. The appellant's mother had pre-deceased the appellant's father, who was a Sunni Mohammadan. Under the Sunni Law, his heirs were: the appellant, his three brothers, Waheb, Majeeth and Hameed (respondents 1 to 3), his second wife, Sakina Bi (who died during the pendency of the suit) and his mother Rabia Bi, who died before the suit was instituted. Abdul Rahiman was a dealer in rope, thread, coir, carpets and other articles. His business was a very successful one and when he died he left a considerable fortune. All the members of his family lived together and the heirs continued to live together after his death. In the year following his death the third respondent married his widow, Sakina Bi, and by her had four children, respondents 4 to 7. After his death the appellant lived with respondents 1 to 3 until 1929 when she left the family house and married one Abdul Aziz. She was then more than 15 years of age. According to the appellant's uncles, respondents 1 to 3, Abdul Aziz removed the appellant from their lawful custody. In fact they filed a complaint charging him with kidnapping the appellant. The complaint was dismissed and the appellant having married Abdul Aziz instituted the suit out of which this appeal arise.

Abdul Rahiman carried on the business in his own name, but the day after he died, respondents 1 to 3 changed the name of the business to "Abdul Rahiman Sahib and Brothers" and set up a claim that they had throughout been partners in the business, each brother having a quarter share. In the month of October, 1921, respondents 1 to 3 caused a panchayat to assemble with a view to the Panchayatdars distributing the estate on the footing that respondents 1 to 3 were each entitled to a fourth share in the business. The proceedings of the Panchayatdars have been referred to here and below as arbitration proceedings and for the purposes of this appeal this description may be adhered to. The arbitrators submitted their award on the 10th October, 1921, but as it was unstamped a fresh award was made on the 24th April, 1922. It has not been suggested in the proceedings before us that the arbitrators acted improperly.

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They gave an award distributing the assets of the deceased's estate on the basis that respondents 1 to 3 were partners. So far as the arbitrators were concerned this was not in issue. Respondents 1 to 3 were not in fact partners and the arbitration proceeded on an entirely wrong basis. At the trial of the suit an issue was framed on the question whether respondents 1 to 3 were partners with Abdul Rahiman and the issue was found against them. This finding has not been challenged before us and the appeal has been argued on the footing that it was a false claim. It is not suggested that the appellant is in any way bound by the award. In fact it is conceded that she is not. The appellant's grandmother, Rabia Bi, purported to act as her guardian when the question of the distribution of the estate was before the arbitrators, but she was not in law the guardian of the minor's property and so far as the minor was concerned the proceedings were a nullity.

The appellant filed the suit on the Original Side of this Court on the 7th March, 1930. She claimed that on the death of her father she became entitled to one-half share of his estate, her grandmother to one-sixth, her step-mother to one-eighth, and respondents 1 to 3 to the remaining 5/24th share in all the assets left by Abdul Rahiman. It is not disputed that Sunni Law requires the estate to be distributed in these proportions. The appellant, however, alleges, and again the truth of her allegation is accepted, that after her father's death her uncles took charge of all his assets, including the business, which they continued to carry on. The business continued to prosper and out of the profits respondents 1 to 3 purchased the properties set out in Part 1 of Sch. B in the plaint. The appellant claimed before the trial Court and contends now that she is entitled to a half share in these properties, and in all the accretions to the estate arising from the business. In law the heirs became tenants in common of the estate as it stood at the time of his death and the learned trial Judge held that the appellant was entitled to a moiety of the estate distributed by the arbitrators with profits from the date of her father's death, but he rejected her claim to a half share in the profit made out of the business after her father's death on the ground that a co-owner in management "does not *per se* stand in a fiduciary relation". In accordance with his decision the learned trial Judge passed a preliminary decree directing the Official Referee to take

accounts on the basis that the appellant was entitled to a moiety of the properties left by her father, but to no share in the acquisitions made by respondents 1 to 3 out of the profits of the business subsequent to the death of Abdul Rahiman. This meant that the appellant was not to be given any share in the properties set out in Part 1 of Sch. B. It is this finding which the appellant challenges. She says that the learned trial Judge should have held that respondents 1 to 3 were in the position of trustees and have given her a half share in all the profits made in the business after the death of her father.

The learned Advocate for the appellant conceded that if there was no fiduciary relationship, the preliminary decree passed by the learned trial Judge was the correct one. On the other hand it is not disputed that if respondents 1 to 3 are to be regarded as being in a fiduciary position the appellant is entitled to succeed in the appeal. Therefore, the sole question which the Court is called upon to decide is whether respondents 1 to 3 in carrying on the business of their deceased brother should be regarded as trustees for the appellant to the extent of one half of the profits. The case of the appellant is that the respondents 1 to 3 stood in a fiduciary position because she was a minor living with them under their care and control and that while she was in this position they took charge of her share in the estate. The facts on which the appellant's case is based do not admit of dispute, and for eight years, that is, until 1929, respondents 1 to 3 had the appellant under their care and control. Moreover, they claimed to be her legal guardians as the pleadings in this case show. The second respondent applied for letters of administration to the estate and effects of the appellant's father for her use and benefit till she attained majority, and on the 18th December, 1922, obtained a grant of letters, but the business and all the other assets of her father's estate remained with respondents 1 to 3.

A trustee is not permitted to make a profit out of his trust and a guardian of a minor is in the position of a trustee when in possession of the minor's property. In *Morgan* v. *Morgan*[1], Lord Hardwicke observed that where a person, whether a father or a stranger, enters upon the estate of an infant and continues

1. (1737) 1 Atk. 489: 26 E.R. 310.

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the possession the Court will consider such person as a guardian of the infant. In *Dormer* v. *Fortescue*[1], Lord Hardwicke declared that the Court will decree an account from the time of the infant's title accrued, "for every person who enters on the estate of an infant enters as a guardian or a bailiff", and in *Doe* v. *Keen*[2], Lord Kenyon, C. J., said that nothing can be clearer than that an infant may consider whoever enters on his estate as entering for his use. This principle has many times been affirmed and is now embodied in the Indian Trusts Act.

S. 88 of the Indian Trusts Act provides that where a trustee, executor, partner, agent, director of a company, legal adviser or other person bound in fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained. S. 90 provides that where a tenant for life, co-owner, mortgagee or other qualified owner by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage he must hold for the benefit of all persons so interested the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

It is not necessary to review the Indian authorities which are in line with the English authorities, but in the course of the arguments our attention was drawn to the case of *Muhammad Abdul Rahim Baig Saheb* v. *Muhammad Abdul Hakim Baig Saheb*[3], where a Bench of this Court (Wallace and Pandalai, JJ.) applied the principle referred to in a case relating to the business of a Muhammadan family. There a Muhammadan cloth merchant died leaving a widow, two major sons, two minor sons, and three minor daughters. The plaintiffs' case was that

1. (1744) 3 Atk. 124: 26 E.R. 875.
2. (1797) 7 T.R. 386: 101 E.R. 1034.
3. (1930) 61 M.L.J. 139: I.L.R. 54 Mad. 543

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the major sons on the death of the father continued his business and taking advantage of their position as the eldest male members of the family used in the business the assets of the other members of the family, including the shares of the widow and the minors. The Court held that by this assumption of family management—it did not matter whether the position of the major sons was that of trustees *de son tort* or executors *de son tort*—the relationship was essentially a fiduciary one.

We are of opinion that the position of respondents 1 to 3 in this case was essentially a fiduciary one. They took charge of the estate of Abdul Rahiman in which the appellant had a half interest at a time when she was a child and in their care and control and they have continued in possession of the estate. Having got possession of the estate they set up a false claim to be partners in the business in order to get a greater share in the estate than the law allowed and utilised monies belonging to the appellant for themselves. When the appellant eventually escaped from their control they alleged that she had been kidnapped from their custody as her lawful guardians and they have acknowledged their guardianship in the pleadings in this suit. On their own showing respondents 1 to 3 were the guardians of the appellant and the minor's property being in their hands they must account in full. The fact that they were co-owners of the estate of Abdul Rahiman does not affect their liability as guardians.

We hold that respondents 1 to 3 were in the position of trustees and are liable to account to the appellant for her half share in the profits arising out of the business. We understand that an account has already been taken on the basis of the preliminary decree. It will now have to be taken on the basis that the appellant is also entitled to a half share in the profits which have accrued from the business, and the preliminary decree will be varied accordingly. The appellant having succeeded she will be entitled to her costs, which will be paid by respondents 1 to 3.

K. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE ABDUR RAHMAN.

Alluri China Bapanna and others .. *Appellants** (*Defendants*)

v.

Sri Muttangi Jaggiah *alias* Jaggarao Garu and others .. *Respondents* (*Plaintiffs and 2nd Plaintiff's L. Rs.*).

Bapanna *v.* Jaggiah.

Mortgage—Assignment of mortgagee's rights—Some of the assignees realising their own share of the mortgage debt—If liable to account as agents or constructive trustees of their co-assignees—Indian Trusts Act (II of 1882), S. 90—Applicability.

A mortgagee owed Rs. 80,000 to the plaintiff and sixth defendant on a promissory note and Rs. 41,079-9-4 to defendants 1 to 5 on a promissory note. The mortgagee on 6th July, 1925, assigned his rights under a mortgagee for Rs. 1,16,650 to the plaintiff and the defendants. The consideration for it was the entire debt payable to defendants 1 to 5 and Rs. 61,525-11-11 out of the debt payable to the plaintiff and the sixth defendant. The mortgagor paid defendants 1 to 5 between April, 1926 and November, 1930, a sum of Rs. 46,000 towards their share of the mortgage amount. The plaintiff averred that there was a partnership between him and defendants or in the alternative defendants 1 to 5 were acting or must be deemed to have been acting on his behalf also and having given a partial discharge they must be held to have acted and realised the money not only for themselves but also for the plaintiff and the sixth defendant and claimed accounts against the defendants. In an earlier suit by the plaintiff (to which defendants 1 to 5 were parties) for the sale of the mortgaged properties, it was held that the amounts realised by defendants 1 to 5 should be credited towards the interest due on the mortgage. The partnership alleged, was found against, but the Sub-Judge allowed the plaintiff's claim holding that defendants were constructive trustees. On appeal,

Held, the defendants were merely co-assignees with the plaintiff of the mortgage and co-assignees are not entitled to give a complete discharge to a mortgagor on behalf of the other co-assignees. If a co-assignee is found to have realised his own share of the mortgage debt, he cannot be said to have been acting in the capacity of an agent or much less of a constructive trustee and any receipt by him cannot be considered to be a receipt on behalf of the others. In the present case the realisation of the Rs. 46,000 was not in excess of what was due to the defendants 1 to 5 for principal and interest and was paid to them expressly towards the debts due to them for which they could give a complete discharge not as agents or trustees but in the capacity of co-assignees of the mortgagee's rights and they are not liable to account to the plaintiff. On the facts there was no bar of *res judicata* against the defendants by reason of the decision in plaintiff's suit for sale of the mortgaged property.

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* Appeal No. 82 of 1936. 24th January, 1939.

Appeal against the decree of the Court of the Subordinate Judge of Ellore in O. S. No. 17 of 1934.

The Advocate-General (Sir A. Krishnaswamy Aiyar) and *K. Venkatarama Raju* for Appellants.

K. Rajah Aiyar for Respondents.

The judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—This appeal arises out of a suit instituted originally by one Muttangi Jaggiah *alias* Jaggarao as one for dissolution of partnership and for accounts but really for the recovery of a proportionate share claimed by him and one Sitaramayya (sixth defendant) from defendants 1 to 5 out of the money collected by them from the late P. Ramarayanim Garu, Rajah of Panagal, who had executed a mortgage deed for Rs. 1,16,650 on the 9th September, 1913, in favour of the Rajah of Badrachalam (Ex. I). This mortgage was assigned to the plaintiff, Sitaramayya (sixth defendant) and the defendants (1 to 5) by the Rajah of Badrachalam on the 6th July, 1925, under Ex. II as the latter owed a sum of Rs. 80,000 to the plaintiff and Sitaramayya on a promissory note dated the 22nd March, 1924, and a sum of Rs. 41,071-9-4 to the defendants (1 to 5) on a promissory note dated the 13th July, 1923. The consideration for the assignment as given in the deed consisted of the entire debt of Rs. 41,071-9-4 payable to the defendants and a sum of Rs. 61,525-11-11 out of the debt payable to the plaintiff and Sitaramayya. The Rajah of Panagal paid a sum of Rs. 46,000 to the defendants on various dates between April, 1926 and November, 1930, expressly towards the share of the mortgage amount due to them and it is out of this sum that a proportionate share was claimed in this suit. Sitaramayya was impleaded as a defendant but was subsequently transposed as a plaintiff.

The plaintiff had come to Court with an averment that a partnership had been entered into between him and Sitaramayya on the one hand and the defendants (1 to 5) on the other on certain terms stated in paragraph 7 of the plaint. It was pleaded by him in the alternative that even if the agreement relating to the alleged partnership be found not to have been established, the defendants (1 to 5) would be liable as they were acting or must be deemed to have been acting on his behalf as well as on that of the sixth defendant and having given a partial discharge, which as co-mortgagees they were competent to do, they must be

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held to have acted and realised the money not only for themselves but also for the plaintiff and the sixth defendant. It was further urged that inasmuch as the money realised by the defendants (1 to 5) from the mortgagor was ordered to be appropriated first towards interest and the balance towards the principal in a suit instituted by the plaintiff and the sixth defendant on the basis of the mortgage deed, to which the defendants (1 to 5) were also parties, it was no longer open to them to contend that the money was realised by them for their own share and the money must in accordance with the decree passed in the suit, be held to have been paid towards the mortgage as a whole.

The various positions taken up by the plaintiff were denied by the defendants who set up an agreement, on the other hand, in paragraph 2 of the written statement to the effect that they had a prior right under it to collect the money due to them. It was also contended on their behalf that they were not co-mortgagees with the plaintiff and the sixth defendant, but the assignees of the mortgagee's rights, and could not be held to have been acting on behalf of the plaintiff and the sixth defendant or to be competent to give a discharge on the latter's behalf particularly when they had not realised any money from the mortgagor in excess of what was due to them. In the end it was pleaded on behalf of these defendants that the suit was barred by limitation.

The learned Subordinate Judge on a consideration of the evidence in the case found against the agreements pleaded by the parties but on an examination of the legal position he came to give a valid discharge on behalf of the plaintiffs and must therefore be taken to have collected the money not merely for their share but for that of the plaintiffs as well. Having regard to the provisions contained in S. 90 of the Indian Trusts Act, he held them to be constructive trustees and thus found them to have realised the money not only for their own benefit but also for that of the plaintiffs. The defendants were consequently ordered to render an account to the plaintiffs and to pay them their share of the money in proportion to what was due to them at the time when Ex. II was executed. The plea of *res judicata* was found against the plaintiffs and that of limitation against the defendants. Aggrieved by this decree the defendants have appealed.

It might be stated here that the plaintiff had instituted a suit (O. S. No. 21 of 1931) in the Court of the Subordinate

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Judge of Chittoor for the sale of the mortgaged properties, against the original mortgagor, the Rajah of Panagal. These defendants (1 to 5) were impleaded in that suit as defendants. This was decreed and although no contention was raised on behalf of the parties to the suit that the amount paid to the defendants (1 to 5) should be appropriated towards the interest due on the entire mortgage debt, the Court in decreeing the claim gave credit to the amount received by the defendants (1 to 5), towards the interest which was due on the mortgage bond. The decree was not appealed against and became final. This has given rise to the contention on behalf of the respondents that the money having been ordered to be credited by the Court decreeing that claim towards the interest due on the mortgage bond, it must be held to have been decided between the parties that the money realised by the appellants was on behalf of the respondents as well and the appellants were therefore precluded by the rule of *res judicata* from raising any contention to the contrary in this suit under the provisions of S. 11 of the Code of Civil Procedure.

In regard to the agreements pleaded on behalf of the parties, no attempt was made before us by the learned Counsel for the respondents to canvass the finding arrived at by the lower Court against his clients. Nor do we think it likely that if an agreement was arrived at between the parties, it could have been on the terms stated in the plaint. The learned Advocate-General however urged on behalf of the appellants that although the statement made by the fifth defendant as a witness could not in view of its inconsistency with what was pleaded on behalf of the defendants, be relied upon and was rightly rejected by the trial Court, yet the agreement mentioned in the written statement was to a large extent supported by some of the letters which were written on behalf of the plaintiffs themselves. The first letter to which our attention was drawn was a registered notice (Ex. IX) sent by the first plaintiff to the defendants asking how much was collected by them jointly or *separately* towards that deed. This was followed by another notice sent by the plaintiffs on the 27th February, 1931, informing the fifth defendant that the plaint had been prepared and calling upon him to deposit Rs. 500 towards the costs of the suit which was to be filed by them against the mortgagor for the sale of the mortgaged property. The requisite court-fee for that suit was of the value

of Rs. 3,392 and yet they had asked the fifth defendant for a sum of Rs. 500 only, which would be approximately required to recover the balance of the money due to the defendants after giving credit to what had been realised by them from the mortgagor. This notice was expressly referred to by the Subordinate Judge in his judgment in O. S. No. 21 of 1931. From the fact that an agreement was being pleaded even by the plaintiffs, although the terms alleged on their behalf were undoubtedly different and bearing the two notices referred to above in mind it would appear to be more likely than not that there was some understanding either explicit or implied to the effect that the parties would be entitled to recover their shares from the mortgagor and as long as they did not realise anything in excess of their shares, they would not be accountable to each other. The reasons given by the learned Subordinate Judge for the finding that no agreement was arrived at between the parties are not convincing. He was mainly persuaded to come to that decision as he found that the statement of the fifth defendant was contrary to what had been pleaded on his behalf. This criticism was perfectly justified but the other reasons which he has given are not very convincing. Having regard to all the circumstances we are rather inclined to the view that an agreement was on some such terms as have been stated above, arrived at between the parties.

If this were all, we would have had to seriously consider if the material on the record was sufficient to reverse the finding arrived at by the lower Court in this respect but in view of the conclusion at which we have arrived in regard to the other points discussed by the learned Counsel for the parties, it seems to us to be unnecessary to rest our judgment on this inference of fact. We propose to devote our attention to the main question involved in the second issue framed by the lower Court which concerns the plaintiff's rights to demand an account from the defendants for the collections made by them. Since the question of *res judicata* was argued with great persistence by the learned Counsel for the respondents, we would have to examine this contention in the course of this judgment. The question of limitation raised by the appellants stands however on a different footing. Its decision depends on the finding whether the defendants are liable to account to the plaintiff. If they are found to be liable, it is apparent that the suit would not be barred by

time. If on the other hand, they are found to be entitled to retain the amount realised by them from the mortgagor, the suit against them would be as they had realised the amount more than three years before the institution of the suit, be barred by limitation. It would therefore be unnecessary to give any finding on this question.

Turning our attention to the crucial question regarding the liability of the defendants to account we must point out that they were not co-mortgagees with the plaintiffs but only assignees of a mortgage executed by the Rajah of Panagal in favour of the Rajah of Bhadhrachalam. It is all the more necessary to keep this in view as the learned Subordinate Judge seems to have lost sight of this distinction and held that the parties to the suit were joint promisees under the mortgage deed (Ex. I) and must therefore be regarded as co-mortgagees. This is obviously not so. The definition of 'promisee' given in S. 2 of the Indian Contract Act must not be ignored. So far as the mortgage is concerned, the Rajah of Panagal was the promisor and the Rajah of Bhadhrachalam the promisee. It was the Rajah of Bhadhrachalam who could be said to have accepted the proposal made by the Rajah of Panagal. It may be that so far as the assignment of the mortgage is concerned, the Rajah of Bhadhrachalam may be the promisor and the parties to this suit the promisees. We are not concerned here with the jural relationship which was brought into existence by the deed of assignment but by the original mortgage executed by the Rajah of Panagal. There can be no doubt that as between the Rajah of Panagal and the parties to this suit even if privity of estate is held to exist the former cannot be described to be the promisor and the latter not the promisees. The heirs of a promisee may be entitled to claim what their ancestor (the promisee) could have claimed, but by standing in his shoes they do not become, in the eye of the law, the promisees themselves. Similarly an assignee of a promise may be able to claim what his transferor could have claimed but he would not become a promisee by reason of the assignment so far as the original promisee is concerned.

We have thus not to decide what the position would have been if a co-mortgagee would have accepted payment from his mortgagor either in full or in partial satisfaction of the mortgage but what it is if a co-assignee realises a portion of the money due from the mortgagor when that portion does not exceed the

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recipient's share of the consideration for which the assignment was made in his favour. There is divergence of opinion between this and several other High Courts on the point whether a mortgage debt would be discharged by paying it to one of two or more mortgagees. It has been held by this Court that a payment to one would discharge the mortgage-debt. (*Barber Maran* v. *Ramanna Goundan*[1] and *Annapurnamma* v. *Akkayya*[2].) The other High Courts have, on the other hand, taken the opposite view in *Jagat Tarini Dasi* v. *Naba Gopal Chaki*[3], *Sitaram* v. *Shridhar*[4], *Jauhari Singh* v. *Ganga Sahai*[5], *Ray Satindra Nath Choudhury* v. *Ray Jatindra Nath Choudhury*[6], *Sukh Lal* v. *Kanjman*[7], *Syed Abbas Ali* v. *Misri Lal*[8] and *Mathra Das* v. *Nizam Din*[9]. But no case has been brought to our notice, even of this Court, where a co-assignee or a co-heir may have been held entitled on behalf of the other co-mortgagees or co-heirs to give a complete discharge of a mortgage debt which has been assigned to or which devolved on the other co-assignees or co-heirs. The principle on which this Court has recognised the power of a co-mortgagee for giving a valid discharge of the whole mortgage debt was largely based on a consideration of S. 38 of the Indian Contract Act, but a reference to this section would show that it is confined to the promisees as defined in the Act and not to his heirs or assignees. Indeed while expressing their opinion in the Full Bench case, both the learned Judges whose view prevailed in that case observed that the rule which they were applying to a co-mortgagee could not be extended to co-heirs. The same distinction was made in *Ahinsa Bibi* v. *Abdul Kader Saheb*[10] by no less than an eminent Judge of this Court than Sir V. Bhashyam Aiyangar.

In view of these authorities an attempt was made by Mr. Rajah Aiyar to distinguish these cases on the ground that they have gone only to the length of holding that the position of a co-heir or a legal representative is not the same as that of a co-mortgagee where the latter could, and the former could not, give a valid discharge to a mortgagor. But he says that the same principle

1. (1897) 7 M.L.J. 269: I.L.R. 20 Mad. 461.
2. (1912) 24 M.L.J. 333: I.L.R. 36 Mad. 544 (F.B.).
3. (1907) I.L.R. 34 Cal. 305.
4. (1903) I.L.R. 27 Bom. 292.
5. (1919) I.L.R. 41 All. 631.
6. (1925) 31 C.W.N. 374.
7. (1929) 28 A.L.J. 290.
8. (1920) 5 Pat.L.J. 376.
9. (1916) 68 P.R. 1917 (F.B.).
10. (1901) I.L.R. 25 Mad. 26 at 39.

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which has been held to apply to co-heirs or legal representatives cannot be made to apply to co-assignees on the ground that while the interest of a propositus devolves on his heirs by operation of law and independently of the deceased's desire, an assignor's interest is conveyed to an assignee by a volition of the former and can be favourably compared with the case of a co-mortgagee where both decide to take a mortgage jointly. The distinction made between a co-heir and a co-assignee is in our opinion of no avail as from what we have already said in regard to the definition of a promisee used in the Indian Contract Act, it would be clear that under that definition, both of them would stand in the same position. If the term 'promisee' cannot be applied to a co-heir or a legal representative it can neither be held to apply to a co-assignee. The situation then seems to be that on a devolution of a mortgagee's interest either on his legal representatives or on his assignees, the legal representatives or co-assignees would be, at least amongst themselves, entitled to recover their own shares and be able to give an acquittance to that extent only and not for the shares of other legal representatives or co-assignees. It would thus follow that if a co-assignee is found to have realised his own share of the mortgage debt, he cannot be said to have been acting in the capacity of an agent or much less of a constructive trustee and any receipt by him cannot be considered to be a receipt on behalf of the others. (*Ankalamma* v. *Chenchayya*[1].) It may be that a devolution of interest upon a co-heir or a co-mortgagee, may effect a severance of the mortgagee's interest between them (*Mahamed Ishaq* v. *Sheikh Akramul Huq*[2]) but if the theory of representation is correct, so far as the heirs are concerned, it would neither be illogical nor unsatisfactory to extend the same although to a limited extent, to the assignees of a mortgage debt as well. The case is *Sunitibala Debi* v. *Dhara Sundari Debi Choudhurani*[3], cited by the learned Counsel for the respondent does not at all help him. We are not concerned here with the form in which the suit has to be filed. Nor are we concerned in this case with the rights of co-mortgagees *inter se* or with the release or redemption of any part of the security by one of the mortgagees. It was on these points that this case is an authority and not on those

1. (1917) 34 M.L.J. 315: I.L.R. 41 Mad. 637.
2. (1907) 12 C.W.N. 84.
3. (1919) 37 M.L.J. 483: L.R. 46 I.A. 272: I.L.R. 47 Cal. 175 (P.C.)

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which are before us for decision in this appeal. The next case relied upon by him was that of *Lakshmi Narasimha* v. *Lakshmammal*[1]. This is also not of much assistance as the co-mortgagee had in that case admittedly received more than his share of the debt and had exceeding his rights given a release in respect of the unrealised portion. He was therefore held and rightly, if we may say so with respect, to be incompetent to give a release to the mortgagor on behalf of his co-mortgagee or to receive any money in excess of his share, which he was ordered to refund. The third case cited by Mr. Rajah Aiyar was that of *Ramachandra Aiyar* v. *Sivarama Aiyar*[2], where it was held by Pandrang Row, J., that in the absence of a covenant to pay the amount due to any particular co-mortgagee a suit by one co-mortgagee for his share of the mortgage money was not maintainable and that the recital in the mortgage deed of the debts due to each co-mortgagee did not amount to an agreement by the mortgagors to pay the mortgagees separately. In view of the distinction that we have already tried to emphasise between the mortgagees and the assignees of a mortgagee this case is of no value to us here.

Reference was made in the end to English cases such as *Tyson* v. *Fairclough*[3], where it had been held that a Court would regard a tenant-in-common who had received the rent as in the nature of a bailiff or an agent for his co-tenants-in-common respecting their shares of the rent. This proposition is in accordance with the cases decided by this Court where a co-mortgagee would be able to give, by receiving the debt due under a mortgage, an acquittance to the mortgagor. This is only because he is held to be a person to whom an offer of performance can be validly made by a promisor under S. 38 of the Indian Contract Act, and by accepting the offer not only on his own behalf but on that of his co-promisees, he would be deemed to have been acting as their agent to the extent of their shares in the mortgage and would therefore be liable to account to them. But the same principle cannot be applied to the assignees of a mortgagee's rights, who cannot be held to be joint promisees in the sense in which that expression has been used in the Indian Contract Act.

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1. (1913) 25 M.L.J. 531. 2. (1936) 4 L.W. 502.
3. (1824) 47 E.R. 955.

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In view of what has been said it is unnecessary to consider the liability of a tenant-in-common when he has received income or rent in respect of the property of which he was a co-tenant with others but there is an authority of this Court where it had been held that a tenant-in-common would not be bound to share his receipts with another co-tenant if they did not exceed the recipient's proper share. (*Nellayappa Pillaiyan* v. *Ambalavana Pandara Sannadhi*1.)

In the present case, the realisation of the sum of Rs. 46,000 by the defendants was not in excess of what was due to them on account of principal and interest and was paid to them expressly by the mortgagor towards the debt due to them and for which they could give a complete discharge not as agents or trustees on behalf of the plaintiffs but in the capacity of co-assignees of the mortgagee's rights. They must consequently be held not to be liable to account for the sum realised by them.

The next question to decide is whether the defendants are barred by the principle of *res judicata* from contending that the sum of Rs. 46,000 was realised by them towards their share alone. It has been already observed that this contention was raised on behalf of the respondents on account of the decision in O. S. No. 21 of 1931 where the Subordinate Judge in decreeing the claim gave credit to the amount realised by the defendants towards the interest due on the mortgage bond although no such plea was raised by any party to that suit. (*Vide* plaint Ex. VIII and the written statement of the defendants Ex. III.) The suit was filed by the plaintiffs for the whole of the amount due under the mortgage deed Ex. I, and the mortgagor had pleaded that a sum of Rs. 46,000 had been paid to the eleventh defendant, that is (the fifth defendant in the present case) for which he had naturally asked for a credit. It was also pleaded on his behalf that the rate of interest stipulated in the deed was of a penal character. The copy of judgment has been exhibited and is marked as Ex. IV. A perusal of this judgment would show that not only was no issue framed in that suit on the question whether the payment received by the defendants should be credited towards the interest on the mortgage debt, but what is more, the only issue (Issue 9) which was framed with the object of arriving at a finding in regard to the disputes

1. (1903) 14 M.L.J. 81: I.L.R. 27 Mad. 465 at 417 (F.B.).

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between plaintiffs and the present defendants was left undecided. In fact the Subordinate Judge has after stating the issue framed in the case started with the words:

"The only two questions that were agitated at the trial were (1) as regards interest claimed and (2) costs to be decreed and against which set of defendants."

Holding that the interest claimed was not in the nature of a penalty and being of the opinion that the costs should be paid by the mortgagor and the present defendants in equal shares, he gave a finding in regard to Issues 3 and 4, which related to the fact and the validity of payment pleaded by the mortgagor in the following words:—

"As regards Issues 3 and 4 it has to be found that payments pleaded are true and binding on plaintiffs in the sense they have to be given credit to."

The ninth issue reads as follows:

"Whether the agreement set out in paragraph 4 of the written statement of the defendants 7 to 11 is true and plaintiffs are bound to pay any amount as per schedule of expenses attached to the written statement of defendants 7 to 11 to them?"

This was not decided by the Subordinate Judge who observed:

"As regards Issue 9, I have ruled that a consideration of this matter of dispute as between plaintiffs on the one hand and defendants 7 to 11 on the other, is not germane to this suit which is one for sale and the question may be left open. I therefore refrain from giving any finding on Issue 9."

This was the only issue which might have settled the disputes raised by the present defendants and this the Court refused to adjudicate upon. How could it be seriously urged then that the matter was decided between the parties? The learned Counsel for the respondent however urged that it was incumbent on the defendants to plead in that suit that the payment was realised by them for their own share. In other words he tried to bring his contention within Explanation IV of S. 11, Civil Procedure Code. But a reference to paragraphs 4 and 5 of the written statement filed by the defendants would show that the point that they were entitled to recover the money due to them before the plaintiffs could do so, was raised by them specifically. They had also pleaded in that suit that the mortgagor had paid a sum of Rs. 46,000 expressly towards their share and prayed for a direction in the decree that out of the balance of the money found due from the mortgagor they should be paid in the first instance. We fail to see what other

plea could have been raised by the defendants. It was this plea which formed the subject-matter of the ninth issue and was left undecided. The Explanation IV imports a fiction into S. 11 of the Code of Civil Procedure. Having provided that a matter which might and ought to have been made a ground of defence or attack in a former suit it introduced a fiction that it shall not only be deemed to have been raised, but also to have been directly and substantially in issue in that suit. This would not have been however enough for the purposes of S. 11, Civil Procedure Code, until the matter was presumed to have been decided. It therefore imported a further fiction that it should also be deemed to have been heard and finally decided. In view of an express order by the Court that the matter would be left open, it is impossible to permit any such fiction to be introduced in this case. The contention is devoid of any force and must be repelled.

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For the above reasons we allow this appeal and order the suit to be dismissed. The appellants will be entitled to their costs both in this and in the lower Court.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

S. Narayanachari .. *Petitioner** (*Applicant*)

v.

T. V. A. K. T. Annamalai Chettiar .. *Respondent* (*1st Respondent*).

Narayanachari v. Annamalai Chettiar.

Madras Agriculturists Relief Act (IV of 1938), S. 20—A puisne usufructuary mortgagee—Suit by first mortgagee—Decree directing puisne usufructuary mortgagee to redeem—If puisne mortgagee a debtor within the meaning of S. 3 (iii) of the Act.

A puisne usufructuary mortgagee, who is made a party to a suit by the first mortgagee which is decreed, is not a debtor within the meaning of S. 3 (*iii*) of the Madras Agriculturists Relief Act (IV of 1938). The decree in the first mortgagee's suit which directed him to redeem the first mortgage is not against him but in his favour conferring on him a privilege to free his own security and retain his possession and as such he is not entitled to apply under S. 20 of the Act.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Tirupathi dated 24th January, 1939 and made in

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* C. R. P. No. 662 of 1939. 28th April, 1939.

Narayanachari v. Annamalai Chettiar.

E. A. No. 632 of 1938 in E. P. No. 708 of 1931 in O. S. No. 352 of 1928.

T. S. Narasinga Rao for Petitioner.

K. Rajah Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was a puisne usufructuary mortgagee. In a suit by the first mortgagee he was impleaded and the suit was decreed. Petitioner, though in terms directed to redeem, that is, to discharge the first mortgage, was in reality merely granted a privilege—the privilege of freeing his own security and preserving his possession. In no sense of the word is he a debtor. The decree is not against him for a debt payable by him, but in his favour allowed him a right in equity to redeem the first mortgage. To use the language of S. 3 (*iii*) of the Debt Relief Act, petitioner is under no liability under the decree. His is not a debt.

The learned District Munsif of Tirupathi has in my judgment rightly dismissed his petition under S. 20 of the Debt Relief Act. I dismiss the revision petition with costs.

S. V. V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

K. A. V. Karuppanna Nadar .. *Petitioner* (1st Defendant)*,

v.

M. K. Mathalai Karuppa Nadar.. *Respondent (Plaintiff)*.

Karuppanna Nadar v. Karuppa Nadar.

Court-Fees Act (VII of 1870), S. 7, cl. (v) and Art. 17-B of II Schedule (Madras)—Suit for declaration and possession of managership of school—No prayer for possession of properties but prayer only for possession of office—Art. 17-B of II Schedule applicable—Value for purposes of jurisdiction—Market value of the school and its properties.

A suit for a mere declaration that the plaintiff is the proper manager of a school and not the defendant, and for an injunction restraining the defendant from functioning as the manager of the school, and asking only for possession of the office without asking for recovery of possession of the school and its endowments does not fall under S. 7, cl. (*v*) of the Court-Fees Act, but falls under Art. 17-B of the II Schedule as a suit incapable of valuation. But the value for purposes of jurisdiction is the value of the institution and its properties, as the right to the managership affects the right to be in possession of and to manage the institution and its properties.

Syed Mahamad Gouse, In re, (1924) 48 M.L.J. 571, distinguished as a case where possession of the properties was prayed for.

* C. R. P. No. 119 of 1938. 24th March, 1939.

Govindan Nambiar v. Krishnan Nambiar, (1881) I.L.R. 4 Mad 146, followed.

Karuppanna Nadar v. Karuppa Nadar.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Manamadura dated 23rd December, 1937 and made in O. S. No. 97 of 1937.

K. Rajah Aiyar for Petitioner.

V. V. Srinivasa Aiyangar and *V. V. Ramadurai* for Respondent.

The Court delivered the following

JUDGMENT.—Two questions arise for discussion in this Revision Petition. One is as to proper court-fee payable on the plaint and the second is whether the value of the suit for the purpose of jurisdiction is above Rs. 3,000 in which case the suit cannot be entertained by the District Munsif's Court.

These two questions form the subject-matter of issues 8 and 9.

Issue 8 raises the question whether the suit is properly valued and whether proper court-fee is paid.

Issue 9 raises the question whether that Court has jurisdiction to try the suit.

The District Munsif of Manamadura before whom the suit was filed, tried these two issues as preliminary issues and held that the suit was properly valued, that proper court-fee was not paid and that he had jurisdiction to try the suit.

The dispute between the parties is with regard to an Educational Institution known as Illupaiyur Nadar Kshatriya Vidya Sala situate in the village of Illupaiyur in Pallimadam Taluk of the Ramnad District.

The plaint alleges that the plaintiff and defendants 1 to 13 were elected on 25th January, 1936, as members of the School Committee, that at a meeting of the School Committee the first defendant was chosen as the manager of the institution, that the first defendant assumed management of the institution on 19th February, 1936, and that some time later he began to act in defiance of the Committee and did not discharge his duties properly. The plaint states that in order to consider the conduct of the first defendant, a meeting of the School Committee was held on 25th April, 1937, and that on the same day there was also a meeting of the General Body of all the persons in whom

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the ownership of the institution is said to vest and that due notices of the meeting of the Committee and of the General Body were given to the first defendant. By those notices the first defendant was informed that his conduct would be considered and the question whether he should be in further management of the institution would be decided. The plaint states that the first defendant did not attend the meeting of either body and that both the Committee and the General Body considered the charges against the first defendant and passed a resolution removing him from the office of the Committee member and manager and appointed the plaintiff in his place. The plaint states that after the resolutions of the Committee and of the General Body were duly communicated to the first defendant, the first defendant refused to hand over the management of the institution and was doing various acts likely to seriously endanger the institution.

In paragraph 18, the plaintiff asks that the first defendant should be declared to have been validly removed from the office of the membership of the Committee and of the managership of the institution, that the plaintiff may be declared to have been duly appointed as a member of the Committee and as the manager thereof and that as such he alone is entitled to be in management of the school. He asks for a perpetual injunction restraining the first defendant from functioning as the manager of the plaint institution. The plaint further asks that if need be the plaintiff should be put in possession of the office of the managership through process of Court.

As regards the prayers for declaration of plaintiff's right and consequential injunction, the suit was valued at Rs. 100 under S. 7 (*iv*) (*c*) of the Court-Fees Act and a court-fee of Rs. 11-3-0 was paid.

The alternative relief of possession of the office of managership is stated in paragraph 17 to be incapable of valuation and the plaintiff valued that relief at Rs. 20 and paid a court-fee of Rs. 2-3-0 thereon.

The lower Court accepted the contentions of the plaintiff that the suit was properly valued for the purpose of jurisdiction. The first defendant now comes up in revision and urges that the plaintiff is not entitled to value the relief for possession of the office of managership at Rs. 20 and to pay Rs. 2-3-0 court-

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fee thereon. First defendant urges that if this relief is really incapable of valuation, the plaintiff cannot value it at Rs. 20 and states that if such a relief is incapable of valuation the fixed court-fee provided under Art. 17-B of the II Schedule should be paid and that for the purpose of jurisdiction the suit should be properly valued having regard to the principles governing such cases. The questions that arise for consideration before me are these:

In a case where the plaintiff does not ask for recovery of possession of the school building and its endowments but asks merely for possession of the office of the managership, is it a case where a relief is really incapable of valuation and if so, how should the suit be valued for the purpose of jurisdiction.

It is contended by Mr. Rajah Aiyar that a suit for recovery of the office of the managership is in effect and in substance a suit for recovery of possession of the school building and its properties and endowments movable and immovable—and that the Court should treat the suit on the footing that all these reliefs are asked for and require the plaintiff to value the same accordingly and pay the requisite court-fee. With this contention I am unable to agree. The office of the managership of an institution such as the present may no doubt carry with it certain other rights flowing from it, namely, a right to be put in possession of the school building, the right to collect the outstandings due to the institution (it is said there are outstandings of the face value of Rs. 12,000) and also to recover the movable and immovable properties belonging to the institution. The petitioner before me who is the first defendant in Court below, does not claim either the institution or the properties of the institution, as his private property. He, like the plaintiff claims to be entitled to manage the institution and nothing more. In a case where the only question that is involved is the right to manage the institution it is not correct to treat the suit as though it is a suit to recover the school building and its properties, movable and immovable. The question whether any particular property is the property of the institution, is not involved in this suit and it is still open to question in a later proceeding. For aught we know, once the plaintiff's title is established in this suit all the persons who owe money to the institution may recognise the title of the plaintiff and willingly pay him. Similarly the persons who are in actual possession of the

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properties may put the plaintiff in possession of the same. It may even be that if the first defendant fails in his contention that he is the manager of the institution good sense will prevail and that he would give up possession of the properties of which he is in possession. Further the school building is not in the possession of the first defendant. It is occupied by the pupils of the institution, by the teachers and the other staff and it is an extraordinary contention to advance that the first defendant is in possession of the school building and to require the plaintiff to value the suit on the footing that the first defendant is in physical possession of the building and that plaintiff should ask for recovery of its possession and value the suit under S. 7 (5) or other appropriate section of the Act. The petitioner's counsel relied very strongly on the decision of Mr. Justice Madhavan Nair in *Syed Mahamad Gouse*, In re[1]. There the plaint itself asked in express terms recovery of possession of the properties of the institution. In a suit where the plaintiff is not content with suing for the recovery of the office of trusteeship but chooses to sue for recovery of the properties as well, there is no escape from valuing the relief for possession in accordance with the Act and from paying the appropriate court-fee. This is the real ground of the decision of the learned Judge as will be seen from the order which he passed on a review application which was filed requesting him to review his original judgment. Therein, the learned Judge points out that in the case before him the plaintiff rightly or wrongly asked for actual possession and therefore the plaintiff should value the suit accordingly and pay the requisite court-fee. As the learned Judge says at page 577:

> "It is not necessary for me to decide whether even in this case the plaintiff is bound to ask for possession. But as possession has been asked for and as the decree also directs that the Durga should be taken possession of, I think the court-fee should be paid under S. 7, cl. 5 of the Court-Fees Act."

Similar observations are to be found on page 576 and also in the earlier portions of the judgment. There are, no doubt, some observations in that case which might seem to support the contention of Mr. Raja Aiyar that in all such cases, the plaintiff should in this suit itself ask for possession of the building and of the other properties, value the suit as for

1. (1924) 48 M.L.J. 571.

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possession and pay *ad valorem* court-fee on the value as determined by S. 7, cl. 5. As the learned Judge ultimately based his judgment on the facts present in that case, namely, that the plaintiff did in fact ask for possession, the observations relied upon by Mr. Raja Aiyar are *obiter*. As pointed in a very early decision of this Court in *Govindan Nambiar* v. *Krishnan Nambiar*[1], a suit such as the present, does not come under S. 7, cl. 5 but really under Art. 17, cl. 6 of the II Schedule of the Court-Fees Act. In that case the suit was to depose the karnavan from management and to appoint in his place the plaintiff as the karnavan of the tarwad. The Chief Justice and Mr. Justice Innes held that the suit could not be treated as one for recovery of the family properties, movable and immovable in which case S. 7 would apply and they pointed out that to a suit of that kind, Art. 17, cl. 6 of the II Schedule is the article applicable. They say:

"The claim for removal of the karnavan is incapable of valuation. S. 17, cl. 6 of the II Schedule is therefore the section under which such suits are to be valued for the purposes of the Court-Fees Act. It would be clearly erroneous to value such a claim as if it were a claim for the recovery of possession of land, for the possession of the property is throughout in the tarwad and is not affected by a change in the person who fills the office of the Manager."

I therefore hold that the suit should be treated as one coming under Art. 17-B of the II Schedule and that the proper court-fee payable would be Rs. 15 if the suit is filed in the District Munsif's Court or Rs. 100 if in a District Court or a Sub-Court.

This brings me to the next question as to how the suit is to be valued for the purpose of jurisdiction. As the Court below has pointed out the properties owned by the institution consists among other things of the school building, and outstandings of the face value of about Rs. 12,000. This question has been the subject of an elaborate discussion in the decision reported in *Vasireddi Veeramma* v. *Butchayya*[2] by Mr. Justice Wallace and Mr. Justice Madhavan Nair. As pointed out in pages 651 and 652 by the learned Judges:

"The general principles deducible for valuation for purposes of jurisdiction where no special method of valuation has been provided by statute, then, would seem to be (1) that where the subject-matter of the suit is wholly

1. (1881) I.L.R. 4 Mad. 146.
2. (1926) 52 M.L.J. 381: I.L.R. 50 Mad. 646.

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unrelated to anything which can be readily stated in definite money terms, then the plaintiff, having to put some money value for the purpose of jurisdiction, must put a more or less arbitrary value, and there being no factors in the case from which the Court can say his valuation is wrong or dishonest, the Court will accept that valuation" . . . .

"and (2) that where the subject-matter is so related to things which have a real money value that the relief asked for will affect these, then the value of the suit for the purpose of jurisdiction is to be taken as the market value of the property affected".

In this latter case the value must be the market value of the whole of the property affected.

Examples of the former class where the subject-matter of the suit is not related to anything which can readily be stated in money value, are a suit for restitution of conjugal rights, a suit for a declaration that the plaintiff is a member of a charity committee. Of the second class we have suits to establish a right to a fishery or a right to a royalty, to set aside an award or to establish or set aside an adoption. In this latter class of cases though the suit is to establish an adoption or a right to a royalty or a right to a fishery, the relief asked for is so related to things which have a real money value that the relief will and must affect those things.

The question in this case is, under which class does the present case fall? In para. 16 of his judgment the District Munsiff held that the case comes under the first category. I think he is wrong. It cannot be said that the relief of possession of the office of the managership is not related to things which have a definite money value and that the reliefs do not affect those things. The right to the managership certainly affects the right to be in possession of and to manage the institution and its properties. Hence the value for purpose of jurisdiction is the value of the properties affected.

Such properties are certainly worth more than Rs. 3,000. Even apart from the school building there are outstandings of the value of Rs. 12,000.

The suit cannot therefore be tried by the District Munsif's Court.

The order of the lower Court is set aside and the plaint is directed to be returned to the plaintiff to be presented to the proper Court. I make no order as to costs in the circumstances of this case.

S. V. V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

V. Ponnambalam Chetti and others .. *Petitioners** (*Appellants in S. A. No. 358 of 1934 on the file of the High Court*)

v.

Ambalam Raman Chetti and others .. *Respondents* (*Respondents in S. A. No. 358 of 1934 on the file of the High Court*).

Ponnambalam Chetti *v.* Ambalam Raman Chetti.

Madras Agriculturists Relief Act (IV of 1938), S. 4 (d)—Vacant site without buildings on it—If "house property"—Inclusion in mortgage—Effect.

Where a mortgage was over two items of properties treated as *separate* items and one of them was a vacant site ear marked for house building purpose but not treated as part of the other item upon which a house stood, the mortgage cannot be said to be of house property only within the meaning of S. 4 (*d*) of the Agriculturists Relief Act (IV of 1938). A decree on foot of such a mortgage is therefore liable to be scaled down under the Act. Granting that the site is suitable for building purposes and that there is an intention to build houses upon it, it would not be considered house property until at least building operations are started.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to apply the provisions of the Madras Agriculturists Relief Act of 1938 and scale down the debt in favour of the petitioners herein before issuing a decree in S. A. No. 358 of 1934 preferred to the High Court against the decree of the District Court of Ramnad at Madura in A.S. No. 361 of 1932—O.S. No. 288 of 1931, District Munsif's Court, Paramakudi.

A. S. Srinivasa Aiyar and *S. Seshadri* for Petitioners.

V. Ramaswami Aiyar for Respondents.

The Court made the following

ORDER.—The question in this petition is whether defendants are entitled to the benefits of the Madras Agriculturists Relief Act. It has been found by the learned District Munsiff from whom a report was obtained, that the defendants have not been assessed to property tax on an aggregate annual rental value of Rs. 600 and that therefore Proviso (*c*) to S. 3 of the Act does not apply to them.

* C. M. P. No. 4070 of 1938 in S. A. No. 358 of 1934. — 13th March, 1939.

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The remaining question is whether the mortgage in respect of which the decree was passed comes within S. 4 (*d*) of the Act, that is to say, whether it is a debt contracted on the security of house property alone in a Municipality. The relevant clause of the mortgage deed recites certain boundaries within which the one-fourth share of two items is conveyed. The first item is a vacant site (*Kalimanai Nilam*) in the south-western side, its measurements being recited, and the second item is another site with a shop building thereon in the north-western side of the area within the boundaries. The question is whether the first item, that is, the vacant site in the south-western side of this area, can be termed "house property". If it can, then the mortgage is a debt contracted on the security of house property alone within a Municipality. If it cannot, then the inclusion of this piece of unoccupied land within the mortgage takes the debt out of the exception recited in S. 4 (*d*) and the debt as a whole comes within the mischief of the Act. It is well established that the term "house" includes the land appurtenant to the house and necessary for its enjoyment. The case-law on the subject is summarised in a Calcutta ruling, *Ghosal* v. *Mitra*[1]. It is contended that the term "house property" is a wider term than the term 'house' and that it will include not only land appurtenant to a house which is in existence, but also land earmarked for house-building purposes. I doubt very much whether this contention is in accordance with ordinary English usage. When we speak of house property, we certainly include buildings of all kinds and the sites thereof. We should probably also include the gardens, compounds and yards attached thereto. But I doubt whether the ordinary connotation of the term 'house property' in every-day language would include land earmarked for building purposes, but unoccupied by any buildings. After all, it is a common experience to see agricultural land advertised for building or even sold for building, but used for agriculture until it is actually converted to the purpose for which it is destined. To my mind, one would not in ordinary English speak of agricultural land as house property merely because the owner thereof is trying to sell it or has sold it to a speculative builder. Granted that the land is suitable for building houses and that there is an intention to build houses

1. (1910) 7 I.C. 436.

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upon it, I do not think that it would be considered to be 'house property' until building operations had, at any rate, started. The alternative line of argument is that this site, item 1, is included in a larger plot with certain boundaries and is adjacent to a site upon which there was actually a building at the time when the deed was executed. It is contended that the building and its site and the vacant site adjacent to it must be deemed to be a single unit and that the whole will fall within the term 'house property.' Now, if in fact these two sites were a single unit, there would, I think, be some substance in this argument. But all the materials available go to show that this is not the fact and that the house and its site on the north-western side were treated as a separate unit, separately recited in the mortgage deed, separately assessed in the union registers and separately numbered for the purpose of assessment. There is nothing to show that the vacant site in the south-western corner was treated as part of the property upon which the house stands. The fact seems to be that the two plots had been separately demarcated; in one of them at the time when this mortgage was executed a house had been built, the other was destined for building purposes, but was still vacant. In fact a house, I am told, has been constructed since the mortgage came into force. This fact alone is an indication that the vacant site was not at the time of the mortgage a part of the compound of the existing house. If, as seems to be the case, it was a separate unit, a piece of land with no building upon it, though destined for building purposes, it would not, in my opinion, be properly described as house property and the inclusion of this site is therefore sufficient to prevent this mortgage from being immune from the operations of the Agriculturists Relief Act.

I find therefore that the petitioners (judgment-debtors) are entitled to have the decree scaled down in accordance with S. 8 of the Act, the mortgage being one of 1924.

The decree will therefore be amended accordingly. The petitioners will be entitled to their costs in this petition.

Leave to appeal is refused.

S. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

S. Appaswami Pillai (deceased) and others .. *Appellants** (*Plaintiff and Nil*)

v.

Thayammal *alias* Thaiyamuthu Achi and another .. *Respondents* (*Defendant and Nil*).

Appaswami Pillai *v.* Thayammal.

Hindu Law—Widow's estate—Conversion into absolute estate—Permissibility—Surrender—Compromise whether amounts to—Essentials of valid compromise—Transaction ignoring legal rights of reversioner—Validity as family arrangement—Invalid compromise by father—Son claiming as reversioner whether bound—Res judicata *between co-defendants.*

The Hindu Law does not permit a widow or any other limited owner to convert her limited estate into an absolute estate. A surrender by the widow genuinely intended and validly effected in favour of the next reversioner is no doubt recognised as valid in spite of the reservation of a reasonable portion of the estate for her maintenance. The particular mode by which such a surrender is to be effected may differ, but it must in substance amount to an effacement of her estate. A compromise is no doubt one of the modes recognised, if in other respects it satisfies the conditions of a valid surrender.

Rangaswami Goundan v. *Nachiappa Goundan,* (1918) 36 M.L.J. 493: L.R. 46 I.A. 72: I.L.R. 42 Mad. 523 (P.C.) and *Sureshwar Misser* v. *Maheshrani Misrain,* (1920) 39 M.L.J. 161: L.R. 47 I.A. 233: I.L.R. 48 Cal. 100 (P.C.), relied on.

A compromise made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioner quite as much as a decree on contest. *Bona fides* in this connection has reference to the state of mind of the parties not in relation to their personal claim in the dispute but in relation to the estate, that is, to the rights of the prospective reversioner to whom it is to descend unimpeded and undiminished except to the extent to which the intermediate holder is permitted to deal with it by law. Consequently a transaction which ignores the rights of the reversioner and aims at securing a personal benefit to the limited owner is not allowed to prejudice the rights of the former. A compromise may in some cases also amount to a family arrangement, and from that point of view, justified if it is prudent and reasonable and *bona fide* effected to secure family peace. But an arrangement made in violation of the law, and in conscious disregard of the right of the reversioner will not be upheld even though it is made to assume the cloak of a family arrangement. In a suit in which the presumptive reversioner or for the matter of that even a stranger is ranged on one side and a widow or widows claiming as heir or heirs of the husband on the other, it is not permissible for either or both of the parties to enter into an arrangement calculated to enlarge the limited estate of the widow into one of an absolute character.

* Appeal No. 149 of 1934. 16th December, 1938.

Gunjeshwar Kunwar v. *Durga Prashad Singh*, (1917) 34 M.L.J. 1: L.R. 44 I.A. 229: I.L.R. 45 Cal. 17 (P.C.); *Kondama Naicker* v. *Kandasami Goundar*, (1923) 46 M.L.J. 172: L.R. 51 I.A. 145: I.L.R. 47 Mad. 181 (P.C.); *Ramsumran Prasad* v. *Shyam Kumari*, (1922) 44 M.L.J. 751: L.R. 49 I.A. 342: I.L.R. 1 Pat. 741; *Baijnath Rai* v. *Mangla Prasad Narayan Sahi*, (1925) I.L.R. 5 Pat. 350 and *Raoji* v. *Kunjalal*, (1930) 58 M.L.J. 720: L.R. 57 I.A. 177: I.L.R. 54 Bom. 455: A.I.R. 1930 P.C. 163 (P.C.), referred to.

One reversioner does not trace his title through another, and even if they are related to each other as son and father, the son will not be bound by an invalid compromise to which he was not himself a party and from which he did not directly derive any benefit.

Neither the fact that a defendant did not contest but supported the plaintiff's claim, nor the fact that he was merely joined as *pro forma* defendant nor again the fact that the suit finally ended in a dismissal is a good reason for negativing a plea of *res judicata* between co-defendants if they occupied a position of conflict.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 1 of 1932.

R. Ramamurti Aiyar for Appellants.

A. V. Viswanatha Sastri, R. Sundaralingam and *S. Seshadri* for Respondents.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—This is an appeal by a reversioner whose suit has been dismissed by the Subordinate Judge of Tanjore. He sued to recover possession of certain lands in Panayur village, Mannargudi Taluk, which admittedly formed part of the estate of one Appa Pillai who died in January, 1879, leaving considerable properties movable and immovable. At his death, Appa Pillai left two widows Thayyamuthu and Kamalathachi, a daughter Neelambal by his pre-deceased first wife, and another daughter Palanivelu by Thayyamuthu, the second of his three wives. Thayyamuthu and Kamalathachi the two widows who survived Appa Pillai died in 1887 and 1907 respectively. Palanivelu died in 1908 and Neelambal the last of the intermediate limited owners died on 28th May, 1923. Neither of them has left any issue and the estate would devolve on the reversioners unless it had been validly disposed of in the meanwhile.

The nearest reversioners according to the finding of the Subordinate Judge were Appasami Pillai the plaintiff-appellant and his brother Thiagaraja. They were the sons of Swami Pillai related to the deceased Appa Pillai as his nephews through their father Thiagaraja, a natural brother of Appa Pillai but adopted to his separated uncle Kathaperumal. The members

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of the family and their relationship to each other are accurately shown in the Genealogical table set out in paragraph 6 of the judgment of the Subordinate Judge. The particulars contained in that table have not been disputed before us.

By a deed of release evidenced by the original of Ex. H dated 14th June, 1923, Thiagaraja released his interest in the reversion to the plaintiff who thus became entitled to claim the whole of the estate for himself exclusively.

The lands in suit form only a fraction of the original estate. There were a number of litigations relating to it, some during Appa Pillai's life and some after. The earliest was a suit O. S. No. 2 of 1871 in the Civil Court of Tranquebar, instituted by Durayappa, a natural brother of the plaintiff's father Swami Pillai, but adopted to his uncle Appasami. In that suit Durayappa claimed partition of the family estates, on the footing that he was an undivided member of a joint family along with his uncle Thiagaraja, his natural brother Swami Pillai, a cousin Panchanada the son of his uncle Muthusami, and his juniormost uncle Appa Pillai, who were all joined as defendants 1 to 4 in the order of enumeration. Though in form the suit was against all the four defendants it was in fact directed against Appa Pillai and for obtaining a share in his separate and self-acquired properties. Defendants 1 to 3 seem to have really colluded with Durayappa whose success would enure to their benefit also. The acting Civil Judge who tried the case found that Durayappa's natural father Thiagaraja had been adopted away to Kathaperumal his divided uncle and ceased thenceforth to belong to the branch of Appa Pillai's father Ramu Thevar. This finding cannot be regarded as irrelevant or unnecessary for the decision of the suit. For it will be seen that though the suit was ultimately dismissed on the ground of limitation, that conclusion was arrived at on a consideration of the question whether the lands in Appa Pillai's exclusive possession belonged solely to him and was enjoyed absolutely by him without reference to the other members of the family. The fact that by his adoption Thiagaraja ceased to belong to the family of his birth was undoubtedly a circumstance and a material one for negativing the joint status set up by Durayappa. The learned Civil Judge expressed his conclusion in the following terms:

"I decide generally that the plaintiff's case is false and the fourth

defendant (Appa Pillai's) case substantially true and particularly that the plaintiff and defendants have not dwelt together in unity . . . . . but on the contrary the first and second and fourth defendants have dwelt apart and separate from the plaintiff and from other members of the family for a very long space of time largely exceeding twelve years before suit brought."

That conclusion was among others based on two documents produced and marked Exs. I and II in that case, which made it abundantly clear that Thiagaraja had been adopted away from the family to a divided uncle, a fact which was not seriously disputed in that case and has not been disputed in the present appeal. An appeal, Regular Appeal No. 31 of 1873 was preferred to this Court against the decision of the Civil Judge, and was disposed of by Innes and Kindersley, JJ., on 17th June, 1873. The opening words of the judgment fully express the view they took. They said:

"That this is in part at least a dishonest and collusive suit is apparent from the admission which plaintiff was compelled to make in the course of it and which he must have been well aware of all along that first defendant (Thiagaraja), his natural father, having many years ago, been adopted into the family of Kathaperumal, a divided branch, had no title whatever to be included as a coparcener entitled to take advantage of the partition as against the fourth defendant (Appa Pillai) except on the ground of reunion with him which is not asserted. Had the suit succeeded upon its original footing plaintiff's natural father and his issue the plaintiff and the second defendant would have fallen into half of the property which plaintiff alleges to be family estate."

The learned Judges then proceeded to consider the merits, and concurred with the finding of fact and of law by the trial Judge, and dismissed the appeal so far as Appa Pillai was concerned. But as regards the lands in the possession of the other defendants, they directed a division on the ground of reunion which appeared to them to have been established as between themselves. It is noteworthy that in this division Appa Pillai neither shared nor claimed to share.

Swami Pillai, the father of the present appellant, was the second defendant in O.S. No. 2 of 1871 and must have known that by reason of his father Thiagaraja Pillai's adoption to Kathaperumal he ceased to possess any interest in the property belonging to Ramu Thevar's branch, and could not therefore advance any claim to the properties of Appa Pillai on the footing of a joint status. He must have also known that Appa Pillai's properties were his own separate properties so found either on the footing of self-acquisition or by limitation. These two cardinal facts were clearly established by the above litiga-

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tion and would in our opinion be *res judicata* if the same questions should be re-agitated between the parties. The reasons adduced by the Subordinate Judge for the contrary view do not convince us as they proceed on an incorrect appreciation of the facts and an erroneous view of the law.

We have already adverted to the circumstances that the interests of Durayappa and those of Thiagaraja and Swami in the suit of 1871 were identical, in that the success of the former would enure to the benefit of the latter as well, and further that all the defendants except Appa Pillai were colluding with the plaintiff in the attempt to establish the joint and therefore the divisible character of Appa Pillai's properties. That Swami Pillai and Appa Pillai were ranged as co-defendants is a matter of no consequence in view of the obvious conflict of interest between the two. To say that 'they were not allowed to be heard' or that 'they were refused to be heard' is to say something which is not borne out by the facts as disclosed in the judgment of the Civil Judge. From it it appears that they were placed *ex parte* on account of their non-appearance at the framing of the issues, an order which they themselves did not choose to question, being apparently content to leave the plaintiff to fight the common battle. They never appeared later nor did they take any step to approach the Court with a view to their being heard. Even otherwise a decision by a competent Court cannot cease to be binding on the parties in a later suit for this or any similar mere irregularity. We are again unable to agree with the Subordinate Judge's view that the only question decided was a preliminary question of limitation. According to our reading of the original as well as the appellate judgment, the findings as to the adoption of Thiagaraja and the separate enjoyment and hence the exclusive title of Appa Pillai formed the true basis on which the binding of limitation was rested, and were in this sense necessary for the decision of the suit. Nor can we find any support for the view that the defendant, who sailed with the plaintiff, could not have appealed against the decision in a suit of this kind. We are again unable to discover why the decisions of the Privy Council in *Maung Sein Done* v. *Ma Pan Nyun*[1] following an earlier decision of the same Tribunal in *Munni Bibi* v. *Tirloki Nath*[2] have not been acted upon by the

1. (1932) 63 M.L.J. 64 : L.R. 59 I.A. 247 : I.L.R. 10 Rang. 322 (P.C.).
2. (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.).

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Subordinate Judge. From them it is clear that neither the fact that a defendant did not contest but supported the plaintiff's claim, nor the fact that he was merely joined as a *pro forma* defendant nor again the fact that the suit finally ended in a dismissal is a good reason for negativing a plea of *res judicata* between co-defendants if they occupied as they in fact occupied a position of conflict. We are therefore of opinion that the decision in the suit bound Swami Pillai, and precluded him from re-agitating questions settled by it. It is unnecessary, however, to stress the point further for the purpose of the present appeal. For even if that decision does not constitute *res judicata* the materials referred to in it are sufficient to incline us to the identical conclusions on an independent consideration. The result then, of this discussion is that it is impossible for Swami Pillai to have believed that he was still a member of a joint family with Appa Pillai, or that on the latter's death his properties could survive to him as the surviving member of that family. Yet this was the position he boldly took up in the suit O. S. No. 1 of 1880 filed by him in the Sub-Court of Kumbakonam to which we shall immediately refer.

When Appa Pillai died in 1879, there was at the time pending in the Sub-Court, Negapatam, O. S. No. 27 of 1878, a suit instituted by him against his nephew Panchanadam, and certain others for the recovery of about 31 velis of land in the village of Thiruvalanchuli on the ground that Panchanadam had unlawfully trespassed on the property. Panchanadam had filed a written statement setting up a gift of the land in his favour by Appa Pillai himself. After the latter's death his senior widow Thayyamuthu alone was brought on the record in his place. The suit was finally settled by a compromise Ex. E, dated 1st March, 1880, made a rule of Court by the judgment Ex. E, on 2nd March, 1880. By this compromise Thayyamuthu accepted the truth of the defendant's case subject only to his paying a sum of Rs. 700 for her costs of the suit. About the end of 1879, while this suit was yet pending, Swami Pillai, the father of the present plaintiff, instituted O. S. No. 1 of 1880 on the file of the Sub-Court, Kumbakonam, laying claim to the entire estate of Appa Pillai, on the allegation that while he, his father Thiagaraja and Appa Pillai were living together as undivided members of a joint family, Appa Pillai had died, and

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that consequently all the properties in the possession of Appa Pillai had survived to him as a surviving member of the family. According to plaint his two widows Thayyamuthu and Kamalathachi who had in the meanwhile obtained a succession certificate for the collection of the outstandings left by Appa Pillai, had no right whatever to the estate and were merely entitled to maintenance. Neither Panchanadam nor Durayappa was recognised as having any right to the property the former on the ground that he had received for his share the lands, which formed subject-matter of his claim O. S. No. 27 of 1878, and the latter on the ground that his suit O. S. No. 2 of 1871 had been dismissed, and he thereby lost all right to a share. About himself he added the somewhat singular remark that the decree did not stand in his way:

"As he was on the same side as a defendant with Appa Pillai, and as he was unable to prefer an appeal for himself inasmuch as he also contested that the family was undivided."

We have not the faintest doubt that this suit was but a knowingly dishonest and disingenuous attempt on the part of Swami Pillai to secure Appa Pillai's estate from his two helpless and probably ignorant widows. The importance and the serious nature of the obstacles in the way of his success in such a bare-faced attempt must have been fully present to the mind of Swami Pillai himself and very likely also of his legal advisers who must have had access to the records of the suit of 1871. It is scarcely possible that they could have thought that there was the remotest chance of getting away with a claim so unsubstantial. What subsequently happened is certainly as mysterious as it is surprising. On 16th March, 1880, each of the two widows filed a separate written statement urging what appears to us a cogent defence, but it is remarkable that within three days, namely, on 19th March, 1880, a razinama, Ex. G, was filed and on 23rd March, 1880, made a decree of Court in Ex. VII. The very brief interval between the written statements and the razinama raises a natural doubt as to whether the defence was meant seriously or whether it was put in merely to invest the compromise with a colour of genuineness. If up till three days prior the widows were bent on fighting the suit, it is scarcely likely that a suit of these dimensions involving rights of substantial value could have been so quickly settled. With our knowledge of prevalent conditions, we are inclined to think

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that there is force in the appellant's argument that the so-called defence was nothing but a pretension devised by Swami Pillai with the willing concurrence of the widows, who were perhaps for their own reasons agreeable to lend themselves to the scheme. We shall presently examine this compromise more closely, but we may at once say that on the validity of its terms that the Subordinate Judge has rested his judgment, and the respondent has almost entirely relied in the present appeal.

By the razinama decree Swami Pillai secured for himself almost three-fourths of the estate straightaway. Thayyamuthu got 27 velis absolutely out of which she gave up 10 velis to Neelambal, retaining about 17 velis equivalent to about 102 acres for herself. She also got a sum of Rs. 4,000 in cash. Kamalathachi was given absolutely lands of the extent of 11$\frac{1}{3}$ velis equal to 70 acres, besides a sum of Rs. 3,000 in cash. The extent of the land and the amount of the cash received dispel the idea that they were reserved to them by way of maintenance, which indeed was not seriously asserted before us. Looking to the cash alone which was very considerable if we remember its value at the time, it seems to us that the widows were in the main prompted by self-interest rather than by any consideration for the estate. It is not unlikely in the then state of the knowledge of the law, that the parties did not realise the legal incidents of a widow's estate under Hindu law, or the true nature of the restrictions which bound such an estate for the benefit of the ultimate reversioners. It was not till the decision of the Privy Council in *Rangaswami Goundan* v. *Nachiappa Goundan*[1] was pronounced that the correct principles became clarified. Very likely Swami Pillai, the widows and their advisers thought, wrongly thought, that if the then nearest reversioner was himself a party, the compromise was incapable of being challenged at any time by the remoter actual reversioner. So they set about getting rid of all possible chance of the widows themselves challenging it on one ground or another, by surrounding it with those indicia which would tend to show that the parties dealt with each other at arms length with a full knowledge of their respective rights, so as to avoid any suspicion of over-reaching or fraud. The result was a division of the estate satisfactory enough to the actual parties to the compromise but entirely destructive of the rights of the ultimate reversioner

1. (1918) 36 M.L.J. 493: L.R. 46 I.A. 72: I.L.R. 42 Mad. 523 (P.C.).

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if he should happen to be a person other than Swami Pillai. The learned Judge in the Court below has accepted the respondent's contention that the actual reversioner was bound by the compromise, and could not claim any portion of the properties which the widow took absolutely under it. We are clearly of opinion that the Subordinate Judge's conclusion cannot be supported.

It cannot be disputed that Swami Pillai was at best only a remote reversioner with a bare expectancy. Nor can it be said that the transaction approximated to a surrender by the widows, a case neither suggested nor considered in the Courts below. We are again not concerned in this appeal with a claim to that portion of the estate which was cut out and carried away by Swami Pillai under the compromise. If that were indeed the case, some of the considerations adverted to by the learned Subordinate Judge may perhaps have a bearing. If the claimant were a stranger, and not the son of Swami Pillai and were not himself in possession of the properties which went to Swami Pillai under the compromise, he would perhaps be in a position to claim it back with a prospect of success. This appeal is however not concerned with that portion but with the other portion of the estate which was retained by the widows and to be more exact, with that part of it which was taken by Thayyamuthu under the compromise with absolute rights.

The Hindu Law does not permit a widow or any other limited owner, to convert her limited estate into an absolute one. A surrender by the widow genuinely intended and validly effected in favour of the next reversioner is no doubt recognised as valid in spite of the reservation of a reasonable portion of the estate for her maintenance. The particular mode by which such a surrender is to be effected may differ, but it must in substance amount to an effacement of her estate. A compromise is no doubt one of the modes recognised, if in other respects it satisfies the conditions of a valid surrender (*Sureshwar Misser* v. *Maheshrani Misrain*[1]). In the present case, however, the compromise cannot be justified by an appeal to the doctrine of surrender in so far as it conveys an absolute interest to the widows in the properties allowed to be retained by them. No such case has, as we have said, been advanced, but apart from it,

1. (1920) 39 M.L.J. 161: L.R. 47 I.A. 233: I.L.R. 48 Cal. 100 (P.C.).

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it is definitely ruled out by reason of the fact that Swami Pillai was not the nearest reversioner at the time. In fact both Durayappa and Panchanadam who were both alive then, were nearer reversioners, belonging as they did to the same branch as Appa Pillai, whereas Swami Pillai belonged to the branch of Kathaperumal to whom his father Thiagaraja had been adopted.

The ground upon which the Subordinate Judge has rested his judgment is that the compromise should be regarded as a *bona fide* settlement of doubtful claims, amounting in fact to a family arrangement brought about in the interests of all parties and with a view to bring peace to the whole family. As we have already indicated, if the claim is made by the actual reversioner to recover properties conveyed away to a stranger under a compromise by the widow, the considerations adverted to by the learned Subordinate Judge may have a material bearing. But the question we have to consider is different, for we are concerned with that portion which had been left with the widows with rights of full ownership. It was urged that the compromise must be regarded as having been *bona fide* entered into in the circumstances in which it was brought about and must therefore be held binding on the actual reversioner. It is impossible for us to accept this argument in the face of the fact that Swami Pillai was putting forward what was to his knowledge a thoroughly unfounded and dishonest claim. When the reversioner acted with such knowledge, the compromise cannot be supported as it is devoid of the essential element of *bona fides* (*Kondama Naicker* v. *Kandasami Goundar*[1], *Gunjeshwar Kunwar* v. *Durga Prashad Singh*[2] and *Baijnath Rai* v. *Mangla Prasad Narayan Sahi*[3]). The compromise also fails for another and an equally potent reason. The rule of law governing a compromise can be stated in this way. A compromise made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioner quite as much as a decree on contest (*Ramsumran Prasad* v. *Shyam Kumari*[4] and *Raoji* v. *Kunjalal*[5]). *Bona fides* in this connection

1. (1923) 46 M.L.J. 172: L.R. 51 I.A. 145: I.L.R. 47 Mad. 181 (P.C.).
2. (1917) 34 M.L.J. 1: L.R. 44 I.A. 229: I.L.R. 45 Cal. 17 (P.C.).
3. (1925) I.L.R. 5 Pat. 350.
4. (1922) 44 M.L.J. 751: L.R. 49 I.A. 342: I.L.R. 1 Pat. 741 (P.C.).
5. (1930) 58 M.L.J. 720: L.R. 57 I.A. 177: I.L.R. 54 Bom. 455 (P.C.).

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has reference to the state of mind of the parties not in relation to their personal claim in the dispute, but in relation to the estate, that is, to the rights of the prospective reversioner to whom it is to descend unimpeded and undiminished except to the extent to which the intermediate holder is permitted to deal with it by law. In other words the protection of the estate, that is, of the interests of the ultimate reversioner, appears to be in part at least the policy underlying the rules of Hindu Law in this behalf, and the restrictions which that law places on a limited owner's powers of disposal are in part at least referable to this end in view. So it is that a transaction which ignores the rights of the reversioner and aims at securing a personal benefit to the limited owner is not allowed to prejudice the rights of the former. A compromise may in some cases also amount to a family arrangement, and from that point of view, justified if it is prudent and reasonable, and *bona fide* effected to secure family peace. But an arrangement made in violation of the law, and in conscious disregard of the right of the reversioner will not be upheld even though it is made to assume the cloak of a family arrangement. It is not the form but the substance that the Court will consider in judging of its validity.

Looking at the facts of the present case, we are unable to find any circumstance which can warrant our holding that the widows obtained in fact an absolute interest as against the actual reversioner, namely, the plaintiff. It may be that if Swami Pillai himself had ultimately turned out to be the actual reversioner, he might be held bound by the compromise in every detail (*Ram Gowda Anna Gowda* v. *Bhausaheb*[1] and *Kanhai Lal* v. *Brij Lal*[2]). But the appellant, though a son of Swami Pillai, does not claim through him, but in his own independent right, and hence is not bound by an invalid compromise to which he was not himself a party and from which he did not directly derive any benefit. That one reversioner does not trace his title through another even if they are related to each other as son and father is too well settled to require any citation of authority. It will also be observed that the widows did not put forward any personal rights in the subject-matter of the litigation, and indeed it is clear they had none. They merely claimed a widow's estate in the properties which in the

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1. (1927) 53 M.L.J. 350: I.L.R. 52 Bom. 1 (P.C.).
2. (1918) 35 M.L.J. 459: L.R. 45 I.A. 118: I.L.R. 40 All. 487 (P.C.).

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written statement they asserted were the separate and self-acquired properties of the husband. It is consequently inadmissible to view the compromise as an acknowledgment of an antecedent title in them on the basis of the principle enunciated in *Khunni Lal* v. *Gobind Krishna Narain*[1]. The decision of the Privy Council in *Nathu Lal* v. *Babu Ram*[2], relied on by both sides before us, does not afford any support to the respondent's contention in the appeal. The award which was the bone of contention in that case was passed in a dispute between Mussamat Jamma the widow of Ji Sukh on the one side and Ram Sahai his undivided brother who had taken the estate by survivorship on the other. The award was held to have conferred an absolute right to a portion of the estate on the widow though before the arbitrators she had claimed only a widow's estate as the heir of her husband. At page 168, their Lordships explain the principle on which the decision was based. They observe:

"No doubt, had the facts been that Ji Sukh at the time of his death was separated from his brother, this award could have availed the plaintiffs nothing against a claim by Ji Sukh's reversioners. On the face of the transaction it is not such a compromise by a Hindu widow as could be held binding upon her husband's reversioners. In the present case, however, as it has been established that Ji Sukh at the date of his death left no heritable interest in the property in suit, the sole question decisive of the rights of the parties is the true construction of the bargain made by Musammat Jamma with Ram Sahai. Their Lordships consider that the absolute title of Musammat Jamma is established and that the learned Judges of the High Court were wrong in thinking that, because her claim before the arbitrators was originally a claim by a Hindu woman to take her husband's estate by inheritance, the estate which she in fact obtained under the award was confined to a limited estate. By the bargain which she drove the reversioners of her husband were not damnified. She did not bind them or represent them, and she was not their agent or trustee to acquire property for her husband's estate. She is not estopped as against them from setting up the title which she took from Ram Sahai: nor have they any claim to share in what she gained."

It will thus be seen that the absolute estate which the widow got under the award was in fact sustained on the footing of a grant by Ram Sahai who was the full owner according to the findingof their Lordships. What is specially worthy of note for the present purpose is the opinion of the Privy Council expressed in the first two sentences of the above extract, which leaves no room for doubt on the principle to be applied to the determination of this appeal. If Ji Sukh had been divided from Ram Sahai,

1. (1911) 21 M.L.J. 645: L.R. 38 I.A. 87: I.L.R. 33 All. 356 (P.C.).
2. (1935) L.R. 63 I A. 155 (P.C.).

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Musammat Jamma would have held only the limited estate of a widow in the properties of her husband. Ram Sahai would have then occupied the position of a presumptive reversioner. If in such circumstances a conflict arose between the widow on the one hand and the presumptive reversioner on the other, could it be properly resolved by an award or a compromise giving to the widow or recognising in her an absolute right to a portion of the estate, so as to bind the actual reversioner? The answer is a definite No. In the words of their Lordships, "on the face of the transaction it is not such a compromise by a Hindu widow as could be held binding upon her husband's reversioners", and could not therefore prevail against the actual reversioner when the estate falls in. If their Lordships' decision recognised the absolute character of the estate obtained by the widow in this case, it was because Ram Sahai was not a reversioner in any sense of the term, but had actually become the owner of the property by survivorship on the death of his brother Ji Sukh. He was consequently in a position to dispose of it in any way he liked, by parting with it in favour of any person he pleased. The conclusion of their Lordships was that Ram Sahai, competent as he was to deal with the property as full owner, should be held to have parted with it in favour of Musammat Jamma. This is clearly implied in the last sentence in the above extract. We think that this decision of the highest tribunal is of much assistance in disposing of the respondents' contention in this case. It follows that in a suit in which the presumptive reversioner or for the matter of that even a stranger is ranged on one side and a widow or widows claiming as heir or heirs of the husband on the other, it is not permissible for either or both of the parties to enter into an arrangement calculated to enlarge the limited estate of the widow into one of an absolute character. The presumption in a transaction of this kind is that the estate taken is merely the limited interest of a widow, though special circumstances may outweigh it. *Saheb Rai* v. *Shafiq Ahmad*[1]. Not only has the presumption not been rebutted, but on the contrary there is reason to think that the widows were prompted by a desire to take advantage of the situation for securing a substantial benefit for themselves in the shape of considerable amounts in cash, besides the immovable properties taken by

1. (1927) 53 M.L.J. 507: A I.R. 1927 P.C. 101 (P.C.).

them absolutely. It is true that in the result the widows were deprived of about three-fourths of the estate which they could have enjoyed for their lives on what was but a flimsy and unsubstantial claim. It is unnecessary however to enquire why they acceded to such a preposterous claim. It might have been due to their ignorance and helplessness, or to the fear that they might lose the whole of the estate and be left only with a bare right of maintenance or it might have been the result of undue influence or even coercion. It is equally possible that the compromise presented an attractive proposition in that it would enable them to obtain a substantial amount of liquid cash for themselves, and for their immediate purposes, and would also leave in their hands considerable immovable properties which they could divert at pleasure in favour of any person or persons on whom they might choose to confer a bounty. This appears to us, to be the more likely alternative. But no materials are now available to enable us to probe into the question and arrive at a definite finding; and further as we have said this enquiry is rendered unnecessary in the view we have taken of the nature and effect of the compromise. We must therefore hold that the terms of the compromise notwithstanding, the widows had no more than a limited interest in the properties allotted to them though in absolute terms by that compromise.

Although the validity of the compromise is the main question to be considered, certain other contentions were also advanced by the respondents and had been accepted by the lower Court. Before we examine them ourselves it is necessary to refer to a few more facts.

The claim in the suit relates to a portion of the properties allotted to Thayyamuthu under the compromise. As we have already mentioned Thayyamuthu got about 27 velis of land besides a sum of Rs. 4,000 in cash, while Kamalathachi got only about 11¼ velis and Rs. 3,000. The discrepancy in the shares is due to the fact that out of Thayyamuthu's share, Neelambal the daughter had to be given the lands promised to her by her father Appa Pillai and included in the deed of gift, Ex. B *dowry deed*, which was later executed by Thayyamuthu but to the registration of which she withheld her consent for the reasons contained in Exs. D and D-1. It would appear that a portion of the land comprised in Ex. B was allotted to Kamalathachi under the compromise, and a house which was to have

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been taken by Neelambal was under the same compromise conveyed to Swami Pillai. The balance alone of the property covered by Ex. B was taken by Neelambal, and formed after her death, the subject-matter of the litigation evidenced by Ex. IX series to which we shall presently refer. Thayyamuthu bequeathed the properties she got under the compromise to her daughter Palanivelu by a will dated 12th June, 1887, who in her turn bequeathed it to one Kandasami by her will of 11th January, 1908. Kandasami took possession of the property and enjoyed it till his death in 1914, when the defendant his widow succeeded to it. She is the first respondent in the appeal, the second respondent being one Ramu Thevar added as a party on his application in order to enable him to watch his reversionary interest in view of a compromise sought to be effected between the legal representatives of the plaintiff-appellant, and Kandasami's widow, the first respondent. She did not take part in resisting the appeal which was in fact contested by the second respondent only. No new or special case has, we may observe, been put forward by him in the arguments presented to us. Among the other contentions advanced by the first respondent in the Court below and accepted by the learned Subordinate Judge, one was, we think rightly, abandoned, namely, that the plaintiff was debarred from contending that the compromise in O. S. No, 1 of 1880 was not binding on him by reason of the decision of the Tanjore Sub-Court in O. S. No. 1 of 1924 which held that it was valid and binding. This contention formed the subject of issue No. 5 in the Court below, which was found in the affirmative. In O. S. No. 1 of 1924 one Ramu Thevar sued as trustee to recover the properties which were gifted to Neelambal subject to the deductions mentioned above. His case was that Neelambal had obtained an absolute interest in the property, which she dedicated to certain charities appointing Kandasami Thevar to conduct and manage the same. Kandasami was unwilling, it was said, to undertake the duties of a trustee, and further predeceased Neelambal. Thereupon she managed them herself during her lifetime and died on 28th May, 1923, having appointed Ramu Thevar to manage the trust after her. It was also alleged that Swami Pillai and his brother Thiagaraja trespassed upon the properties, and they were accordingly made parties to the suit along with the widows of Kandasami. The compromise in O. S. No. 1 of 1880 was impugned by Swami

Pillai and his brother, but without success, in the trial and the appellate Courts. In second appeal however, that question was not gone into, as it became unnecessary in view of the finding that the properties were held to have been gifted to Neelambal even during the lifetime of Appa Pillai himself. In view of the abandonment of this contention, we do not think it necessary to enter into a discussion of the legal effect of the decisions arrived at in the said suit and evidenced by the judgments marked as Ex. IX series in the present suit.

The next contention which we have to consider is that covered by issue No. 6 which is as follows:—

"Is the plaintiff estopped from questioning the absolute rights of the deceased Thayyamuthu Achi for reasons mentioned in paragraph 12 of the written statement."

The acts of the plaintiff on which the estoppel is sought to me made out are:

(i) A partition between the plaintiff and his brother of the properties their father, Swami Pillai, got under the compromise.

(ii) The acceptance by plaintiff of a gift from Kamalathachi of the properties she got under the same compromise, the gift deed containing a recital that the properties had been got by her absolutely with full powers of alienation.

(iii) The purchase by plaintiff of a property from Purnathachi, the daughter-in-law of Panchanadam, who got it under a compromise with Thayyamuthu on a suit instituted by Appa Pillai himself during his lifetime, for recovery of the property on the ground that Panchanadam had trespassed on it. This was O. S. No. 27 of 1878 which was settled on 1st March, 1880, by Thayyamuthu accepting the defendant's case that the property had been gifted to him by Appa Pillai.

(iv.) Lastly that plaintiff was a party to certain exchange deeds which dealt with the properties he had purchased from Kamalathachi, whose title was traceable to the compromise.

Having given our careful consideration to this plea we are clear that there is no substance in it. Here again the conduct of the plaintiff evidenced by these transactions has little bearing on the nature of the estate which the widows originally purported to obtain under the compromise. It is difficult to see how the partition referred to above would raise an estoppel. The brothers had succeeded to the properties which their father rightly or wrongly managed to secure, and how the partition which they effected could be said to amount to conduct or representation on which any body could be said to have acted to his prejudice is impossible to see. The conduct implied in the other heads referred to above, can no doubt prevent the plaintiff

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from impeaching those transactions themselves, as against the parties or privies and in respect of the properties comprised therein. But no higher efficacy than that can be attributed to them. The defendants who are strangers cannot take advantage of them, as they have neither acted on them nor have in any way been prejudiced by them. Reliance was placed in this connection on the case reported in *Ramakotayya* v. *Viraraghavayya*[1]. The proposition of law is succinctly stated in the headnote of the report in these terms:

> "If the next presumptive male reversioner consents, though for no consideration, to an alienation without necessity by a Hindu widow (for example, a gift as in this case), the transaction will be binding on him when he actually succeeds to the estate."

The correctness of this proposition is beyond question, but it is to be observed that it has no application to the present case. As explained by Coutts-Trotter, C.J., the essence of the doctrine (of estoppel) is that the person who acted on the faith of the assertion was damnified and this feature is as conspicuous by its absence in this case as it was in that case. Nor is there any reason for the application of the other principle, termed the third doctrine at page 560, whether its true label is election or ratification. It is enough to say that so far as the plaintiff is concerned he did nothing to affirm or validate the absolute right of Thayyamuthu in the properties in suit. Further we are not in this case dealing with an alienation by the widow which is voidable, and therefore capable of being confirmed or ratified by the reversioner. As we have already observed we are concerned to decide the character of the estate retained by the widow, and not of that which was conveyed away by the compromise. This contention must also accordingly be overruled.

Lastly there is the objection that plaintiff could not make out a full title to the property claimed, as the release deed Ex. H is inoperative for want of specification of the properties covered by it. By this deed Thiagaraja released his interest in the properties which accrued to both the brothers as reversioners on the death of Neelambal, in consideration of a sum of Rs. 6,000 received by him from the plaintiff in the manner mentioned in the document. The document has been registered though it did not set out the properties for some reason which has not been made clear to us. In spite of this omission, there is and can be no difficulty

1. (1928) 56 M.L.J. 755: I.L.R. 52 Mad. 556 (F.B.).

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in ascertaining what were the properties which were released by Thiagaraja. Thiagaraja himself never objected to the validity of the deed, and far from it he appears to have affirmed it as second defendant in his written statement in O. S. No. 1 of 1924. In these circumstances we cannot find a justification for refusing to recognise the claim of the plaintiff in full. We may also say that this point was not reiterated before us.

The result is that the appeal succeeds. There will be a decree for possession in favour of the appellant of the properties claimed in suit. The Subordinate Judge will ascertain the amount of the mesne profits claimed in the plaint, and pass a final decree in accordance with the result of his enquiry. The respondents will pay the appellants their costs.

B. V. V. ——— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD ROMER, LORD PORTER AND SIR GEORGE RANKIN.

Mahanth Singh .. *Appellant**

v.

U Ba Yi .. *Respondent.*

P.C.

Mahanth Singh v. U Ba Yi.

Principal and surety—Withdrawing action against principal debtors and continuing to sue the surety—Creditor's rights against surety, when preserved—Indian Contract Act (IX of 1872), Ss. 134, 139 when applicable—Civil Procedure Code (V of 1908), O. 23, r. 1—Withdrawing suit against some defendants—No terms inserted in order—Effect on right to institute fresh suit in respect of same subject-matter—Contract Act, S. 2 (j)—Contract becoming unenforceable by virtue of some procedural regulation—If would cause the contract to become void.

The appellant a building contractor was employed by the four trustees of a pagoda. The contract was in writing signed by the appellant and the four trustees The respondent (who was the trustee of the estate of a lady who had left certain property for charitable purposes) was not a party to the contract but orally guaranteed its due performance by the trustees. The appellant's action was for the sum due on the contract, against the four trustees and the respondent, claiming relief against each defendant personally. After the suit had been commenced, the four trustees of the pagoda were removed and eight others appointed in their place. The appellant by interlocutory application got the eight new trustees substituted and the names of the four original trustees were struck out. At the trial it was suggested by the Judge that the liability of the original trustees was a personal one. The appellant's application to have three out of the four original trustees who were then alive, replaced as defendants, was refused and in the suit the claim

* P.C. Appeal No. 30 of 1938. 3rd March, 1939.

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against the new trustees was dismissed and the respondent found liable as guarantor.

On appeal to the High Court the respondent was held to be discharged by the act of the appellant in foregoing his claim against the original trustees, and on appeal the Judicial Committee,

Held, if no terms are inserted in an order substituting new trustees for old, as defendants the effect of withdrawing the suit against the old trustees is to be ascertained from O. 23, r. 1, and as the order does not give liberty to the applicant to institute a fresh suit the plaintiff is precluded from instituting a fresh suit. However, the result is not to release or discharge the debt but merely to prevent the creditor from suing the principal debtor. The appellant's act in continuing to sue the surety though he withdrew his action against the principal debtors was a clear reservation of his rights. A mere failure to sue within the time specified by the statute of limitation or an inability to sue by reason of the provisions of the Civil Procedure Code would not cause a contract to become void. As the only result of the striking out the original trustees from the action is to preclude the bringing by the appellant of a fresh suit in respect of the subject-matter against them, and is not to release or discharge the principal debt, the debt remains a debt, though the creditor by reason of a rule of procedure cannot himself bring an action upon it.

Appeal from a decision of the High Court, Rangoon, dated 27th January, 1937 (Sir Goodman Roberts, C.J. and Leach, J.) (A.I.R. 1937 Rang. 302) reversing a decision dated 9th April, 1936, of the same Court in its original civil jurisdiction (Braund, J.).

L. M. D. de Silva for Appellant.—The proceedings taken by the appellant to have the original trustees replaced by the new trustees as defendants did not bring into operation the provisions of O. 23, r. 1, because they were taken under O. 1, r. 10, and did not preclude the appellant from bringing a new action against the original trustees.

But even if he was so precluded that did not extinguish the debt or discharge the respondent as surety, for, whatever the position between the appellant and the principal debtors, he clearly reserved his rights against the respondent by proceeding with the action against him after withdrawing it as against the original trustees.

The reasoning by which the High Court held that, the plaintiff having lost his right of action against the original trustees, his contract with them became void, involves, it is submitted, a misconception of S. 2 (*j*) of the Indian Contract Act. The contract between the appellant and the principal debtors has not become void in the sense envisaged by that sub-section. The surety could only pray in aid of his release Ss. 134 and 139 of the Act, but that is not open to him because the appellant has reserved his rights against him.

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R. W. Leach for Respondent.—The appellant's application to have the four original trustees removed as defendants was a withdrawal of the action against them under O. 23, r. 1, with the result that he was precluded from bringing another action against them in respect of the same subject-matter. That operated, it is submitted, to release the respondent as surety.

But the surety is in any event discharged by virtue of S. 2 (*j*) of the Indian Contract Act as a result of which the contract between the appellant and the original trustees, having ceased to become enforceable by the operation of O. 23, r. 1 became void. There is no warrant for limiting the meaning of S. 2 (*j*), and any contract in respect of which an action cannot be brought is void. The surety derives his discharge from the absolute release which the principal debtors have consequently obtained through the appellant's actions.

3rd March, 1939. Their Lordships' judgment was delivered by

Lord Porter.

LORD PORTER.—The facts in this case can be shortly stated. The plaintiff, who is a building contractor, was employed by the four trustees of a pagoda known as the Kyaikasan Pagoda. The terms of the employment are set out in a written agreement dated the 1st January, 1933, and expressed to be made between the Board of the Kyaikasan Pagoda Trustees and the appellant. It is signed by the appellant and each of the trustees. The respondent was trustee of the estate of a lady called Daw Dwe who had left certain property for charitable purposes. He was not a party to the contract but had orally guaranteed its due performance by the trustees, and in Burma such a guarantee is binding though it is not in writing. The appellant fulfilled his contract, and there was due to him a sum of Rs. 26,082-8-6, less, as the learned trial Judge found, a sum of Rs. 158, which had not been paid. The appellant thereupon instituted the present action on the 21st May, 1934, in the High Court in its original jurisdiction, claiming the former sum against the four trustees and the respondent.

In the plaint each of the trustees was named as a defendant, and after their names were added the words "All the above four are trustees of the Kyaikasan Pagoda, Thingangyun and are sued in that capacity". By his prayer the plaintiff asked for relief against each of the defendants personally and against the respondent in particular as the trustee of Daw Dwe's trust. The sum awarded by the learned trial Judge was obviously due

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from the respondent and from the trustees personally, but the appellant seems to have thought that his remedy was not against the named trustees but against any one who might from time to time be trustee of the pagoda.

Shortly after the suit had been begun the four trustees were removed from their position as trustees of the pagoda, and eight others were appointed in their place. The appellant thereupon made an interlocutory application asking originally to add the eight new trustees as defendants, and ultimately to substitute the new trustees in place of the old. The application was granted on the 20th June, 1935, and thereupon the names of the four original trustees were struck out and those of the new trustees inserted in their place.

When, however, the case came on for trial, and before the hearing on the merits, the learned trial Judge suggested that the liability of the original trustees was a personal one and that no liability attached to the new trustees. Thereupon the appellant on the 24th March, 1936, applied to replace the names of three out of the four original trustees (the other having died) as defendants. To this application the trial Judge refused to accede. He held that he had jurisdiction to grant it under O. 1, r. 10 and O. 6, r. 16 (? r. 17) of the Code of Civil Procedure, but he did not think that the appellant should be allowed to change his mind again in the course of the proceedings. The eight trustee defendants were, he thought, entitled to have their case disposed of, more particularly as in his view the appellant would probably be able to pursue his remedies against the original trustees in another suit, though to do so might expose him to a liability for some extra costs. The suit then proceeded to trial, the claim against the new trustees was dismissed and the respondent found liable as guarantor.

From this decision the respondent appealed to an Appellate Bench and in that appeal for the first time put forward the contention that the learned Judge erred in law in holding him liable. His liability, it was suggested, should have been held to be discharged by the act of the present appellant in foregoing his claim against the original trustees. The learned Judges of the Appellate Bench whilst rejecting all the other grounds of appeal held that this contention was well founded, allowed the appeal and condemned the

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appellant in costs. The question argued before their Lordships was whether they were right in so doing.

The grounds upon which, in circumstances material to the present case, a guarantor may be discharged from his liabilities are well established and indeed were not in issue. A surety is discharged if the creditor, without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time. In each case the ground of the discharge is that the surety's right to pay the debt at any time and, after paying it, to sue the principal in the name of the creditor, is interfered with.

To hold that in such cases the creditor still retained his right against the surety, and that the surety on his part could still sue the principal debtor, would mean that the release or grant of time was of no effect inasmuch as the debtor would still be liable at any moment to an action at the suit of the surety.

Where an absolute release is given there is no room for any reservation of remedies against the surety. (See *Webb* v. *Hewitt*[1] and *Commercial Bank of Tasmania* v. *Jones*[2].)

Where, however, the debt has not been actually released, the creditor may reserve his rights by notifying the debtor that he does so, and this reservation is effective not only where the time of payment is postponed but even where the creditor has entered into an agreement not to sue the debtor. In neither case is there any deception of the debtor since he knows that he is still exposed to a suit at the will of the surety.

In England the striking out of the names of the four original trustees would not have affected the respondent's liability. A fresh action could have been brought against them at any time. But it is said that the law of Burma differs from the law of England in this respect, and reliance is placed upon the terms of O. 23, r. 1 of the Code of Civil Procedure and upon S. 2 (*g*) and (*j*) and Ss. 134 and 139 of the Indian Contract Act. O. 23, r. 1 is as follows:—

"(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

"(2) Where the Court is satisfied—

"(*a*) that a suit must fail by reason of some formal defect; or

1. (1857) 3 K. & J. 438: 69 E.R. 1181.
2. (1893) A.C. 313.

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"(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

"(3) Where the plaintiff withdraws from a suit or abandons part of a claim without the permission referred to in sub-r. (2) he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

The sections of the Indian Contract Act are as follows:—

"2.—(g) An agreement not enforceable by law is said to be void.

"2.—(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

"134.—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

"139.—If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

By reason of these provisions the debtor, as the respondent contended, was absolutely released. The appellant indeed contended that he had not proceeded under O. 23, r. 1, in applying to substitute the new trustees for the old, but that his application was made under O. 1, r. 10 alone. Their Lordships cannot accept this view. The last named rule no doubt authorizes the Court to order the name of a party improperly joined to be struck out and that the names of any person who ought to have been joined be added. But such an order is expressly directed to be made on such terms as may appear to the Court to be just.

If no terms are inserted in the order, then, in their Lordships' view, the effect of withdrawing the suit against some of the defendants is to be ascertained from O. 23, r. 1. That order is not very happily worded, but its meaning is reasonably clear. Under its provisions the Court may give liberty to the applicant to institute a fresh suit after a withdrawal, but, if it does not do so, the plaintiff is precluded from instituting a fresh suit in respect of the same subject-matter.

The result, however, is not to release or discharge the debt, but merely to prevent the creditor from suing the principal debtor.

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In England an undertaking by the creditor not to sue the principal debtor, or a binding agreement to give him time, does not operate as a discharge of the surety provided it is a condition of the undertaking or agreement that the rights of the creditor to sue or receive the money from the surety are reserved. (See *Bateson* v. *Gosling*[1] and *Oriental Financial Corporation* v. *Overend Gurney & Co.*[2])

Similarly, a failure to sue the principal debtor until recovery is barred by the statutes of limitation does not operate as a discharge of the surety in England. (See *Carter* v. *White*[3].)

The same view prevails in most of the High Courts in India. (See *Sankana Kalana* v. *Virupakshapa Ganeshapa*[4], *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi*[5], *Subramania Aiyar* v. *Gopala Aiyar*[6] and also *Dil Mohammad* v. *Sain Das*[7].)

It is true that the first two cases were decided in reliance upon the provisions of S. 137 of the Indian Contract Act which enacts that:—

> "Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not in the absence of any provision in the guarantee to the contrary discharge the surety"

But the two later cases base their reasoning also on the broader ground adopted by English law, and hold S. 137 to be merely declaratory of the law and to be enacted only to allay any doubts as to whether the same principles were applicable in India. With these decisions of the other High Courts in India may be contrasted the case of *Ranjit Singh* v. *Naubat*[8] which decides that in spite of the provisions of S. 137, the creditor's right against the surety is not preserved unless he sues the principal debtor within the period of limitation. Such a decision is inconsistent with the views held by the Courts in England and the majority of the Courts in India. In this conflict, their Lordships prefer the reasoning of the majority. In any case those decisions deal rather with the question whether the debt was absolutely released, than with the question whether an agreement not to sue or to give time with a reser-

1. (1871) L R. 7 C.P. 9.
2. (1871) L.R. 7 Ch. 142 at 153.
3. (1883) 25 Ch. D. 666.
4. (1883) I.L.R. 7 Bom. 146.
5. (1885) I.L.R. 12 Cal. 330.
6. (1909) 20 M.L.J. 633: I.L.R. 33 Mad. 308.
7. A.I.R. 1927 Lah. 396.
8. (1902) I.L.R. 24 All. 504.

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vation of right against the surety, operated as a discharge to him.

The present case is in their Lordships' opinion an example of the latter type, and they entertain no doubt that the creditor's rights against the surety were preserved. The appellant's act in continuing to sue the surety though he withdrew his action against the principal debtors was in their view a clear reservation of his rights. Indian authority illustrating this proposition is to be found in *Murugappa* v. *Munusami*[1] and in *Nur Din* v. *Allah Ditta*[2].

But the respondent argues that, even if those cases are applicable in their own circumstances, or binding in England, they are not applicable in Burma to the present case, because, as he maintains, S. 2 (*j*) of the Indian Contract Act alters the position. In his contention that section must be read in its widest sense; with the result that in India and Burma any contract in respect of which an action cannot be brought is void, and therefore the plaintiff's right to recover the debt from the original trustees being unenforceable, is void. It follows, he argues, that, the principal debtors having been absolutely released, the surety is discharged.

If the premises were accurate the conclusion might follow, even though some of the results would be startling and unexpected. One such result would be that when the period of limitation had run out, not only would the remedy be barred, but the debt would be gone and with it all right to retain anything given as security for the debt, and all right to set off a counter liability against it. This possibility was indeed envisaged in *Hajarimal* v. *Krishnarav*[3], but the point was left undecided. A still more startling result, however, is brought about on this construction if S. 2 (*j*) is read with S. 65 of the Indian Contract Act, since in such a case not only would every unenforceable contract become void but each party would be under the obligation of restoring or making compensation for any benefit received, no matter how much had been done towards the performance by either party.

But it is not necessary to adopt a construction leading to such surprising results. The solution is, in their Lordships' view, to be found in the wording of S. 2 (*j*) itself. Not every

1. (1919) 38 M.L.J. 131.
2. (1932) I.L.R. 13 Lah. 817.
3. (1881) I.L.R. 5 Bom. 647.

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unenforceable contract is declared void, but only those unenforceable *by law*, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by S. 2 (*g*), and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by S. 2 (*j*). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void. Finally, as their Lordships think, Ss. 134 and 139 are merely declaratory of what the law of England was and is. S. 139 only applies where the eventual remedy of the surety against the principal debtor is impaired, and for the reasons they have given, their Lordships find nothing in the present case which impairs the respondent's remedy against the original trustees.

Under S. 134 the surety is discharged if, and only if, a contract has been entered into by which the debtor is released, or if there has been any act or omission on the part of the creditor the legal consequence of which has been to discharge the principal debtor.

If, as in the present case, the only result of striking out the original trustees from the action is to preclude the bringing by the appellant of a fresh suit in respect of the subject-matter against them, and is not to release or discharge the principal debt, then the debt remains a debt though the creditor by reason of a rule of procedure cannot himself bring an action upon it. In such circumstances there is nothing in the section to discharge the liability of the surety.

For these reasons their Lordships hold that the respondent has not been relieved of his liability under the guarantee, and will humbly advise His Majesty that the appeal be allowed, the decree of the High Court on its Appellate Side set aside and the decree of the trial Judge restored.

The respondent must pay the appellant's costs of the appeal before the Appellate Court and before their Lordships' Board.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *Gard, Lyell & Co.*

R. C. C.

K. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

S. T. P. Kasi Chetti *alias* Thenappa Chetti and others .. *Appellants* in both (Petitioners)*

v.

Minor Nagappa Chetti lately a minor since declared a major and guardian discharged, *vide* Order dated 18th August, 1938, on C. M. P. Nos. 768 and 769 of 1938 .. *Respondent in both (Respondent).*

Kasi Chetti *v.* Nagappa Chetti.

Civil Procedure Code (V of 1908), O. 32, r. 6—Compromise decree directing payment to next friend of plaintiff—Provisions of Code to be strictly adhered to—Direct payment to next friend without sanction by Court unlawful—Next friend need not be same at the time of payment as at the time of decree.

Where a compromise decree provides that a payment shall be made to the plaintiff's next friend, it must be understood as meaning that the payment shall be made under the provisions of the Code and that the next friend must apply to the Court to receive the money and, if not a statutory guardian, must furnish the requisite security. O. 32, r. 6 is imperative on the point. Again it is obvious that the next friend at the time of payment of money need not be the same person who was the next friend when the compromise decree was sanctioned. It is necessary that the Court sanctioning receipt of money on behalf of the minor should apply its mind to the circumstances that exist at the time of the receipt and not as they existed at the time when the decree was passed.

If the compromise included in respect of payment certain unlawful acts, namely, making the payment direct out of Court to the plaintiff's next friend that part of the contract by way of analogy of S. 56 of the Indian Contract Act was unlawful and therefore void.

Appeal against the order of the Court of the Subordinate Judge of Sivaganga dated 26th July, 1935, and in E.P. No. 222 of 1935 in O. S. No. 76 of 1925.

M. Patanjali Sastri and *T. K. Sundararaman* for Appellants.

C. Padmanabha Aiyangar and *R. Rangaswami Aiyangar* for Respondent.

The judgment of the Court was delivered by

Stodart, J.

Stodart, J.—These appeals arise out of certain proceedings had in execution of the decree in O. S. No. 76 of 1925 on the

* C. M. As. Nos. 481 and 482 of 1935. 23rd February, 1939.

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file of the Sub-Court, Sivaganga. That decree was passed on the 21st December, 1932, and was slightly modified in A. S. No. 37 of 1933 of this Court on the 23rd August, 1934. The decree directed the payment of money to the two plaintiffs Palaniappa Chetti and Nagappa Chetti. The first plaintiff became a major in 1931 and the second plaintiff was at all material times a minor. On the 21st January, 1935, the plaintiffs and defendants filed a joint petition in the Sub-Court requesting the Court to sanction a compromise. By that compromise the terms of the decree were varied. The original decree provided that the decretal amount should be paid jointly to the plaintiffs. By the compromise it was provided that half of it should be paid to the first plaintiff and half to the second plaintiff. Then the amount of the decree was varied. The decree amount was about Rs. 64,000. The plaintiffs in consideration of the defendants refraining from filing an appeal in the Privy Council agreed to receive Rs. 50,000. Lastly and this is the part of the compromise with which we are now concerned, the parties agreed that the money should be paid in four instalments, on the 6th November, 1934, 6th February, 1935, 6th May, 1935 and 6th August, 1935. The first two instalments were to be paid to the first plaintiff and the second two instalments to the second plaintiff. The first two instalments were duly paid, and as provided in the compromise, part satisfaction of the decree was recorded by the Court in respect of them. As regards the third and fourth instalments payable to the second plaintiff the compromise provided that payments should be made to the next friend of the second plaintiff who was at the time of the suit and at the time of the compromise petition his mother Muthayi Achi living in a town in Pudukkottah State. It was also a term of the compromise that these payments should be made not in cash but since the second plaintiff was a minor, it should be made in the shape of Government bonds and postal certificates. Defendants 6 to 8 did not, as a matter of fact, deliver Government bonds and postal certificates to Muthayi Achi on the 6th of May, 1935, for the third instalment nor on the 6th of August for the fourth instalment. What they did was that on the 24th of June, 1935, they paid into Court in money the amount due up to that date in respect of the third instalment and filed an application E. A. No. 222 of 1935 requesting the

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Court to record part satisfaction of that instalment and on the 5th of August, 1935, they paid into Court the money due in respect of the fourth instalment and made a similar request to the Court, with the further prayer that full satisfaction of the decree should now be entered up. The second plaintiff contested these applications and contended that the terms of the compromise had been broken and that therefore the default clause in the compromise came into operation. The default clause is found in paragraph 7 of the compromise and reads as follows:—

> "If default is made in respect of any instalment out of the instalments stated above, even in the manner stated in paragraph 6, the plaintiffs are at liberty to recover by proceeding in execution the aggregate amount of principal, etc., due as per the appeal decree after deducting such of the amounts as might have been received subsequent to the High Court decree, as on the respective dates."

The Subordinate Judge on the 26th of July, 1933, rejected the defendants' petition holding that the satisfaction tendered was not in accordance with the terms of the compromise and that part satisfaction could not therefore be entered in respect of the third instalment. On the 28th of August on E.A. No. 312 he passed a similar order and also observed that on account of the default of the defendants the default clause in the contract enured to the benefit of the plaintiff. The present appeals are against these orders respectively.

The question for our decision is whether there was any default made by the defendants in the payment of the third and fourth instalments of the Rs. 50,000 which they were bound to pay under the compromise aforesaid. It may be explained here that the compromise allowed a period of 30 days grace after the due dates of payments, providing for interest at the rate of Re. 0-4-0 per cent. per mensem during the said period.

Learned counsel for the appellants relies on two circumstances which he says, prevent the payments which defendants made from amounting to a default. His case is that these payments substantially conformed with the terms of the compromise. His first contention is based on the fact that on the 30th of May, the Chief Court in the Pudukottah State where the plaintiffs, and the next friend of the second plaintiff, reside, issued an order of injunction restraining defendants from paying the decree amounts due in this suit to the second plaintiff and restraining the second plaintiff from receiving these amounts.

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The defendants therefore could not tender the bonds to Muthayi Achi at her residence in Pudukottah by reason of this injunction nor could Muthayi Achi have received them if they have been tendered to her. The defendants point out that though they are residents of British India they were bound at their peril to obey the order of injunction because they had a considerable amount of property within the Pudukottah State, which could have been proceeded against if they had disobeyed the order. The defendants' case therefore is that they did the best they could to carry out the terms of compromise by paying the money into Court. They could not pay it into Court on the 6th May the due date nor on the 6th of June the day when the days of grace expired since both days fell within the vacation of the Court; but they paid it with the accrued interest on the date when the Court reopened, namely, the 24th of June, 1935. Then when the 6th of August came round the injunction was still in force and they adopted similar procedure, paying the instalment even before the due date, namely, on the 5th of August, into Court. The Subordinate Judge has held agreeing with the defendants that they were bound to obey the injunction of the Chief Court, Pudukottah, but that that did not prevent them from tendering the Government bonds and postal certificates to the second plaintiff's mother and next friend. The finding is not attempted to be supported by the learned Counsel for the respondents. It is clear that the injunction in the Pudukottah Chief Court extended to the payment and satisfaction of the decree in the suit in whatever manner it was sought to be effected.

The defendants' second contention is that in any case it would not have been lawful to tender the bonds, etc., to the minor's next friend because in so doing they would have been doing an unlawful act, unlawful, that is to say, by reason of O. 32, r. 6, Code of Civil Procedure. That rule is:

"A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either (*a*) by way of compromise before decree or order or (*b*) under a decree or order in favour of the minor,"

and the second part of that rule is:

"Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, the Court shall, if it grants him leave to receive the property require such security and give such directions, as will, in its opinion, sufficiently protect the property from waste and ensure its proper application."

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Learned Counsel for the defendants points out that, though in the compromise it was provided that the bonds should be handed over to Muthayi Achi direct, it would have been unlawful for her to receive them since first of all she could not do so without the leave of the Court and secondly the leave of the Court could not be granted without first calling upon her to furnish security. We are informed that she is not the guardian of the property of the minor within the meaning of the second part of O. 32, r. 6.

We agree with both these contentions of learned Counsel and we are satisfied that the defendants substantially complied with the conditions laid down in the compromise for the payment of the third and fourth instalments. The object of the compromise so far as the plaintiffs were concerned was to secure prompt payment of the decree in the shape of money or easily realisable securities. The manner of the payment of the third and fourth instalments, namely, in the shape of Government bonds and postal certificates, was not in our opinion very material. It is true that the defendants could have complied more strictly with the terms of the compromise by bringing into Court, on the days on which they brought into Court the money, Government bonds and postal securities purchased in the name of the minor, but that, in our opinion, is the full measure of the default committed by the defendants and we do not regard it as a material breach of the terms of the compromise. There is ample authority for the position that when money becomes payable under the compromise decree on a day when the Court is closed it is not a breach of the compromise to pay the money into Court on the first day when the Court reopens. *See* the case reported in *Sankaran Unni* v. *Raman*[1].

We are not inclined to accept the argument of the learned Counsel for the respondent that the injunction of the Pudukotta Chief Court could have been and should have been disobeyed by the defendants, nor are we impressed with his argument that in this case there was no necessity for the second plaintiff's next friend to get the leave of the Court to draw out or to receive the money or the bonds which had to be paid under the compromise. This last argument is based on the fact that the Court sanctioned the compromise holding it beneficial to the minor. Such a

1. (1924) 48 M.L.J. 596.

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sanction however has nothing at all to do with the provisions of O. 32, r. 6. When a decree provides that the payment shall be made to the plaintiff's next friend it must be understood as meaning that the payment shall be made under the provisions of the Code and that the next friend must apply to the Court to receive the money and, if not a statutory guardian, must furnish the requisite security. O. 32, r. 6 is imperative on this point. Again it is obvious that the next friend at the time of payment of the money need not be the same person who was the next friend when the compromise decree was sanctioned. It is necessary therefore that the Court sanctioning the receipt of money on behalf of the minor should apply its mind to circumstances as they exist at the time of the receipt and not as they existed at the time when the decree was passed.

In the course of the very interesting argument which we have heard in this case, learned Counsel for the appellant has pointed out that apart from the two main considerations on which he has based his appeal the defendants were fully justified in acting as they did on the analogy of the terms of S. 56 of the Indian Contract Act. S. 56 is:

"An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void, when the act becomes impossible or unlawful."

Here the compromise included certain lawful acts, but in respect of the payment of the third and fourth instalments it included acts which were unlawful, namely, making the payment direct, out of Court, to the second plaintiff's next friend. That part of the contract by way of analogy to S. 56, the defendants were entitled to ignore as being unlawful and therefore void. In the result we allow these appeals with costs throughout here and in the Court below and direct that satisfaction be entered of the third instalment and of the fourth instalment and that the decree be recorded as fully satisfied.

K. C. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE STODART.

Katragadda Nagayya .. *Appellant** (*Plaintiff*)

v.

Sree Raza Rao Venkata Mahipathi Gangadhara Rama Rao Bahadur .. *Respondent* (*Defendant*).

Nagayya *v.* Venkata Mahipathi Gangadhara Rama Rao Bahadur.

Madras Local Boards Act (XIV of 1920)—Amending Act (II of 1932)—Education tax levied on proprietor of an estate as land cess—Proprietor if can recover half of it from tenant—S. 88, if applicable to such a tax—Effect of Ss. 34 and 36 as amended.

Where a Local Board levied an education tax as an addition to land tax under Ss. 34 and 36 of the Local Boards Amending Act II of 1932 and collected it from the proprietor of an estate falling under the Estates Land Act, it is open to the proprietor to collect half of the tax so paid by him in respect of the tenant's holding from the tenant by virtue of the proviso to S. 36 of the Amending Act which attracts to it the provisions of the proviso to S. 88. The meaning of S. 36 is that the education tax levied being added to the land cess, both shall be collected as one unit and all the provisions of the Local Boards Act applicable to land cess (including S. 88) shall be applicable to the consolidated sum.

Nagabushanam v. *Venkanna*, (1929) 57 M.L.J. 726 I.L.R. 53 Mad. 151 and L. P. A. No. 135 of 1929 (unreported) distinguished as cases before the amendment.

Appeal against the decree of the District Court of Kistna at Masulipatam dated 14th February, 1935, in Appeal No. 178 of 1934 preferred against the decree of the Court of the Deputy Collector of Gudivada Division dated 30th May, 1934, in S. S. No. 7 of 1934.

P. Satyanarayana Rao for Appellant.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The subject of this second appeal is a sum of Rs. 5-1-0, which was collected under the Estates Land Act from the plaintiff, who is an occupancy tenant in a proprietary estate. This sum was collected by the proprietor on the 23rd October, 1933, and it represents one half of the education tax which the proprietor had to pay in respect of the plaintiff's holding. The plaintiff's suit was under S. 144 of the Estates Land Act to recover back this money from the landholder on the ground that the latter was not legally entitled to collect it from him. Both the trial Court and the learned District Judge on appeal

* S. A. No. 606 of 1935. 27th January, 1939.

Nagayya
v.
Venkata
Mahipathi
Gangadhara
Rama Rao
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from it have held that the landholder was so entitled and the plaintiff now appeals against that decision. In order to understand how the education tax is assessed and levied it is first necessary to refer to the provisions of the Local Boards Act (XIV of 1920). In that Act provision is made for the collection of a cess which is called a land cess. This cess in proprietary estates is not paid by the occupancy tenants. It is assessed upon and levied from the proprietor of the estate. It is calculated on the rental value of the lands in his estate. The Act, however, provides that the landholder shall be entitled to reimburse himself to the extent of half the cess payable in respect of any holding by collecting it from the occupancy tenant. The question that now arises, put in its simplest form, is whether the landholder can collect from the occupancy tenant one half of the education tax which he has paid in respect of the holding of that tenant. In order to decide this question the provisions of the Elementary Education Act relating to the assessment and the mode of collection of the tax have got to be construed. These provisions so far as relevant to the present question are Ss. 34 and 36, the latter section being a new section introduced by the Amending Act II of 1932. These sections are as follows, leaving out unnecessary words:—

"S. 34 (2).—Any District Board may levy tax not exceeding 25 per centum of the taxation levied under the law for the time being in force governing District Boards under all or any of the following heads, namely, land cess, profession tax and house tax."

This section therefore empowers the Board to impose new taxation in one of several modes. It may declare that the new tax shall be 25 per cent. of the land tax or 25 per cent. of the profession tax or 25 per cent. of the house tax; or it may declare that the new tax shall be 25 per cent. of all these taxes combined or 25 per cent. of any two of them combined. S. 36 deals with the realisation of the tax and the relevant words of it are as follows:—

"Every tax levied under any head of taxation mentioned in S. 34 shall be deemed to be an addition to a tax levied under the same head under the law for the time being in force governing local boards."

Then the section goes on:

"and all the provisions of such law relating to the incidence, assessment or realisation of such tax or *in any manner connected therewith* shall be applicable accordingly."

The first part of this section appears to mean that when under S. 34 the tax is imposed as a surcharge, say on the land

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cess, then it shall be deemed to be an addition to the land cess. If it is imposed as a surcharge under the terms of S. 34 as a surcharge on the profession tax, it shall be deemed to be an addition to the profession tax and so on; and by the latter part of the section the provisions of law relating to the incidence, assessment and realisation of the substantive tax are made applicable to the newly added surcharges. The lower Courts have interpreted this last provision as meaning that the proviso to S. 88 of the Local Boards Act is made applicable to the education tax when the education tax has been levied as in this case as a surcharge upon the land cess; and this amounts to finding that the landholder, just as he can recover from the occupancy tenant half of the land cess which he has paid in respect of that tenant's holding, can recover from him also half the amount of the education tax. Learned counsel for the appellant argues that that is not the meaning of S. 36. His contention is that the latter part of S. 36 relates only to the incidence, assessment and realisation of the education tax and that that tax is neither assessed upon, nor to be realised from the occupancy tenant.

I think, however, that the lower courts are correct in their interpretation of S. 36. That section attracts the provisions of the Local Boards Act not only in matters relating to the incidence, assessment or realisation of the tax but also the provisions of the Local Boards Act *in any manner connected therewith*. In other words the meaning of S. 36 in my opinion is that the education tax levied under this Act being added, say, to the land cess levied under the Local Boards Act, both shall be collected as one unit, and all the provisions of the Local Boards Act applicable to the land cess shall be applicable to the consolidated sum levied as land cess and education cess. The provisions of the Local Boards Act contained in the proviso to S. 88 of that Act is a provision connected with the incidence of the land cess. The tax falls in the first instance on the landholder and by reason of this proviso it is transferred in part to the shoulders of the occupancy tenant.

In the course of the argument a certain previous decision of this Court has been cited by learned counsel for the appellant. That decision is that under the Madras Elementary Education Act, 1920, before it was amended by Madras Act II of 1932, the landholder had no statutory power to collect from his

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occupancy tenant one half of the education tax. The decision is reported at *Nagabushanam* v. *Venkanna*[1], and it is discussed and explained in an unreported case, L. P. A. No. 135 of 1929. The law then in force was different from the present S. 36 of the Elementary Education Act. S. 36 then read simply:

"The assessment and realisation of the tax leviable under S. 34 shall be in accordance with the procedure prescribed,"

that is to say, prescribed within the meaning of S. 3 (11) of the Act by rules made under the Act by the Governor in Council. And a rule had been made by the Governor in Council under this section. That rule was,

"The tax levied by a local authority under S. 34 of the Madras Elementary Education Act, 1920, under any head of taxation specified therein shall be treated as an addition to the tax levied under that head and shall be assessed and recovered along with the said tax as an integral part of it."

The difference between this rule and the new S. 36 is obvious. The former does not make applicable to the Elementary Education tax, the provisions of law relating to the incidence, assessment or realisation, for instance, of the land cess "*or in any manner connected therewith.*" The learned Chief Justice Sir Owen Beasley and Mr. Justice Bardswell who decided the Letters Patent Appeal held that the provisions of S. 88 of the Madras Local Boards Act and its proviso were not by this rule imported into the Elementary Education Act and with respect I think that that is obvious. But the amending section has changed the situation. As I have said, I think that section must be interpreted in the sense in which it has been interpreted by the lower Courts. The second appeal is dismissed with costs.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Mullapudi Sooranna .. *Appellant** (*Respondent*)

v.

Mullapudi Venkanna .. *Respondent* (*Petitioner*).

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Limitation Act (IX of 1908), Arts 181 and 182—Joint decree against A, B *and* C*—Payment of, by* B *and* C *alone—Appeal by* B *and* C*—Appellate Court exonerating* B *and* C*—Starting point of limitation, date of decree or date when money paid by* B *and* C *is refunded to them—Article applicable 181 or 182 (2) of the Limitation Act.*

1. (1929) 57 M.L.J. 726: I.L.R. 53 Mad. 151.

* A. A. A. O. No. 26 of 1936. 19th April, 1938.

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A joint and several decree for payment of money was passed against *A*, *B* and *C*. The money was paid by *B* and *C* alone and the Court thereupon entered up satisfaction of the decree. *B* and *C* also appealed against the decree in so far as the decree held them also liable for the amount and the appellate Court set aside the decree against *B* and *C* and modified the decree by confining the decree against *A* alone.

Held, the decree became an executable decree against *A* from the date of the appellate decree and an application for execution must be filed within three years of the appellate decree under Art. 182 (2). The fact that the money was paid back to *B* and *C* at a later date will not save limitation. On *B* and *C* being exonerated, the order entering up satisfaction of the decree became automatically superseded by the appellate decree and from that date the money realised from *B* and *C* ceased to be money paid in satisfaction of the decree. There was no money paid by *A* and there was therefore nothing to render the appellate decree incapable of execution against *A*. The result of giving effect to the decree-holder's contention will be that he can by his own act or default indefinitely postpone the period of limitation for the execution of the decree.

Appeal against the order of the Court of the Subordinate Judge of Ellore dated the 14th December, 1935, and made in A. S. Appeal No. 70 of 1935 preferred against the order of the Court of the District Munsiff of Kovvur in E. P. No. 592 of 1933 in O. S. No. 913 of 1926.

A. Lakshmayya for Appellant.

K. S. Desikan for *V. Govindarajachari* for Respondent.

The Court delivered the following

JUDGMENT.—The question in this case is whether the application for execution, out of which this appeal arises, is barred by limitation. The learned District Munsiff has held that it is barred while the learned Subordinate Judge has taken a different view.

The plaintiff obtained a money decree against defendants 2 to 4 in O. S. No. 913 of 1926 on the file of the District Munsiff's Court of Kovvur on the 25th February, 1928. He then made an application (E. P. No. 730 of 1928) for execution of the decree by attachment of the movable property of the defendants. Defendants 3 and 4 preferred an appeal A. S. No. 375 of 1928 on the file of the Sub-Court, Ellore, and applied for stay of execution of the decree. By order dated 16th October, 1928, the learned District Judge, before whom the appeal was pending, directed the defendants to deposit the amount into Court and ordered that the amount of the decree may be paid to the plaintiff on his furnishing security to the satisfaction of the District Munsiff, but if the amount was not

deposited, the execution of the decree may go on. In pursuance of this order defendants 3 and 4 deposited the decree amount into Court. The plaintiff then drew the amount on executing a security bond in favour of the District Munsiff of Kovvur in and by which he undertook as follows:—

"As it has been ordered that I should furnish security, I stand surety for Rs. 585-6-6, out of my free will and I have mortgaged therefor my immovable property mentioned in the schedule hereunder. If the decree of the lower Court be reversed or modified in the appellate Court, I hereby agree that I shall be liable to give away in execution of the said decree, any property which I have taken, to take out proceedings properly and conduct the same, according to the appellate decree, to pay any amount, if any, payable by me under the said appellate decree, that on failure to do so, you are at liberty to recover the entire amount, that may be found payable by me by means of this mortgage property, if the amount realised by sale of the mortgage property is not sufficient for the amount payable by me, I, my heirs and my representatives shall be liable to pay the balance on our personal liability and by means of our other properties and I have executed this security bond. I have retained the said property in my possession."

After the execution of the security bond the plaintiff received the said amount and thereupon an order of satisfaction of the decree was made. The order was, "Enter full satisfaction. Struck off". Even though an appeal was preferred by defendants 3 and 4 the order of full satisfaction on payment of the decree amount by defendants 3 and 4 enured also to the benefit of the second defendant because on that date the decree was a joint and several one and the payment by any one of them would operate as a satisfaction of the entire decree. On 21st October, 1929, the appeal of defendants 3 and 4 was allowed. They were exonerated without costs of the lower Court and the decree against the second defendant was confirmed. The operative portion of the decree ran thus:

"This Court doth in modification of the decree of the lower Court order and decree that the plaintiff (first respondent) do recover from second defendant (third respondent) alone the sum of Rs. 398-2-9, with interest thereon at 12 per cent. per annum from date of the plaint (2nd December, 1926) till date of decree of the lower Court (25th February, 1928) and further interest on the aggregate sum at six per cent. per annum from 25th February, 1928, till date of payment and do also recover Rs. 88-3-0 being the costs of the lower Court. This Court doth further order and decree that appellants (defendants 2 and 4) be hereby exonerated without costs of the lower Court and that each party do bear his own costs of the appeal."

The present execution application against the second defendant was made on 9th August, 1933, for attachment and sale of the immovable property of the second defendant. The second defendant pleaded that the application was barred by

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limitation the same having been filed more than three years from the date of the appellate decree, namely, 21st October, 1929. But the plaintiff contended in answer that the application was not barred because it was only on 20th June, 1933, he repaid by way of restitution the amount which was deposited by defendants 3 and 4 and taken by him on furnishing security and in respect whereof full satisfaction was entered and under Art. 181 of the Limitation Act the right accrued only on the date of the refund. This contention prevailed in the lower appellate Court. The question is whether this contention is tenable.

When a decree has been modified in appeal, it is superseded by the appellate decree and the only decree which is capable of execution is the appellate decree and the starting point for limitation is three years from the date of the appellate decree as provided by Art. 182 of the Limitation Act. In this case the decree of the first Court was against the defendants 2 to 4 but the appellate decree was only against the second defendant, the decree against defendants 3 and 4 having been set aside. From the operative portion of the appellate decree which has been already extracted above, it will be seen that the said decree orders and directs that the plaintiff do recover from the second defendant a certain sum of money with interest. Thus the appellate Court passed a fresh decree which *prima facie* is capable of execution. It is contended that Art. 181 of the Limitation Act and not Art. 182 should be applied in the present case. But it is only when Art. 182 cannot be applied, Art. 181 will come into operation. In *Rameshwar Singh* v. *Homeshwar Singh*[1], the Privy Council formulated the following test for the applicability of Art. 182:

> "They are of opinion that when the Limitation Act of 1908 prescribes three years from the date of a decree or order as the period within which it must be enforced, the language read with its context, refers only, to an order or decree made in such a form as to render it capable in the circumstances of being enforced."

It cannot therefore be said that the form of the appellate decree in this case is such as to render it incapable of being enforced. Again, in *Rungiah Goundan & Co.* v. *Nanjappa Row*[2], Benson and Bhashyam Aiyangar, JJ., observed at page 789 thus:

1. (1920) 40 M.L.J. 1: L.R. 48 I.A. 17 (P.C.).
2. (1903) 13 M.L.J. 412: I.L.R. 26 Mad. 780.

"The true criterion in determining whether Art. 179 (corresponding to Art. 182 of the present Act) or 178 (corresponding to Art. 181) applies to a particular application is to ascertain whether any one of the six points of time specified in column 3 of Art. 179 is applicable to it and if none of them is applicable, it is only then that Art. 178 will apply."

If we are to apply this test, the second point of time indicated in Art. 182, namely, where there has been an appeal, the date of the final decree or order of the appellate Court or the withdrawal of the appeal will certainly apply here. But the contention urged is that there was already an order of satisfaction made on 18th December, 1928, and till that order is set aside and the money refunded, it will not be open to the plaintiff to apply for execution of the decree and therefore the appellate decree, until the money is refunded, is incapable of enforcement and Art. 181 will therefore govern the case. The effect of the decision of the appellate Court is that the original decree is no longer in force and has been entirely superseded and with it the order of the full satisfaction entered on the 18th December. The appellate decree exonerates defendants 3 and 4 entirely from liability and wipes out the original decree. The money realised in execution of the original decree against defendants 3 and 4 could no longer be deemed to be money paid in satisfaction of the decree which has been passed by the appellate Court against the second defendant on the 21st February, 1929. On the passing of the latter decree, the obligation to refund the sum of money realised from defendants 3 and 4 immediately arose and the security bond executed by the plaintiff and by which he undertook to refund the said sum of money on the security of his immovable property became operative. There is no obligation on the part of the plaintiff to make restitution of any sum of money to the second defendant nor could the second defendant in virtue of the appellate decree call upon him to refund any sum of money realised in execution of any wrong decree against him. As therefore the sum of money realised from defendants 3 and 4 in execution of the original decree could no longer be said to be moneys received in satisfaction of the decree against the second defendant the right to execute the appellate decree against the second defendant arose on the date of the passing of the said decree, namely, 21st February, 1929. The cases relied on by Mr. Desikan and also by the lower Court seem to me to be distinguishable. *Mangamma Nayakuralu* v. *Rama-*

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dasappa Nayanimvaru[1] was the first case relied on with considerable emphasis. In that case, a decree was passed by the first Court for a sum of money against the judgment-debtor. In execution of the said decree, certain zamindari properties were attached. In order to save that property from being sold, the judgment-debtor paid the money and satisfaction of the decree was entered up and the execution petition was dismissed. But the decree was modified in appeal by adding the words "excluding the zamindari" thus making it clear that the amount of the decree is not realisable from the zamindari property; but the obligation of the judgment-debtor to satisfy the decree amount was not interfered with. After the passing of the decree, the judgment-debtor applied for refund of the amount paid by him by reason of the wrongful attachment of the zamindari property. An order of refund was made and after payment of the said sum of money the decree-holder applied to execute the decree against the judgment-debtor. Under such circumstances the question arose whether Art. 181 or Art. 182 would apply. Odgers and Wallace, JJ., held that Art. 181 and not Art. 182 would apply on the ground that the starting point for limitation could not be the date of the appellate decree because by virtue of the previous order of satisfaction it was incapabale of execution on that date. Therefore by applying the test formulated in *Rameshwar Singh* v. *Homeshwar Singh*[2], they were of the opinion that in the circumstances the decree must be held to be incapable of being enforced on the date of the appellate decree. Odgers, J., observes:—

> "A quite possible view is that down to 1918 the decree was in fact non-executable by the decree-holders as they had been paid in full."

Wallace, J., observed:

> "When the decree-holder in the present case got his final decree as amended by the High Court, the decree he had obtained in the lower appellate Court was already satisfied and would remain satisfied unless the judgment-debtor chose to recover by appropriate proceedings the amount already paid. In my view the decree-holder could not, at least until the judgment-debtor demanded restitution, apply for execution of the amended decree. Until then it was not a decree capable of execution and Art. 182 would have no application. Art. 181 must therefore apply."

It is clear from these observations that the judgment-debtor whose liability to satisfy the decree remained unaffected, did pay money in satisfaction of the decree and it was a proper

1. (1924) 48 M.L.J. 563. 2. (1920) 40 M.L.J. 1: L.R. 48 I.A. 17 (P.C.).

payment in satisfaction thereof. Therefore it can be said that unless the judgment-debtor chose to recover the same by appropriate proceedings the decree must be deemed to have been satisfied and until the order of satisfaction is set aside, the decree would be incapable of enforcement. But the facts in this case are different.

The next case relied on is *Raminidy Venkata Appa Row* v. *Lakkoju China Ayyanna*1. The facts in that case are as follows. The plaintiff in that case obtained a mortgage decree and had the property sold on the 10th December, 1898; but the sale was set aside on the 9th of October, 1900, at the instance of the judgment-debtor. The purchaser applied for the refund of the purchase money on the 19th June, 1901. The Court ordered the decree-holder to refund. On the 20th June, 1904, the decree-holder applied for execution. The learned Judges held that the application was not barred by limitation. The ground of the decision is thus stated by the learned Judges:—

"The decree-holder is not however bound to do anything except pay on demand; S. 315 of the Code of Civil Procedure empowers the auction purchaser to require re-payment, but does not impose upon the decree-holder the duty of tendering the money as soon as the sale is set aside. Can he then, so long as he holds the money, apply for another sale? . . . . So here the judgment-debtor's action in getting the sale set aside did not injure the decree-holder until he was compelled to refund the purchase money to the purchaser, and till then he had no right to call upon the judgment-debtor to pay his debt a second time. He could not resist the claim of the purchaser before the District Munsiff, and at the same time apply for execution of his decree against his judgment-debtor."

In this view they apply Art. 178 of the Limitation Act (XV of 1877) observing that although there were undoubtedly difficulties in the way of excluding the case from the purview of Art. 179 of the said Limitation Act, they were not prepared to dissent from the two cases referred to, one of the Calcutta High Court and the other of the Bombay High Court which applied Art. 178 under similar circumstances, as otherwise monstrous injustice would ensue. It will be then seen that the case the learned Judges were dealing with was that of a sole judgment-debtor whose property was sold and it may be argued that until the date of the order for refund, satisfaction against the judgment-debtor could be deemed to be subsisting because the decree-holder was retaining in his hands the sale proceeds of the

1. (1906) 17 M.L.J. 194: I.L.R. 30 Mad. 209.

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judgment-debtor's property. But the case here is different. However, with due respect to the learned Judge, the view taken in this case does not commend itself to me to be sound. It will be seen that the moment the sale is set aside the obligation to refund the purchase money to the purchaser arose. The money in the hands of the decree-holder must be deemed to be money had and received to the use of the purchaser which in equity he was bound to refund to the purchaser. The money therefore could no longer be money realised from the property of the judgment-debtor by the fact of the sale having been set aside and the property of the judgment-debtor being restored to him. It is not therefore possible to understand the observations of the learned Judges when they observe that till the money was refunded the decree-holder had no right to call the judgment-debtor to pay his debt a second time. It seems to me that the moment the sale is set aside, the order of satisfaction goes, the decree is capable of execution and the right to apply accrues from the date of the setting aside of the sale, and even if Art. 178 applied, the right would have accrued from 9th October, 1900 and not on 19th June, 1901. I am not able to understand what any question of damage has to do with the construction of Art. 178 or Art. 179 of the Limitation Act. Mr. Desikan also relied on the decision in *Borojo Charchi* v. *Basudebo Doss*[1]. The said decision only follows *Raminidy Venkata Appa Row* v. *Lakkoju China Ayyanna*[2] and is based on the theory of damage. But these decisions do not apply to the facts of this case. The logical result of giving effect to the contention of the respondent would be that he can by his own act or default indefinitely postpone the period of limitation for the execution of the decree. To put the matter concretely, in this case by virtue of the security bond executed by the plaintiff, defendants 3 and 4 may wait for 12 years and take proceedings to realise the amount to be refunded and the said proceedings may take any length of time before the amount is actually realised and all this time the decree against the second defendant must be deemed to be alive, a result which ought not to be allowed, unless there is a compelling provision of law to do so and I have not been shown any. I am therefore of the opinion that Art. 182 is applicable and the execution application is

1. A.I.R. 1928 Mad. 152.
2. (1906) 17 M.L.J. 194: I.L.R. 30 Mad. 209.

barred by limitation. I may observe that the respondent's counsel did not seek to support the judgment of the lower Court on the ground that the execution application in question is a continuation of the prior execution application.

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I therefore reverse the decision of the lower appellate Court and restore that of the District Munsiff with costs throughout.

Leave to appeal refused.

S.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Emani Satyanarayanamurthi, Manager of Sree Bala Tripura Sundari Rice Mill, Attili .. *Appellant** (*Plaintiff*)

v.

Katuri Gopalan and another .. *Respondents* (*Defendants*).

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Partnership—Clause in partnership deed for legal representatives of a deceased partner continuing partnership as before—If specifically enforceable—Refusal by representative to continue partner—Remedy of partnership—Suit for contribution for loss—Relief of damages for breach of consent, if can be given.

A deed of partnership contained a covenant to the effect that "if any of the shareholders should die while the business of the firm is carried on, his heir or his representatives shall after his lifetime be a partner in his place, being entitled to the right and interest of the said partner, and he shall get the business done subjecting himself to the abovesaid terms and on that account neither the partnership should be cancelled nor would it come to an end."

Held, that such a covenant to continue the partnership cannot be specifically enforced and the effect of the death of the partner coupled with the refusal of the representatives to continue the partnership will be the dissolution of the firm.

In a suit to recover money due by way of contribution towards the loss incurred by such a partnership from the sons of a deceased partner, it is not permissible to give relief by way of damages for the breach of the contract entered into by the father because the basis of the claim for damages for breach of a covenant to continue a partnership is totally different from the basis of a claim for a proportionate share of the loss from a particular partner.

Appeal against the decree of the Court of the Subordinate Judge of Narasapur in A. S. No. 63 of 1935 preferred against

* S. A. No. 877 of 1935. 28th February, 1939.

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the decree of the Court of the District Munsif of Tanuku in O. S. No. 394 of 1931.

B. Sitarama Rao for Appellant.

A. Lakshmayya for Respondents.

The Court delivered the following

JUDGMENT.—The appellant was the plaintiff in a suit brought on the basis of a deed of partnership to recover money due by way of contribution towards the loss incurred by the partnership from the defendants as sons of a deceased partner. The basis of the suit is a covenant in the deed of partnership which runs as follows:—

"If any of the shareholders should die owing to an act of Providence while the business of the firm is being carried on, his heir or his representatives shall after his life time be a partner in his place, being entitled to the right and interest of the said partner, and he shall get the business done subjecting himself to the aforesaid terms and on that account neither the partnership should be cancelled nor would it come to an end."

The plaint alleges that the partnership worked at a loss and that by a resolution of the shareholders the plaintiff was authorised to collect the proportionate quotas of the loss from the various shareholders on behalf of the firm, that the father of the defendants having died, all his properties passed to his sons, the defendants, that the first defendant has been taking part in the management of the partnership firm and that the second defendant is liable because the business of the firm has been managed for the benefit of the family. It is established that the defendants' father died in September, 1929, that the firm incurred a loss in the year 1929-1930 and that the defendants on demand paid on 21st March, 1931, their quota towards this loss. The suit was filed in July, 1931, for what is claimed as the proportionate amount of the loss of the firm incurred in the year 1930-31. It has been found as a fact by the lower appellate Court that the first defendant did not become a partner at his father's death or take part in the management of the firm. As a matter of fact in September, 1929, when defendants' father died both the defendants were minors and they could not legally have become partners though they might have been admitted to the benefit of the partnership with reference to S. 247 of the Contract Act which governs the suit. It is established by the decision in *Lancaster* v. *Alsup*[1], that a covenant by a deceased

1. 57 L.T. 53.

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partner binding his executors to continue the partnership cannot be specifically enforced against the executors and that the effect of the death of the partner coupled with the refusal of the executors to continue the partnership will be the dissolution of the firm. The learned Judge suggests, however, that the surviving partners might have a right of action for damages against the executors for the breach of the covenant of the deceased partner that his representatives should continue the firm.

It is not now argued that the defendants in view of the findings of the lower appellate Court can be held liable for the trading loss *qua* partners; but it is suggested that the amount may be recovered from them by way of damages for the breach of the contract entered into by their father that the partnership should be continued by his representatives after his death. It seems to me that there are two very grave objections to this contention. One is that the basis of a claim for damages for breach of a covenant to continue a partnership is totally different from the basis of a claim for a proportionate share of the loss from a particular partner. In the latter case all that the plaintiff has to do is to ascertain the total loss, divide it amongst the various shareholders and claim proportionately. But a claim for damages for breach of a covenant to continue a partnership would necessarily be based on the loss which the firm suffered, not by reason of its unsuccessful trading in a particular year, but as a consequence directly flowing from the withdrawal of one of the partners from the firm. Quite conceivably such a claim for damages might be made when the firm as a whole had made a profit. In any case it has no direct relation to the amount of profit or loss made by the firm in a particular year. Incidentally I may observe that the defendants have paid their quota of the actual loss sustained by the working of the business during the year in which their father died and there is little in the evidence to indicate that the firm suffered any loss by the withdrawal of the defendants' father which is not adequately compensated by what has been paid.

A second objection to the remedy suggested by Mr. Sitarama Rao for the appellant is the fact that this is not a remedy which has been sought in the plaint. The plaint proceeds quite clearly on the footing of an obligation under the partnership deed whereby the defendants are bound to pay their quota of the trading losses. This is quite a different action from one

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in which the firm claims damages for a breach of a covenant to continue the business as a partnership by the representatives of a deceased partner. I say nothing about the further ground on which the plaintiff has been non-suited, namely, his capacity to sue as the sole representative of the firm. The appeal is dismissed with costs.

Leave to appeal refused.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Chaganti Veeresalingam .. *Appellant** (*Petitioner*)

v.

Mallampalli Subbarayudu and others .. *Respondents* (*Respondents and nil*).

Veeresalingam v. Subbarayudu.

Security—Bond—Construction to be strict—Bond mentioning a condition—Appellant and another liable on the bond—Success of one of them—Refund cannot be claimed unless both succeeded in the appeal.

Surety bonds have to be construed with strictness. A surety can only be held to his bond if the condition of liability has been fulfilled.

Where the appellant and another (defendants) deposited in the trial Court the amount of decree and executed a bond which ran as follows: "If the defendants should succeed in the appeal preferred in the Subordinate Judge's Court we agree that the said amount may be recovered by means of the property given as security and also from us personally and we have given the undermentioned property as a security for the said amount, retaining the same in our possession", but one of the respondents in appeal withdrew the amount on a security bond signed by the other two respondents along with him, on the question whether the appellant on succeeding in the appeal was entitled to a refund when the appeal was dismissed against the other appellant with him.

Held, that since the liability of the sureties in the bond was made dependant on both defendants' succeeding in appeal, the success of the appellant would not entitle him to a refund of the money.

Appeal under cl. 15 of the Letters Patent against the judgment and order of the Hon'ble Mr. Justice Cornish dated the 9th day of September, 1936 and passed in appeal against Appellate Order No. 136 of 1931 preferred to the High Court against the order of the Court of the Subordinate Judge of Narsapur dated 24th October, 1930 and made in A. S. No. 109

* L.P.A. No. 111 of 1936. 13th March, 1939.

of 1930 (E. P. No. 481 of 1930 in O. S. No. 412 of 1925, District Munsif's Court, Tanuku). Veeresalingam v. Subbarayudu.

V. Suryanarayana for Appellant.

Ch. Raghava Rao, P. Somasundaran and *T. R. Thiyagarajan* for Respondents.

The judgment of the Court was delivered by

The Chief Justice.—The third respondent filed a suit in the Court of the District Munsif of Tanuku against the appellant and his mother-in-law, one Brahmaramba, for the recovery of certain jewels or, in the alternative, damages for conversion, and obtained a decree against both the defendants for the payment of Rs. 1,275-1-0, including costs. The appellant and his mother-in-law filed an appeal in the Court of the Subordinate Judge of Narsapur and pending the hearing applied for an order staying execution of the decree. The application was granted on the condition that they deposited the full amount of the decree in the trial Court with liberty to the decree-holder to withdraw the amount on furnishing security. The appellant deposited the amount and it was withdrawn by the third respondent on a security bond being signed by the first and the second respondents. The second respondent has died during the pendency of the appeal and his estate is represented by the fourth respondent. The Subordinate Judge set aside the decree of the District Munsif so far as it affected the appellant, but dismissed the appeal of his mother-in-law. As the result of this decision the appellant applied to the District Munsif for an order against the third respondent and the sureties for the refund of the money. The District Munsif granted the application. The sureties challenged the correctness of this order so far as it affected them in an appeal to the Subordinate Judge. The Subordinate Judge allowed the appeal, basing his decision on the wording of the security bond. Although the third respondent had not appealed the Subordinate Judge also set aside the order as against her. The appellant then appealed to this Court. The appeal was heard by Cornish, J., who concurred in the decision of the Subordinate Judge so far the sureties were concerned, but restored the order of the District Munsif against the third respondent. Leach, C. J.

It is quite clear from a perusal of the security bond that the decision of Cornish, J., is correct. The bond recites that the

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Leach, C. J.

defendants, namely, the appellant and his mother-in-law, should deposit the money in Court and the condition of the bond was this:

"If the defendants should succeed in the appeal (preferred) in the Subordinate Judge's Court we agree that the said amount may be recovered by means of the property given as security and also from us personally; and we have given the undermentioned property as a security for the said amount, retaining the same in our possession."

It will be observed that the liability of the sureties is here made dependant on both the defendants succeeding in the appeal. The appellant succeeded, but his mother-in-law failed. We are asked to read the word "defendants" as meaning the defendants or either of them. This would mean reading into the bond something which is not there. Surety bonds have to be construed with strictness. A surety can only be held to his bond if the condition of liability has been fulfilled. The condition of liability has not been fulfilled in the present case. It is unfortunate for the appellant, but no other construction is open to the Court. It is incumbent upon a party especially upon a party who is to be benefited by it, to see that the security bond is properly drawn up. The appellant did not take the precaution which he should have done and he must suffer for his neglect. The appeal will be dismissed with costs in favour of the first respondent.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRE ENT:—MR. JUSTICE SOMAYYA.

T. A. Padmasani Bai .. *Appellant* (Plaintiff)*

v.

Sabapathy Mudaliar .. *Respondent (Defendant).*

Padmasani Bai v. Sabapathy Mudaliar.

Practice—Local inspection by Judge—Result of, if can form basis of judgment—Evidence contra to impressions of judge at local inspection—Duty of Judge to put it to witnesses.

A local inspection of premises made by a Judge should be used by him only to test the accuracy of the evidence let in. He should not make his knowledge the sole evidence for determining the question raised before him, without making a note of his impressions and giving opportunities to the parties to let in counter evidence and explain what he noted at the inspection.

Where therefore in a suit for declaration of plaintiff's right to light and air to a room through a window, the only evidence was that of the plaintiff to the effect that it was the only window, etc., and there was no evidence contra, it is not proper for the Court to base a conclusion on foot of the existence

* C. C. C. A. No. 32 of 1937. 17th March, 1939.

of another window or door in the room as seen by him at a local inspection, without recording it and putting it to the plaintiff in cross-examination.

Appeal against the decree of the Principal City Civil Judge of the City Civil Court, Madras, in O. S. No. 1000 of 1936.

M. N. Duraiswami Aiyangar for Appellant.

K. S. Narayana Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—Plaintiff is the appellant. She filed the suit out of which this appeal arises for a declaration of her right to light and air to a room in her house, which she was using as a kitchen. She complained that the window through which she was getting light and air was threatened to be obstructed by a construction which the defendant proposes to put up in his own house. The defendant denied the easement right claimed by the plaintiff. Two issues were raised:

"(1) Has this window been there for the statutory period? (2) If so, will the proposed construction of defendant, have the effect of diminishing the flow of light and air to such an extent as to entitle the plaintiff to the injunction claimed?"

There was only one witness examined at the trial and that is the plaintiff. She gave evidence that the window has been there at least from 1909 when she purchased the property. She also said that that is the only window on the southern side and if it is closed there will be no light and air in the room and that it would not be possible to cook properly. There was no cross-examination except to elicit that in 1924 she put up a chimney to the kitchen and that the smoke will get out through the chimney. No evidence was adduced on the side of the defendant. The learned Judge has found that the plaintiff has established the easement of light and air through the window in the kitchen of the plaintiff. That finding is not challenged before me. The learned Judge made an inspection of the premises on the day prior to the date of the trial. In the judgment he gave various directions which, if observed by the defendant, would, in his opinion, be enough to protect the right of the plaintiff which he finds in her favour. In the judgment there is a reference to a window on the northern side of the plaintiff's room and also to a door way on that side through which he says a fairly good amount of light and air gets into the plaintiff's kitchen. It is complained before me by the appellant's learned Advocate that the window on the northern

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side is so situated that practically there is no light and air coming through that window. There are also other observations made by the learned Judge which are all evidently based upon the impressions that he formed at the time when he made the local inspection. In cross-examination the defendant did not elicit from the plaintiff any of the facts on which the judgment is now based. Nor did the learned Judge think it necessary to put those questions to the plaintiff and have her answers on those points. The learned Judge has based his judgment solely on the impressions formed by him at the time of his local inspection and has come to a conclusion quite contrary to the only evidence on the point, namely, that if the alterations proposed by the defendant were carried out the room would be rendered useless for the purpose for which it is being used. The Judge did not make any notes of inspection and he has not placed on record what it is that he found on inspection so as to enable this Court to come to an independent conclusion whether his decision is right. In *Syed Ahamad Sahib Shutari* v. *The Magnesite Syndicate, Ltd.*,[1] which was decided by Seshagiri Aiyar and Kumaraswami Sastriar, JJ., it is said:

"Even under the old Code it was held by the Judicial Committee of the Privy Council that a judgment should not be based solely on the result of the personal inspection by the Judge. (See *Kessowji Issur* v. *G. I. P. Railway Co.*[2]) The same reasoning applies to cases instituted under the new Code. (See *Raikishori Ghose* v. *Kumudini Kanta Ghose*[3].) The inspection which a Judge makes should be used by him only to test the accuracy of the evidence let in. He should not, without submitting himself to the test of cross-examination make his knowledge the sole evidence for determining the question raised before him. We have no hesitation in holding that the procedure of the learned Judge has seriously prejudiced the appellant."

The decision of Anantakrishna Aiyar, J., in *Municipal Council* v. *Velayudha Menon*[4] is also to the same effect. He says:

"I must say that, though it is open to Courts who have to record findings on questions of fact, and though it may also be proper for the Court in proper cases to make local inspection with a view to understand and follow the evidence in the case and to appreciate it properly, I am clear that it is not open to a Court either of first instance or of appeal to base the Court's findings of fact solely on the result of its local inspection nor without giving opportunities to the parties to let in counter evidence and explain what is recorded as the result of the inspection."

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1. (1915) 28 M.L.J. 598: I.L.R. 39 Mad. 501.
2. (1907) 17 M.L.J. 347: L.R. 34 I.A. 115: I.L.R. 31 Bom. 381 (P.C.).
3. (1910) 15 Cal. L.J. 138.
4. A.I.R. 1931 Mad. 531.

In the present case, as I said before, the judgment is based solely on the observation made by the Judge at the time of his local inspection and he has not placed on record what it is that he found at the time. These points were not put to the plaintiff and her answers elicited. In this state of the record, I am constrained to reverse the decision of the lower Court and to send the case back for disposal according to law. Costs of this appeal will abide and follow the result.

It is not to be understood that I agree with the observations of the lower Court as regards the standard of proof which the plaintiff has got to adduce before succeeding in the suit.

S. V. V. *Appeal allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS,

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Kizhakkepat Palat, deceased Lakshmi Kutty Amma's daughter Kunhi-lakshmi Amma and others .. *Appellants** (*Plaintiffs*)

v.

Kizhakkepat Palat, deceased Lakshmi Kutty Amma's children Tavazhi Karnavan and Manager, Krishna Menon and others .. *Respondents* (*Defendants*).

Marumakkathayam Act (XXII of 1932), Ss. 41 and 43 (4)—Tarwad registered—Tavazhi *possessing separate properties—Suit for partition maintainable*—Tavazhi *not governed by S. 43 (4).*

On the question whether after a Marumakkathayam tarwad has been registered as impartible under S. 43 of the Marumakkathayam Act (XXII of 1932), a *tavazhi* of that tarwad which had separate properties is not governed by the provisions of Chapter VI of the Act which permits a partition of such properties as if the *tavazhi* were a tarwad,

Held, that a suit for partition is maintainable under S. 41 of the Act in spite of registration of the main tarwad as impartible.

It is clear that 'tarwad' in cl. (4) of S. 43 means the tarwad which was actually registered as impartible and nothing more; in other words, it is only the property of the tarwad which has been registered as impartible, that is to say, the tarwad's properties that are removed from the operation of Chapter VI of the Act relating to partition till the registration is cancelled. It would not have been intended to affect in any way the specific provisions of S. 41 which say that the provision of the chapter relating to partition

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* Appeal No. 125 of 1938. 20th March, 1939.

Kunhi-lakshmi Amma, v. Krishna Menon.

shall apply to every *tavashi* possessing separate properties, as if it were a tarwad.

Appeal against the decree of the Court of the Subordinate Judge of Ottapalam in O. S. No. 70 of 1936.

K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Appellants.

T. R. Venkatarama Sastri, A. P. Kuttisankara Menon, K. V. Gopalakrishnan Nair, Ch. Raghava Rao and *M. Chinnappan Nair* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—The only point that arises in this appeal is whether after a Marumakkathayam tarwad has been registered as impartible under S. 43 of Marumakkathayam Act (XXII of 1932), a *tavashi* of that tarwad which possesses separate properties is not governed by the provisions of Chapter VI of the Act which permits a partition of such properties as if the *tavashi* were a tarwad—*vide* S. 41 of the Act. It is clear from the Chapters V and VI that in the case of *tavashies* possessing separate properties, the provisions of the two Chapters are made applicable to such *tavashies* as if they were tarwads—*vide* Ss. 37 and 41 of the Act, and the reason is obvious because where there are separate properties belonging to a *tavashi*, so far as the management of the properties and their partition is concerned, there is no reason for making any difference between *tavashies* possessing separate properties and tarwads. S. 41 runs as follows:—

> "The provisions of this chapter shall apply to every *tavashi* possessing separate properties as if it were a tarwad,"

and it is clear from S. 38 that any sub-*tavashi* represented by the majority of its major members may apply for partition of such *tavashi* properties. This is a right given in express terms by Ss. 41 and 38 of the Act, and there is therefore no scope for the application of S. 50 (*b*) of the Act. It has not been contended before us that S. 50 (*b*) has any bearing on the present case, once it is found that, under Ss. 41 and 38, the right of partition exists in this case. Reliance is however placed on the respondents' side by Mr. Venkatarama Sastri on the provision contained in S. 43 (4) which runs as follows:

> "On such registration, the provisions of Chapter VI shall not apply to such tarwad unless and until the Registration is cancelled under S. 44."

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Pandrang Row, J.

He contends that the word "tarwad" here means not merely the tarwad as defined in the Act but every branch of it, so that once a tarwad is registered as impartible, no *tavashi* can have its separate properties partitioned between members of the *tavashi* itself or between its sub-*tavashies*. There is, in our opinion, no warrant for this construction. In the first place, it is not reasonable to support that the Legislature meant to give to members of the tarwad a voice in deciding whether the separate properties of a *tavashi* in which they have no concern as such should be partible or impartible. Secondly, the word "tarwad" is defined in the Act itself as the group of persons forming a joint family with community of property governed by the Marumakkathayam Law of inheritance. There is not the usual clause "unless the context shows otherwise" in this definition, nor does the context in S. 43 (4) show that the word 'tarwad' is used in any other sense. It is clear that 'tarwad' in cl. (4) of S. 43 means the tarwad which was actually registered as impartible and nothing more; that, in other words, it is only the property of the tarwad which has been registered as impartible, that is to say, the tarwad properties, that are removed from the operation of Chapter VI of the Act relating to partition till the registration is cancelled. It would not have been intended to affect in any way the specific provisions of S. 41 which say that the provision of the Chapter relating to partition shall apply to every *tavashi* possessing separate properties as if it were a tarwad. We are therefore unable to accept the view of the Court below on this point.

The finding of the lower Court on the first issue to the effect that the suit for partition is not maintainable is set aside. We find that the suit is maintainable under S. 41 of the Act in spite of the registration of the main tarwad as impartible. The appeal is therefore allowed and the suit is remanded to the Court below for disposal according to law after deciding the other issues, as the Court below dismissed the suit on the preliminary ground that the suit was not maintainable and the other issues have not been decided. The costs in the Court below will be provided for by the Court below in its revised decree. The appellants are entitled to their costs of this appeal to be paid by respondents 1, 8 and 25. The court-fee paid on the memorandum of appeal will have to be refunded to the appellants.

K. C.   ——   *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Velur Munuswami Mudaliar .. *Petitioner** (*2nd Defendant*)

v.

Darwaija Raghupathi .. *Respondent* (*Plaintiff*).

Munuswami Mudaliar *v.* Raghupathi.

Civil Procedure Code (*V of 1908*), *S. 10—'Matter in issue' meaning of—A suit when debarred under the section.*

The expression 'the matter in issue' as used in S. 10 of the Civil Procedure Code does not mean any matter in issue. The matter in issue in a previously instituted suit obviously refers to the entire subject-matter in dispute and not to one of the issues, however important it may be foi the decision of the suit.

Where the petitioner contended that inasmuch as the main point between the parties in the present suit and an earlier one related to the occupancy rights claimed by the petitioner, he was entitled to demand a stay of the present suit, till the appeal against the earlier one was disposed of,

Held, that since the matters in issue in both the suits were not the same, owing to the amounts claimed having been for different periods, S. 10 of the Civil Procedure Code would not debar the trial of the present suit.

Petition under S. 25 of the Provincial Small Cause Court Act and S. 224 of the Government of India Act praying the High Court to revise the judgment and order of the Court of the District Munsiff of Tirupati dated 27th January, 1936 and made in I.A. No. 2 of 1936 in S. C. No. 861 of 1935.

B. C. Seshachala Aiyar for Petitioner.

D. R. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition for revision against the order of the District Munsiff of Tirupati rejecting the petitioner's application for stay of suit No. 861 of 1935 under S. 10, Civil Procedure Code, until the matter in Appeal No. 6 of 1934 pending in the District Court of Chittoor is decided. It has been urged on behalf of the petitioner that inasmuch as the main contention between the parties in the present suit and in Appeal No. 6 of 1934 relates to the occupancy rights claimed by the petitioner he is entitled to demand a stay. It cannot be disputed that the provisions contained in S. 10 are mandatory in character and when the facts of a particular case invoke the operation of that section, the Courts have no other alternative but to give effect to it and stay the suit. I have therefore to determine if the 'matter in issue' in the present suit is directly

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* C. R. P. No. 299 of 1936. — 2nd September, 1938.

Munuswami Mudaliar v. Raghupathi.

or substantially in issue in Appeal No. 6 of 1934, which must be taken to be the continuation of a previously instituted suit.

At this stage it will be convenient to state that the first suit was filed on behalf of the respondent for rent in respect of a particular period and the present suit is in respect of a subsequent period. It is not quite clear from the record which is in the High Court whether the rents claimed in both the suits were for the same plots of land. The Counsel for the respondent asserted before me that they were different. The Counsel for the petitioner, on whom the onus lay to show that the provisions of S. 10, Civil Procedure Code, applied to the facts of this case and that the order of the lower Court was wrong, was unable to deny the fact alleged by the counsel for the respondent. Assuming however for the sake of argument that the area of land comprised in both the suits was identical, the question still remains to be decided if "the matter in issue" in the prior suit is the same. The petitioner's counsel contends that the question of the nature of tenure in both the suits is common and this is, it is urged, the main issue in both the suits. But the expression "the matter in issue" as used in S. 10, Civil Procedure Code, does not mean any matter in issue. The matter in issue in a previously instituted suit obviously refers to the entire subject-matter in dispute and not to one of the issues, however important it may be for the decision of the suit.

In this case, even if the area of the land in both the suits is regarded to be the same, the amount claimed in the latter suit is apparently for a different period from the amount claimed in the former suit. The matters in issue in both the suits are therefore not the same. S. 10, Civil Procedure Code, does not therefore debar the trial of this suit. The revision is accordingly rejected with costs.

It is unfortunate that this petition has been pending for two years although the order passed by the learned judge admitting the revision on 31st August, 1936, was that the Civil Revision Petition would be posted within a month. It is also surprising that the appeal pending in the District Court of Chittoor has not been decided up till now. Both these questions must be investigated and I should be informed of the reasons why the Civil Revision Petition was not posted earlier and how the matter in appeal has not been so far disposed of.

K. C. —— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Varagunarama Pandia Chinnathambiar .. *Petitioner**
(Petitioner)

v.

Rengasamy Naidu and others .. *Respondents*
(Ryots).

Varagunarama Pandia Chinnathambiar v. Rengasamy Naidu.

Madras Estates Land Act (IX of 1908), S. 20-A—Order of Collector—Whether High Court can interfere under S. 115, Civil Procedure Code (V of 1908)—Doctrine of res judicata *whether applicable to such orders.*

Where a Collector of a district passed an order on an application made under S. 20-A of the Madras Estates Land Act,

Held, that it was a matter in which the High Court could not interfere under S. 115, Civil Procedure Code.

It is not in every case that parties may be prejudiced by orders passed by Collectors under the Estates Land Act and that the Collector can be deemed to have acted as a Court or that this Court will be justified in interfering under S. 115, Civil Procedure Code.

Applications of the kind contemplated by S. 20-A are not matters to which the doctrine of *res judicata* can be applied.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the District Collector of Tinnevelly dated 8th February, 1937 and made in D. Dis. No. 274 of 1937.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Petitioner.

V. Viyyanna and *G. Srinivasa Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition asking this Court to revise an order passed by the Collector of Tinnevelly on an application made to him by the Zamindar of Sivagiri under S. 20-A of the Madras Estates Land Act. I cannot accede to the contention of the learned Counsel for the petitioner that this is a matter in which this Court has jurisdiction to interfere under S. 115, Civil Procedure Code. It is not in every case that parties may be prejudiced by orders passed by Collectors under the Estates Land Act and that the Collector can be deemed to have acted as Court or that this Court will be justified in interfering under S. 115, Civil Procedure Code. I have therefore no alternative but to dismiss the revision petition with costs.

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* C.R.P. No. 685 of 1937. 21st February, 1939.

Varagunarama Pandia Chinnathambiar v. Rengasamy Naidu.

In the ordinary course, I should have contented myself with the above order; but it seems to me to be my duty to do what I can to prevent the perpetuation of the mistake into which in my opinion the Collector has fallen in this case. I am not concerned with the merits or the validity of the order passed by Mr. Warren on a previous occasion, that is, on 4th April, 1936, nor even with the contention that that order is vitiated by his omission to observe the statutory rules. I only note that I am told by the learned Counsel for the respondent that Mr. Warren's order was passed before the present statutory rules came into force and that he acted in accordance with the rules then in force. I only propose to point out that the later order of 8th February, 1937, passed by a successor of Mr. Warren which is now sought to be revised is not right in so far as it purports to be based on the doctrine of *res judicata*. There are no doubt certain matters contemplated by the Estates Land Act in respect of which the doctrine of *res judicata* will apply. But I am unable to concur in the view that applications of the kind contemplated by S. 20-A of the Estates Land Act are matters to which that doctrine can be legitimately applied. That section contemplates that the power thereby conferred on the District Collector may be exercised from time to time according to exigencies and changing requirements. The use of the expression "no longer required" in cl. (*a*) clearly indicates that it could not of course have been the intention of the legislature that a party could go on applying every month or every year under that provision without alleging any change of circumstance or some other sufficient cause, since the passing of the previous order. If in such cases the Collector dismisses the application, it will only be on the ground that as circumstances have not changed and no special cause is shown there is no reason for changing his opinion. It is a mistake to suppose that this is exactly and literally the doctrine of *res judicata* in its well-understood sense. It is because the order of the Collector now complained against is wholly based on his view of the application of this doctrine and not upon his view as to the merits of the claim that I have thought it necessary to make the above remarks.

K. C. —— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Jeeva Ammal .. *Appellant** (*Plaintiff*)

v.

Ranganatha Mudaliar .. *Respondent* (*Defendant*).

Jeeva Ammal *v.* Ranganatha Mudaliar.

Hindu Law—Claim of maintenance—Wife living away from husband in adultery for a long time—Proof of her subsequent conduct as clean, necessary for grant of starving maintenance.

If a wife, who has left her husband's house as a result of her own adultery and has voluntarily lived apart from her husband for a considerable number of years, were to compel him to take her back into his house or to pay her a sum for maintenance, and on his refusal to do so, she ought to be required to state the truth before the Court and to offer evidence that she has repented for her immorality and has been living a clean life for some appreciable time before the suit. In the absence of any such plea of evidence, the suit for maintenance can be dismissed.

Kandasami Pillai v. *Murugammal*, (1895) I.L.R. 19 Mad. 6 and *Chirukula Nagalakshmamma* v. *Chirukula Viswanatha Sastri*, (1912) 23 M.L.J. 289, followed.

Appeal against the decree of the District Court of Chingleput in A. S. No. 315 of 1934 preferred against the decree of the Court of the District Munsif of Poonamalle in O. S. No. 479 of 1933.

M. S. Venkatarama Aiyar for Appellant.

K.S. Champakesa Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The appellant, a Hindu wife, sued her husband for maintenance. The parties married in or about 1920 and lived together until 1926 when there was a breach. According to the findings of the learned District Judge, the occasion for this breach was the misconduct of the plaintiff and her adultery with her brother-in-law, resulting in a panchayat which excommunicated her. Shortly after this breach, she went away to Penang where she lived until 1933. In 1933 she returned to India and almost at once started proceedings against her husband for maintenance. The basis of her suit is an allegation that she had been cruelly ill-treated and driven from the house. The plaint contains no suggestion that she herself was in any way to blame or that she had ever strayed from the path of virtue. The District Judge finding that the basis of her plaint was untrue and that the allegations of the defendant regarding her misconduct had been established, dismissed the suit.

* S. A. No. 767 of 1935. 27th February, 1939.

Jeeva Ammal v. Ranganatha Mudaliar.

It is now contended in second appeal that even assuming the truth of the findings of the learned District Judge, the dismissal of the suit is improper and that the wife should have been awarded at least what is called in the text books, 'starving' maintenance. The contention is that a husband is obliged to provide for his wife; that this obligation is nullified only by the open and continuous misconduct of the wife and that if she has gone wrong but subsequently repents and offers to return to her husband, he is obliged to provide for her minimum requirements. It seems to me that if a wife, who has left her husband's house as a result of her own adultery and has voluntarily lived apart from him for a considerable number of years, is to compel him to take her back into his house or to pay her a sum for maintenance, on his refusal to do so, she ought to be required to state the truth before the Court and to offer evidence that she has repented for her immorality and has been living a clean life for some appreciable period before the suit.

So much seems to follow from the decision of Subramania Aiyar, J., in *Kandasami Pillai* v. *Murugammal*[1], which was a case in which a decree for maintenance was set aside on the ground of recent, open and continuous misconduct on the part of the wife. She was held not be entitled to bare maintenance on the basis that a wife who has once been guilty of infidelity must show not merely that she was living a chaste life at the time of the suit, but also that her life had been chaste for a sufficiently long period to justify the conclusion that she was a reformed woman. That principle has been applied by a Bench in a case reported in *Chirukula Nagalakshmamma* v. *Chirukula Viswanatha Sastri*[2]. It seems to me quite clear that a woman cannot file a suit on the basis of her own chastity and her husband's misconduct and, when she is proved to be unchaste and her husband's conduct is found to be irreproachable, fall back upon a plea of infidelity and subsequent reformation which has never been advanced and is not supported by the necessary evidence.

To my mind if an unchaste wife wishes to enforce her right to bare maintenance against her husband on the ground she has ceased to live a life of unchastity and returned to the path of virtue, that case should be definitely pleaded and

1. (1895) I.L.R. 19 Mad. 6. 2. (1912) 23 M.L.J. 289.

Jeeva Ammal v. Ranganatha Mudaliar.

supported by definite evidence. In the absence of any such plea or evidence, the decision of the learned District Judge was in my opinion correct. The appeal is therefore dismissed with costs.

Leave refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Narayana Mudali and another .. *Appellants* (Defendants)*

v.

Peria Kalathi Mudali and another.. *Respondents (Plaintiffs).*

Narayana Mudali v. Kalathi Mudali.

Malicious prosecution—Suit for—Nature of and incidents pertaining to—Burden of proof—Reasonable and probable cause—Malice—How far in proceedings under S. 144, Criminal Procedure Code, a suit for malicious prosecution could be justified—Representative action for damages in tort—Whether can lie.

In order to sustain a suit for malicious prosecution of proceedings under S. 144, Criminal Procedure Code, there must be proof that the defendants moved the Magistrate to take proceedings and that proceedings were actually taken. It must be shown that the final termination was in favour of the plaintiffs. The plaintiff must prove that the institution of the proceedings was malicious and that it was without reasonable and probable cause. Further it must, in all such cases, be proved that there was legal damage suffered as a consequence of the institution of the proceedings. It is not sufficient merely to prove that there was a petition in which an allegation was made of a danger to the public peace by withholding of a private right.

The burden of proof in such a suit lies on the plaintiff. The plaintiff has to show not only that the petition was malicious but that the petitioner had no reasonable and probable cause for bringing it. To show this, it is necessary not merely to point to the eventual failure of the petitioners to establish the civil right which they claimed; there should also be some indication that they did not believe that they had this civil right for which they were contending.

Where the appellants were claiming certain rights in a festival which they had been exercising for a long period and those rights had been denied to them on the ground that they had failed to pay certain customary contributions to the funds of the temple out of which the festival was financed, and it was a very arguable question, granting there had been a default in the payment of contribution, whether the majority faction was justified in enforcing payments by refusing facilities to the minority faction to take part in a religious festival,

Held, that the facts established did not justify the inference of absence of probable and reasonable cause or the presence of malice for a petition to the Magistrate under S. 144 of Criminal Procedure Code.

It is well established that a representative suit does not lie for damages in tort, though when a representative suit properly framed for other reliefs, incidentally involves a claim for damages put forward by certain individuals

* S. A. No. 1091 of 1934. 8th November, 1938.

among the plaintiffs, such a claim has been permitted to be ancillary to the main suit. But the plaint in this suit quite clearly sets forth the representative character of the suit and the damages for which the suit is filed are damages which, to a considerable extent, are common to the faction and not peculiar to the two plaintiffs.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 62 of 1934 preferred against the decree of the Court of the District Munsif of Ranipet in O. S. No. 300 of 1933.

T. V. Ramanatha Aiyar and *M. Seshachalapathi* for Appellants.

K. Rajah Aiyar and *M. Krishna Bharathi* for Respondents.

The Court delivered the following

JUDGMENT.—The appellants were defendants in a suit for damages for malicious prosecution arising out of an application which they preferred to the Magistrate against the plaintiffs and others praying the Magistrate to take proceedings under S. 144 of the Criminal Procedure Code.

The trouble arose out of a dispute between two sections of Sengundars with reference to the conduct of a festival managed by their community in the village temple. The appellants belong to the minority faction, which, owing to dissensions, had refused to pay its subscriptions to the funds out of which the festival is financed. As a consequence of this refusal, the majority faction, represented by the plaintiffs in this case, refused to allow the appellants' party certain privileges at the festival. The one with which we are now concerned was the privilege of making an offering known as *Deeparadhana* before the God, and having it returned intact after it had been offered. Although the appellants asserted before the Magistrate that their offerings had been refused, the whole grievance appears to have been that they were not allowed to get back their offerings intact as they thought they should be allowed. The complaint to the Magistrate, Ex. VI, describes the history of the quarrel, states that the respondents were preventing the petitioners from participating in the *Deeparadhana* as per *mamool* and that the continuance of the festival in view of this dispute is likely to involve serious breach of the peace; the petitioners therefore pray the Magistrate either to direct the majority faction and the Gurukkal to give the petitioners the customary facilities for *Deeparadhana*, or to prevent the conduct of the festival in the absence of such facilities. The Magistrate apparently went to the village on the same

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day; the respondents to the petition asked time to file their objections; consequently, on that same day, an order was issued (Ex. E) temporarily prohibiting the festival. On the 10th, that is to say, three days later, both parties presented an adjournment petition with a view to compromise. On the 13th, the Magistrate passed orders referring to the admissions regarding the customary levy of contributions, stating that though the respondents might not be justified in enforcing the payment by refusing *Deeparadhana*, there was no necessity to prevent the conduct of the rest of the festival in view of the undertaking of the respondents that it should be peaceful and of the arrangements made for a police guard. After this order the festival was concluded.

There were two other suits filed by the appellants, one relating to their rights in the *Kappukattu* ceremony with which we are not now concerned and the other relating to the rights in the *Deeparadhana* ceremony. The appellants succeeded in all the suits in the trial Court and in all the suits failed before the lower appellate Court. I have passed orders dismissing the second appeals from the decisions in the two connected suits mainly on the ground that they relate to matters of ritual outside the jurisdiction of the Civil Court.

In the present second appeal, various contentions have been raised; firstly, it has been contended that there was no prosecution properly speaking and therefore that no suit for damages for malicious prosecution can lie. Now, with reference to this contention, it cannot, I think, be denied that a suit for damages for malicious prosecution can be based on the institution of proceedings under S. 144 of the Criminal Procedure Code, provided that the necessary facts are established. So much has been laid down by this Court in *Appala Narasimhulu* v. *Mahant Hari Narayana Das Bavaji*[1] and it seeme to me that the view taken by the Bench which decided that case is one which necessarily follows from the principles upon which the action for malicious prosecution is based. These have been succinctly stated in the case of *Wiffen* v. *Bailey*[2], wherein it is laid down that an action for malicious prosecution can be supported by any one of three sorts of damage:—firstly, damage to a man's fame, as if the matter whereof he is accused be

1. (1900) 11 M.L.J. 122. 2. (1915) 1 K.B. 600.

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scandalous; secondly, damage to his person, as where a man is put in danger to lose his life, limb or liberty; thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. Buckley, L. J., goes on to point out that an action for malicious prosecution may lie where the proceedings are civil and not criminal, though in the ordinary civil action, any damage which the defendants may have suffered by reason of the proceedings is normally compensated by the award of costs, so that there is nothing left to justify a separate action. The point to note, however, is that the action for malicious prosecution does not depend on the institution of a prosecution in the narrowest sense of the term. The basis of the action is the malicious and unjustified institution of unsuccessful proceedings in a court which have resulted in damage to the good name, the person or the property of the individual prosecuted. The fact that an action of this kind lies as a result of proceedings by way of civil injunction or attachment of a temporary nature which could not have been compensated by the award of costs in the suit, is recognised by the provisions of S. 95, Criminal Procedure Code. The institution of proceedings under S. 144, Criminal Procedure Code, may be at the instance of a party to the quarrel which is likely to lead to a breach of peace; it may be at the instance of some disinterested person; or as, in the great majority of cases, it may be at the instance of the Police or as a result of action *suo motu* by the Magistrate. I take it that the action for malicious prosecution as a result of such proceedings would normally be brought only in the case of proceedings brought at the instance of a party to the quarrel, though that need not necessarily be the only ground for such an action. Again, it must be remembered that orders under S. 144 of the Criminal Procedure Code vary widely in their scope and effect. They may have the most drastic effect in curtailing the liberties of individual or communities or they may restrict for a considerable period the use by a man of his private property. On the other hand, in a great number of cases, their effect is merely to control the route of processions, restrict slightly the hours in which property shall be enjoyed in a particular way and generally to cause the minimum of interference with private rights in the interests of the public peace. The point is that it should not be thought

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that any unwarranted attempt to secure a Magistrate's order under S. 144, Criminal Procedure Code, will justify a suit for malicious prosecution. There must, in order to sustain such a suit, be proof that the defendants moved the Magistrate to take proceedings and that proceedings were taken. It must be shown that the final termination was in favour of the plaintiff. The plaintiff must prove that the institution of the proceedings was malicious and that it was without reasonable and probable cause. Further, it must, I think, in all such cases be proved that there was legal damage suffered as a consequence of the institution of these proceedings. In ordinary criminal prosecutions, the damage will be inferred from the very fact of an accusation of a crime involving moral turpitude and necessarily damnifying the good name of the accused. But when we are dealing with quasi civil proceedings such as those under S. 144, Criminal Procedure Code, in order to establish the essential fact of damage, it is not sufficient merely to prove that there was a petition in which an allegation was made of a danger to the public peace by the withholding of a private right.

In the present case, it has been established that the appellants did institute magisterial proceedings as a result of which the festival was stopped for a period of some days. It is also established that the result of these proceedings was the vacation of the temporary order and the decision of the magistrate that there was no danger of a breach of the peace which would justify the continuance of the prohibition of the holding of the festival. There was no finding by the Magistrate that the complaint preferred by the petitioners of refusal of the *Deeparadhana* facilities to them was unfounded. But it must be held that the proceedings initiated by the appellants terminated in favour of the plaintiffs. Both the courts below have held that the plaintiffs suffered damages as a result of those proceedings, the damages consisting of the legal expenses which they incurred, the cost of the *Samprokshana* ceremony necessitated by the stoppage of the festival and the deterioration of the provisions which had been made ready for the rest of the festival. The trial Court, although it found in the connected suit that the refusal of the *Deeparadhana* facilities was unjustified, did not go into the question of reasonable and probable cause, but held that there was no prosecution and that any damage that was sustained was sustained by the plaintiffs

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owing to their own delay in putting forward their case to the Magistrate. The lower appellate Court finds, to my mind correctly, that the institution of proceedings before the Magistrate under S. 144 may be sufficient ground for a suit for damages for malicious prosecution. On the question of absence of reasonable and probable cause, the learned Subordinate Judge comes to the conclusion that because he himself has decided that the appellants' case with reference to their rights to *Deeparadhana* was unsustainable they cannot have had reasonable and probable cause for presenting the petition to the Magistrate. He also comes to the conclusion that the only witness for the appellants had not given any very satisfactory reason for apprehending a breach of the peace on the 8th day of the festival, when the previous seven days had gone on without trouble; and he concludes that the conduct of the appellants in applying to the Magistrate was apparently to wreak their vengeance against the other side for successfully carrying on the festival. Now it is established that though the basis for a finding of absence of reasonable and probable cause and the presence of malice consists in matters of fact, the inference that should be drawn from the proved facts, and the question whether these facts are sufficient to establish the absence of reasonable and probable cause and the presence of malice, are matters of law upon which interference in second appeal is permissible—vide *Herniman* v. *Smith*[1] and *Nagendra Nath Ray* v. *Basanta Das Bairagya*[2].

I must say that the decision of the lower appellate Court on this question is not particularly satisfactory. The learned Subordinate Judge seems to have overlooked the fact that the burden of proof lay upon the plaintiffs in this matter. The plaintiffs had to show not only that the petition was malicious but that the petitioners had no reasonable and probable cause for bringing it. And to show this, it was necessary not merely to point to the eventual failure of the petitioners to establish the civil right which they claimed; there should also be some indication that they did not believe that they had this civil right for which they were contending. The question which the learned Subordinate Judge decided in favour of the majority party was not one entirely free from difficulty. The trial court

1. (1938) A.C. 305. 2. (1929) I.L.R. 57 Cal. 25.

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took a different view from that which the learned Subordinate Judge has taken and the decision in the second appeal was not so much on the merits of the claim of the minority party, as on the power of the Civil Courts to adjudicate upon it. It is indisputable that the rights which the appellants were claiming in this festival were rights which they had been exercising for a long period in the past. Those rights had been denied to them solely on the ground that they had failed to pay certain customary contributions to the funds out of which the festival was financed; and it was certainly a very arguable question, granting that there had been a default in the payment of contributions, whether the majority faction was justified in enforcing payments of contributions by refusing the usual facilities to the dissenting faction to take part in this religious festival. The argument put forward in this connection was that the payment of contributions should have been enforced by the usual machinery of caste discipline and not by the withholding of religious privileges. I do not propose to say whether this argument is a correct one or not; but it is, at any rate, an argument which cannot be dismissed as frivolous. Surely, therefore, the appellants in demanding the privilege which had been accorded to them in the past without question and had been refused to them on account of the default in the matter of payment of subscriptions, when it is not clearly established, that the denial of the privilege was the customary way of enforcing liability for subscriptions, cannot be said to have manifestly acted without reasonable and probable cause in asserting their rights before the Magistrate. Whether they were acting without reasonable and probable cause in saying that a breach of the peace was likely as a result of the withholding of those rights is a more debateable question. But at any rate, feelings must have been somewhat strained at the time and it is noticeable that the Magistrate, though he cancelled the order stopping the processions, did so on an undertaking by the majority party that they should keep the peace, at the same time providing for police facilities to see that this undertaking was carried out. In these circumstances I do not think, that it can be said to have been proved positively that the appellants had no reason to apprehend a danger of a breach of the peace owing to the refusal of the *Deeparadhana* facilities to their party. On the question of malice, the learned Subordinate Judge

conjectures that the minority party were trying to wreak their vengeance for a successful conduct of the festival. There appears to be little or no basis in the evidence for this conclusion. The only witness who speaks to malice had to be asked the same question three times before he could remember the answer which was expected of him. I am therefore of opinion that the facts established did not justify the inference of absence of reasonable and probable cause or the presence of malice as the motive for a petition to the Magistrate. It seems to me quite probable on the facts established that the appellants honestly believed in the justice of their claim and honestly thought that the denial of these alleged rights might lead to a disturbance of the peace.

There is a further question which has been argued and that is with reference to the frame of the suit in which the two plaintiffs—one of them being a trustee of the temple—claimed to represent the seventeen persons who were impleaded as respondents in the petition to the Magistrate. No application under O. 1, r. 8, Civil Procedure Code, appears to have been filed. The case proceeded throughout as if the plaintiffs on the record could bring an action for the damages suffered collectively by the party to which they belonged. Objections to the frame of the action was taken in the written statement and though the proper issue was not framed, the Court framed an issue regarding misjoinder which had no point unless it was a somewhat unsuccessful attempt to put in issue the question of the frame of the suit in its semi-representative character. It is, I think, well established that a representative suit does not lie for damages in tort, though when a representative suit properly framed for other reliefs incidentally involves a claim for damages put forward by certain individuals among the plaintiffs, such a claim has been permitted to be urged as ancillary to the main suit—vide *Kumaravelu Chettiar* v. *Ramaswami Aiyar*[1] and *Katha Pillai* v. *Kanakasundaram Pillai*[2]. It is true that the present suit has not been filed with the formalities prescribed for representative actions. But the plaint quite clearly sets forth the representative character of the suit and the damages for which the suit is filed are damages which, to a considerable extent, are common to the faction and not peculiar to the two

1. (1933) 65 M.L.J. 87: L.R. 60 I.A. 278: I.L.R. 56 Mad. 657 at 665 (P.C.).
2. (1918) 8 L.W. 160.

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plaintiffs. It is argued for the respondents that the two plaintiffs may be entitled to such damages as can be lawfully ascribed to them personally. It seems to me that this is not the correct way in which the suit should have been framed; but if I had been disposed to hold that the plaintiffs deserved to succeed on the merits, I should have remanded the suit for a fresh finding on the question of the damages which affect personally the plaintiffs themselves.

In the view which I have taken on the main question, however, this is unnecessary. The appeal is allowed and the suit is dismissed with costs throughout.

Leave to appeal refused.

K.C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE GENTLE.

The Chairman, Municipal Council,
Anakapalli and another .. *Appellants** (*1st Defendant and Party Appellant*)

v.

Sri Rajah Vyricherla Narayana
Gajapatiraju Bahadur Garu .. *Respondent* (*Plaintiff*):

Chairman, Municipal Council, Anakapalli v. Narayana Gajapatiraju Bahadur Garu.

District Municipalities Act (V of 1920), amended (1930), S. 86—Property taxed—Melwaram interest alone in the assessee—Right to tax the entire interest whether proper—Definition of 'owner'.

Under S. 86 of the Madras District Municipalities Act (amended 1930) the person liable to pay tax is the owner of the premises. In order to be owner he must be in the same category of a person receiving or entitled to receive rents and profits of a property.

Where the property in respect of which the respondent, who was entitled to receive the rents and profits, was limited to his *melwaram* interest,

Held, that there was no provision in the statute by which a person in the respondent's position could be assessed in respect of the interest of another person, a kudivaramdar, and have a right to recoup himself for the tax he had paid in respect of the other person's interest or the other person's property. The wording of S. 86 does not entitle the municipality to demand from the respondent anything more than a tax upon the interest in the premises of which he was the owner, and that the assessment made against him upon the value of the whole of the interests in the property was wrong.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam in O. S. No. 83 of 1932.

* A. S. No. 100 of 1935. 14th February, 1939.

Chairman, Municipal Council, Anakapalli v. Narayana Gajapati-raju Bahadur Garu.

Gentle, J.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *K. Subramaniam* for Appellants.

K. Umamaheswaran for Respondent.

The Judgment of the Court was delivered by

Gentle, J.—In the Court of the Subordinate Judge of Vizagapatam, the respondent sued the first appellant and the Secretary of State for India in Council claiming the sum of Rs. 4,141-0-8 representing the difference between the amount which he alleged he was liable to pay for property tax during the years 1929-1930 and 1930-1931 in respect of his interest in the Anakapalli estate within the precincts of the Municipality and the amount which in fact he had paid. The learned Subordinate Judge decided in his favour and passed a decree for the repayment by the Municipality to the respondent of the above sum together with interest at the rate of six per cent. per annum. Against this decision the first appellant filed this appeal and later the Municipality of Anakapalli was joined as the second appellant. Other claims were made in the suit to which it is unnecessary to refer, as no contest arises in regard to them in this appeal.

The respondent is the Zamindar of Chemudu and proprietor of the melwaram interest of the Anakapalli estate which is situated within municipal precincts of the second appellant. The estate comprises ryoti agricultural lands, the ryots being entitled to the kudiwaram interest. To this estate the provisions of the Madras Estates Land Act apply. The respondent was assessed by the second appellant at a sum of Rs. 74,447-0-0 which represents the value of the melwaram and kudiwaram interests and is an amount for which the lands of the estate might reasonably be expected to let. The respondent contended that as the provisions of the Madras Estates Land Act applied and controlled the income from the lands and prohibited enhancement of any rents save as is provided by the Act, the assessment in respect of which he was required to pay property tax should be based upon the actual income he received in respect of his melwaram interest during the relevant years. This income amounted to Rs. 37,698-11-1. There is no dispute in regard to the above figures and it is not suggested that the respondent's income could have been increased at any time. The point for decision is whether the respondent should be required to pay tax upon the higher or the lower of the above figures.

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The respondent could never be in a position to receive the income from both the melwaram and the kudiwaram interests, the ryots alone being entitled to the latter. The point for decision depends upon the construction of a few of the sections of the Madras District Municipalities Act V of 1920. It is somewhat academic at the present time inasmuch as by the Madras District Municipalities Amendment Act of 1930 the provisions of S. 79 of the Local Boards Act have been incorporated into the statute and provision is also made for the collection of taxes in equal shares from the landholders and tenants.

The relevant provisions of the Madras District Municipalities Act, 1920 (hereinafter called the Act) at the time of assessments in this matter, are as follows:

" S. 78. (1) Every Municipal Council may levy (a) a property-tax."

" S. 81. (1) The property-tax shall be levied at a consolidated rate on all buildings and lands within municipal limits;"

" S. 82. (2) "The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year."

" S. 86. The property-tax shall be paid by the owner of assessed premises."

The learned Advocate-General on behalf of the appellants contended that the property-tax authorised in S. 78 (1) means a tax upon the totality of the value of the whole of the lands including, in the case of ryoti agricultural lands, both the melwaram and kudiwaram interests. He referred us to the *Rajah of Pittapuram* v. *The Revenue Divisional Officer*1, a case under the Land Acquisition Act for the ascertainment of the value of lands which included melwaram and kudiwaram interests. At page 646 Sir John Wallis, C.J., pointed out that the amount to be ascertained had to be apportioned among the parties according to their respective interests, and the land to be acquired had to be valued in the first instance by including all interests in it. Later he said that the fact that neither the landlord nor the tenant could utilize the land for building purposes without the concurrence of the other made no difference. The difference between the market value and the value of the tenant's interest would represent the landlord's interest. It is to be seen that a distinction is emphasised between the two respective

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1. (1919) 36 M.L.J. 455: I.L.R. 42 Mad. 644.

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interests although for the purposes of the Land Acquisition Act and the ascertainment of the total value, all interests were to be grouped together.

Before the amendments, which were introduced by the Amending Act of 1930, S. 82 of the Act was not really applicable to agricultural lands and it is probable that the legislature may not have considered the possibility of an estate, like the Anakapalli estate, lying within same municipal limits and therefore provision in regard to taxation of such lands might not have been contemplated as being required. Learned Counsel on behalf of the appellants and the respondents both agree that the owner of the melwaram interest alone cannot let out the whole of the lands but together with the owner of the kudiwaram right the whole of the lands could be so let. That of course would be subject to an agreement between the respective owners of those interests. S. 82(2) of the Act is a means to ascertain the annual rental value which a hypothetical tenant would pay for the whole of the lands. This income could not be obtained by the respondent alone. He is entitled to receive not the income from the whole property but only in respect of his limited interest. By S. 86 of the Act the property-tax is payable by the owner of the assessed premises. To obtain an assessment based upon the letting value of the whole of the property, the respondent's and the ryot's interests would have to be taken together and if that is the basis upon which under this Act the Municipality is entitled to call upon the respondent to pay a tax, then it must follow that in arriving at a sum at which they have assessed him the value of the premises or the interest in the premises of which he is not the owner and in respect of which he is not entitled to the income would have to be taken into account. Whatever may be the effect of S. 82 (2) as to the valuation of an estate such as the one of which the respondent is the owner of the melwaram interest, one must look at S. 86 in order to see what could be demanded of the respondent. That section, as pointed out, provides that the tax shall be paid by the owner of the assessed premises. S. 3 (17) defines "owner" as including the person for the time being receiving or entitled to receive the rents or profits of the property. It has been contended that by its phraseology this definition may not be exhaustive. But returning to S. 86 of the Act once again, the person liable to pay tax is the owner of the premises. Although perhaps the defini-

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tion of owner is not exhaustive, it does not extend the definition to a person who is not entitled to receive and does not receive income from property of which he is not the owner. In order to be an 'owner' he must be in the same category as a person receiving or entitled to receive rents and profits of a property. In our view this being a taxing statute it must be construed strictly. If there is any doubt, the doubt must be exercised in favour of the tax-payer. There can be no doubt that a Municipality is not entitled to demand of a subject taxes which legislation has not authorised and has not cast upon a subject a liability to pay. Under the statute the one liable to pay property-tax is the owner of the premises and that is a person who is in a category analogous to someone who is entitled to receive rents and profits of the property. The property in respect of which the respondent is entitled to receive the rents and profits is limited to the melwaram interest. There is no provision in the statute by which a person in the respondent's position could be assessed in respect of the interest of another person and have a right to recoup himself for the tax he has paid in respect of the other person's interest or the other person's property. In our view the wording of S. 86 does not entitle the municipality to demand from the respondent anything more than a tax upon the interest in the premises of which he is the owner, and that the assessment made against him upon the value of the whole of the interests in the property is wrong. The respondent is entitled to recover from the appellants the amount for which he sued in the Court below. The result is that this appeal should be dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Kumaraswami Pillai and another .. *Petitioners** (*Defendants 1 and 2*)

v.

Thiruvengadatha Aiyangar .. *Respondent* (*Plaintiff*).

Kumaraswami Pillai v. Thiruvengadatha Aiyangar.

Madras Agriculturists Relief Act (IV of 1938), Ss. 19 and 20—Provision for application for scaling down within 60 days after stay of execution—Expiry on a day when Court closed—Filing of application for

* C. R. P. No. 1450 of 1938. 30th March, 1939.

scaling down on re-opening day—If in time—General Clauses Act (X of 1897), S. 11—Applicability.

Kumaraswami Pillai *v.* Thiruvengadatha Aiyangar.

Per *Chief Justice*: The proviso to S. 20 fixes a period of limitation and S. 4 of the Limitation Act is applicable and an application filed on the re-opening day where the time for filing it expires on a day when the Court is closed is within time.

Chenchuramana Reddi v. *Arunachalam*, (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.), distinguished.

Per *Patanjali Sastri, J.*: Even if the sixty days be not strictly regarded as a period of limitation the right to apply under S. 19 must be taken to accrue *de die in diem* and S. 11 of the General Clauses Act would be applicable.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Tiruvarur dated 12th August, 1938, in I. A. No. 78 of 1938 and passed in S. C. S. No. 600 of 1935.

R. Krishnaswami Aiyangar for Petitioners.

R. Narasimhachariar for Respondent.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—A decree having been passed against the petitioners, the decree-holder applied for execution to the Court of the District Munsif, Thiruvarur. The petitioners then applied for a stay under the provisions of S. 20 of the Madras Agriculturists' Relief Act, 1938, in order that they might prefer an application under S. 19 to the Court of the Subordinate Judge, Thiruvarur, for the scaling down of the debt. On the 11th April, 1938, the District Munsif granted a stay. S. 20 contains the following proviso:— Leach, C.J.

"Provided that where within sixty days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under S. 19 or where an application has been so made and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in this Act to the contrary."

The petitioners had therefore sixty days in which to apply to the Subordinate Judge. The Court of the Subordinate Judge closed for the summer vacation in the third week of April, 1938 and did not reopen until the 20th June, 1938. As the result of the Court being closed the petitioners were not in a position to file the application for a period of eight weeks, but filed it on the reopening day, that is, seventy days after the stay order had been passed. The petitioners, however, contended that they were within time and relied on S. 4 of the Limitation Act. The Subordinate Judge refused to accept this argument and formed the opinion that the filing of the application within sixty days

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Leach, C.J.

of the stay order was a condition precedent to their right to apply to the Court for relief. He considered that the decision in *Chenchuramana Reddi* v. *Arunachalam*[1] applied. On this reasoning the petition was dismissed. The petitioners have applied to this Court for revision of the Subordinate Judge's order.

The scheme of the Madras Agriculturists' Relief Act is to provide for the scaling down of debts due by agriculturists. S. 7 of the Act states that notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of the Act, shall be scaled down in accordance with the provisions of Chapter II. S. 19 provides for the scaling down of debts due under decrees passed before the commencement of the Act. Where a Court has passed a decree for the repayment of a debt it shall on the application of a judgment-debtor who is an agriculturist apply the provisions of the Act notwithstanding anything contained in the Code of Civil Procedure, and amend the decree in accordance with the Act or enter up satisfaction as the case may be. By virtue of S. 20, a Court is bound to stay execution proceedings against an agriculturist on application made by him. I have already referred to the proviso to this section, which gives him sixty days in which to make an application to the trial Court for scaling down the debt. If the proviso to S. 20 can be read as fixing a period of limitation there can be no doubt that the application here was filed in time.

S. 29 of the Limitation Act applies *inter alia* S. 4 to a special or local law unless such law expressly excludes S. 4. S. 4 states that where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court reopens. For the petitioners it is said that the proviso to S. 20 fixes the period of limitation for an application by an agriculturist judgment-debtor when a decree is being executed against him. It is a special provision inserted in the Act to meet the case where an agriculturist against whom a decree has been passed has not taken the steps contemplated by S. 19 and he finds that the decree-holder is taking active steps against him. I consider that this is the correct interpretation of S. 20. The period of limitation fixed

1. (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.).

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by S. 20 has no application in any other circumstance. Reading S. 19 in conjunction with S. 7 it would appear that the intention of the legislature was to fix no period of limitation in ordinary circumstances. So long as a debt is enforceable a debtor has a right to apply at any time for the scaling down of the debt, except in the circumstances contemplated by S. 20. In such circumstances, there is a period of limitation and it is sixty days from the date on which the application for a stay is granted. If the debtor has not previously made an application under S. 19, the decree-holder is at liberty to apply for execution of the decree as it stands, but the judgment-debtor is still allowed to apply for relief under the Act, provided he applies within the time fixed.

The decision in *Chenchuramana Reddi* v. *Arunachalam*[1] has no application here. In that case the Court held that the period of three months fixed in S. 9 (1) (*c*) of the Provincial Insolvency Act is not a period of limitation, but is a condition precedent to an adjudication. In other words, unless an application for adjudication is filed within three months of the act of insolvency complained of a petition does not lie. S. 9 of the Provincial Insolvency Act bears no analogy to S. 20 of the Madras Agriculturists' Relief Act, and the conclusion arrived by the Subordinate Judge was based on a false premise. The application was in time and the petitioners are entitled to the relief they seek. My learned brother agrees with me and the case will therefore be remitted to the Subordinate Judge to be dealt with in the light of this judgment. The petitioners are entitled to their costs.

Patanjali Sastri, J.

Patanjali Sastri, J.—I concur in the judgment just delivered by my Lord, the Chief Justice, and would only add that even if the period of sixty days referred to in S. 20 of the Madras Agriculturists' Relief Act, 1938, be not strictly regarded as a period of limitation for an application under S. 19, the result would be the same. For, apart from S. 20, there is no time limit for such an application. It is clear from S. 7 that the debtor is entitled to the benefit of the scaling down of his debt in accordance with the Act so long as the debt is outstanding and enforceable. His right to apply under S. 19 must therefore be taken to accrue *de die in diem*. His application would thus

1. (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.).

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be a proceeding to which the Limitation Act does not apply and therefore the provisions of S. 11 of the General Clauses Act would be applicable. Under this section, the petitioner was clearly entitled to make his application on the reopening day of the lower Court after the summer holidays.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mohona Ponda .. *Appellant** (*Plaintiff*)

v.

Raghunadha Das and another.. *Respondents* (*Defendants*).

Mohona Ponda v. Raghunadha Das.

Madras Proprietary Estates Village Service Act (*II of 1894*), *S. 15—Rules under—Regrouping of villages—Appointment of karnam by village proprietor—Excessive exercise of powers—Vetoing by village proprietor—Fresh appointment by Revenue Divisional Officer—Powers of—Validity of such appointment.*

Where the plaintiff was appointed by the proprietor of a village from out of a class or group of persons from whom the proprietor had no legal right to make an appointment and the appointment was vetoed by the Revenue Divisional Officer by an executive act not based on any statutory power and there was an appointment of the first defendant which would be perfectly legal, provided there was a vacancy at that time,

Held, that a proprietor under the Act had no power of appointment except that which is conferred by S. 15. That power is only a power to appoint a person whom he may consider to be best qualified from among the families of the last holders of the defunct offices of the same class as the new office created in the new village. If when purporting to exercise that power the proprietor goes outside the field of selection and appoints a stranger or a person who is not a member of the families of the incumbents of the defunct offices of the same class, he is not only arrogating to himself a power which he does not possess under the statute, but he is in fact encroaching upon the residuary power of the Revenue Divisional Officer to fill the vacancy in case it is not filled by the proprietor. If the appointment of the plaintiff by the proprietor derives no validity from the statute, the plaintiff must be deemed to be at most a mere personal servant of the proprietor and not a holder of a statutory office and it would follow that the proprietor's appointment does not affect the existence of a vacancy for the statutory office and that no valid appointment having been made by the proprietor within the time allowed, the Revenue Divisional Officer's order appointing the first defendant would be legal, even though he has no statutory power to interfere with an appointment made by the proprietor within the powers conferred by law.

Appeal against the decree of the District Court of Ganjam dated 9th March, 1935 and made in A. S. No. 236 of 1934 preferred against the decree of the Court of the Principal

* S.A. No. 708 of 1935. 14th March, 1939.

District Munsif of Berhampur dated 30th July, 1934 and made in O. S. No. 333 of 1933.

Mohona Ponda v. Raghunadha Das.

B. Jagannadha Das for Appellant.

V. Govindarajachari and *The Government Pleader* (*B. Sitarama Rao*) for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises questions relating to the powers of the proprietor and the Revenue Divisional Officer in making appointments under S. 15 of the Madras Proprietary Estates Village-Service Act (II of 1894) in a case of re-grouping of existing villages. The plaintiff was a karnam of one of the villages affected by the re-grouping. In the new group the proprietor appointed the plaintiff, not as karnam, but as headman. He did not actually take office owing to the fact that when the report of the appointment was received, after some correspondence, the Revenue Divisional Officer set aside the appointment and, purporting to act under S. 11 (2) of the Act, appointed the first defendant who admittedly was qualified for the appointment. The plaintiff filed the suit for a declaration that the appointment of the first defendant was illegal. The suit was decreed in the trial Court. But before the appeal against this decision was heard, the proprietor on the basis of the decision of the District Munsif, treating the office as vacant by reason of that decision, made a fresh appointment and this time he appointed the first defendant, that is, the person actually substituted for his own first nominee by the original order of the Revenue Divisional Officer which had been declared illegal by the District Munsif. The Revenue Divisional Officer accepted this appointment; so that when the suit came before the District Judge in appeal the plaintiff was confronted, not by the order of the Revenue Divisional Officer which had been found to be illegal, but by a subsequent order of the Revenue Divisional Officer confirming an apparently legal appointment of the first defendant by the proprietor. The learned District Judge dismissed the suit. Hence this appeal.

Now, when there is a re-grouping of villages, the powers of appointment to village offices in the new group are governed by S. 15 of the Act which lays down that, by reason of re-grouping, new hereditary offices shall be created in the new village and in choosing persons to fill such new offices the proprietor shall select the persons whom he may consider the

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best qualified from among the families of the last holders of the offices which have been abolished and shall report his action to the Revenue Officer in charge of the division. By a rule framed under the Act, embodied in Appendix V of Board's Standing O. 147, it has been laid down that the proprietor should select a person from among the incumbents of the previously existing offices of the same class as that constituted; and it seems to me that this rule undoubtedly interprets the spirit of S. 15 (1), the wording of which is not so specific, though I have no doubt that it was not the intention of the legislature to give incumbents of the talayari's office which has been abolished a right to claim that they should be considered for the appointment to the new headman's office and *vice versa*. It must have been the intention of the section that incumbents of each office abolished, should have a right to have their claims considered to the new office of the same class created and not to an office of a different class for which they might well be entirely unqualified. It follows that the order of the proprietor appointing the plaintiff as headman of the suit village was not in accordance with the powers conferred upon him by S. 15 of the Act.

The scheme of the Act provides no remedy for an appointment by the proprietor purporting to be made under S. 15 but not complying with the provisions of that section. There is no right of appeal laid down in the Act nor is there any right of suit similar to that given to an aggrieved person when the question is one of succession to an existing office. It would in my opinion be in accordance with the spirit of the Act for the Board of Revenue to exercise its rule-making power under S. 32 and to provide for the contingency of the proprietor making appointments in excess of his powers under S. 15. But so far as I can gather, no such rule has been framed. The rules under the Act are embodied in Appendix V to Board's Standing O. 147. Board's Standing O. 149 contains what appear to be executive instructions for the working of the Act and there is nothing in the form of this order to suggest that it embodies statutory rules. Sub-S. 3 (2) of that order as it stood at the time of the present suit, contained a direction to the Revenue Divisional Officer to make a selection himself if the proprietor should select a person other than a member of the families of the last holder. That provision was deleted in 1935, but in any case it is not

shown to be part of any rule framed under the statutory rule-making power conferred by S. 32 of the Act.

The position therefore seems to me that the plaintiff was appointed by the proprietor illegally from out of a class of persons from whom the proprietor had no legal right to make an appointment. That appointment was vetoed by the Revenue Officer by an executive act not based on any statutory power. After the suit was decreed there was an appointment of the first defendant which would be perfectly legal, provided that there was a vacancy at that time. It seems to me that a proprietor under this Act in a case of re-grouping has no power of appointment except that which is conferred by S. 15. That power is only a power to appoint a person whom he may consider to be best qualified from among the families of the last holders of the defunct offices of the same class as the new office created in the new village. If when purporting to exercise that power he goes outside the field of selection and appoints a stranger or a person who is not a member of the families of the incumbents of the defunct offices of the same class, he is not only arrogating to himself a power which he does not possess under the statute, but he is in fact encroaching upon the residuary power of the Revenue Divisional Officer to fill the vacancy in case it is not filled by the proprietor. If the appointment of the plaintiff by the proprietor derives no validity from the statute, the plaintiff must be deemed to be at most a mere personal servant of the proprietor and not the holder of a statutory office. It seems to follow that the proprietor's appointment does not affect the existence of a vacancy for the statutory office and that no valid appointment having been made by the proprietor within the time allowed, the Revenue Divisional Officer's order appointing the first defendant would be legal, even though he has no statutory power to interfere with an appointment made by the proprietor within the powers conferred by law.

Even otherwise, assuming that the appointment by the proprietor is illegal and that the cancellation of his order and the appointment of the first defendant by the Revenue Divisional Officer are also illegal, what is the position? The plaintiff cannot base his suit on possession, for he never took possession of the suit office. He cannot base his suit on title, for he can derive no title to a statutory office by reason of an appointment which is beyond the statutory powers of a proprietor. He is

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therefore in the position of a would-be trespasser, whose trespass has been prevented before it is effective. Certainly that is not a character which could afford a basis for the granting of any declaration. Whichever way one looks at the case, therefore, the plaintiff's suit must fail. The appeal is therefore dismissed with costs—two sets.

Leave to appeal is refused.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

P. Rm. St. Subramania Chettiar .. *Appellant**

v.

Felix Joseph Sarprasadam and others .. *Respondents.*

Subramania Chettiar v. Felix Joseph Sarprasadam.

Executrix—Moneys borrowed by her for obtaining probate—Estate of deceased liable to indemnify creditor to the extent of the claim of the executrix—Plaint prayer—Construction of—Whether wide enough to allow creditor to stand in the shoes of the executrix.

Where an executrix of an estate borrowed money from the appellant for the purpose of obtaining probate, but she having denied receipt of the money from the creditor, he filed a suit in which she raised the contention that even if he had in fact given her the money, he was not entitled to the benefit of the indemnity which she herself enjoyed,

Held, that since the creditor provided the money for a necessary purpose, it was a proper case where the appellant should be allowed to stand in the shoes of the executrix and therefore entitled to be indemnified by the estate to the extent of the borrowings.

Where the plaint in such a case prayed as follows: "I therefore pray that the Court may be pleased to pass a decree directing the defendants 4 and 5 (fourth defendant being the executrix) to pay to the plaintiff the amount noted hereunder together with subsequent interest and cost of the suit, the fourth defendant from out of the estate of the deceased *S* which she is managing as executrix and which belongs to defendants 1 to 3, and the fourth and fifth defendants personally,

Held, that the prayer was a claim for a decree against the estate as well as against the executrix personally and so on that ground the plaint should be considered sufficiently widely drawn to allow the creditor to stand in the shoes of the executrix.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Varadachariar dated 23rd November, 1936, and passed in S. A. No. 91 of 1935 preferred against the decree of the District Court of Trichinopoly in

* L. P. A. No. 51 of 1937. 31st March, 1939.

Subramania Chettiar v. Felix Joseph Sarprasadam.

A. S. No. 1 of 1934—O. S. No. 408 of 1932 on the file of the Court of the Principal District Munsif of Trichinopoly.

K. S. Desikan for Appellant.

A. V. Narayanaswami Aiyar and *V. Subramaniam* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—Santhanathammal, the grandmother of the first, second and third respondents died on the 17th August, 1928, leaving a will by which she bequeathed her properties to her grandsons and others. She appointed the fourth respondent, who is her daughter-in-law and the mother of the first, second and third respondents, her executrix. On the 6th March, 1929, the fourth respondent and her mother, Kanikaimari Ammal, who was the fifth defendant in the suit out of which this appeal arises, borrowed from the appellant a sum of Rs. 1,700 for the purpose of taking out probate of the will. A promissory note was executed by the fourth respondent and her mother for this amount and the instrument stated the purpose for which the money was borrowed. The fourth respondent executed the promissory note in her capacity as executrix and as guardian of her sons. The probate was obtained, but the fourth respondent failed to repay to the appellant the money which she had borrowed from him for the purpose. The consequence was that the appellant was compelled to file a suit in the Court of the District Munsif of Trichinopoly for the recovery of the money. The defendants to the suit were the respondents to this appeal and Kanikaimari Ammal. The fourth respondent denied that the money had been paid to her by the appellant, but the District Munsif held that this was untrue. A personal decree was passed against the fourth respondent and her mother, but the suit was dismissed as against the estate. The appellant appealed to the District Judge of Trichinopoly against the finding of the District Munsif that the estate was not liable. The respondents to this appeal were the first, second and third respondents in the present appeal. The appellant, however, did not make the fourth respondent a party. The District Judge allowed the appeal, holding that the appellant was entitled to a charge against the estate. The grandsons of the testatrix then appealed to this Court. The appeal was heard by Varadachariar, J., who restored the decree of the District Munsif. Before Varadachariar, J., the appellant asked that he be allowed the

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benefit of the indemnity to which the executrix would be entitled in law from the estate if it was shown that the money had been applied for purposes necessary for or beneficial to the estate. The learned Judge refused to accept this contention on the ground that the pleadings did not justify a decree being passed against the estate. The present appeal has been filed against the judgment of the learned Judge under cl. 15 of the Letters Patent, a certificate having been granted.

The appeal first came before us on the 23rd February and after hearing the arguments we were unable to share the opinion of Varadachariar, J., that the plaint was not sufficiently widely drawn to allow the appellant to stand in the shoes of executrix. The prayer in the plaint reads as follows:—

> "I therefore pray that the Court may be pleased to pass a decree directing defendants 4 and 5 to pay to the plaintiff the amount noted hereunder together with subsequent interest and cost of this suit—the fourth defendant from out of the estate of the deceased Sandanathammal which she is managing as executrix and which belongs to defendants 1 to 3, and the fourth and fifth defendants personally."

In our opinion there is here a claim for a decree against the estate as well as against the fourth respondent and her mother. The plaint was written in Tamil and the words used may not be as precise as the words which an expert draughtsman in English would use, but we consider that they were sufficiently precise for the purpose. In these circumstances we thought it proper to make the executrix a respondent in the appeal. In accordance with our direction she was served with notice of this appeal and became the fourth respondent. The judgment of Varadachariar, J., shows that he would have adopted this course himself had he considered that the plaint was sufficiently widely drawn to permit of an order being made against the estate. The case comes on for hearing with the fourth respondent before us.

We agree with the opinion of Varadachariar, J., that the District Judge was wrong in holding that the appellant was entitled to a charge, but we consider that he is entitled to stand in the shoes of the executrix, for the purpose of recovering the money from the estate. S. 321 of the Indian Succession Act, 1925, provides that the expenses of obtaining probate shall be paid next after the funeral expenses and death-bed charges. Mr. Subrahmaniam on behalf of the fourth respondent has contended that no order should be passed allowing the appellant to

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stand in her shoes as the executrix. Why his client has adopted this attitude is not far to seek. She is a woman and although she has been held personally liable it will be difficult if not impossible to execute a personal decree against her. She borrowed the money from the appellant for obtaining probate, and for her to say that the appellant should not be allowed the benefit of the indemnity which she herself enjoys is dishonest. The appellant provided the money for a necessary purpose and she utilized it for that purpose. It is not disputed that in a proper case a creditor can stand in the shoes of an executor and be given his remedy against the estate. This is a proper case which the appellant should be allowed to stand in the shoes of the executrix, and we will allow the appeal to this extent.

The case will be remanded to the trial Court for inquiry as to what rights the fourth respondent has against the estate in respect of the sum of money borrowed for obtaining the probate. The trial Court will draw up a fresh decree based on its findings in the inquiry arrived at in the light of this judgment. It will not be open to any of the respondents to contend that the money was not borrowed from the appellant for the purpose of obtaining probate, or to contend that this was not a necessary purpose. There are findings, and they are conclusive, that the money was borrowed by the fourth respondent from the appellant for the purpose of obtaining probate and that it was borrowed for a proper purpose. The inquiry will therefore proceed on this basis. The decree against the fourth respondent and the fifth defendant will stand in so far as they are personally concerned.

Before Varadachariar, J., the first, second and third respondents contended that if the estate was to be made liable the rate of interest mentioned in the promissory note was excessive. In view of the decision of the learned Judge on the other questions arising in the case which led to the restoration of the decree of the District Munsif it was not necessary to go into this question. It has been agreed by the parties that the question of the rate of interest so far as the estate is concerned shall be decided by the District Munsif on remand.

As the appellant did not make the fourth respondent a party in his appeal to the District Judge, and failed to make her a party in this Court we make no order as to costs, either in this Court or in the District Court.

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The memorandum of objections will be dismissed but there will be no order as to costs.

K. C. *Appeal allowed in part.*
Memo. of objections dismissed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE SOMAYYA.

In the matter of Sri P. Ramanujachariar, Advocate, Madras*.

F.B.

In the matter of Ramanujachariar.

Indian Bar Councils Act (XXXVIII of 1926), S. 10 (1)—Professional misconduct—Agreement by advocate to advance moneys towards litigation with a view to share the profits—High Court can take disciplinary action.

Where under S. 10 (1) of the Bar Councils Act charges against an advocate ran thus: "That you, having been engaged in C. S. No. 168 of 1932 on the file of the High Court for the plaintiff, accepted a share of the profits of litigation for your professional remuneration, namely, 14 per cent. of the sum that may be decreed in the suit including costs" and the Bar Council's tribunal thought that no definite agreement had been entered into, but on evidence before the High Court, it turned out that the advocate did finance the litigation and advanced various other sums to the complainant and his sister, and certain letters between the advocate and his clients supported the charge,

Held, that for an advocate to enter into an agreement of the nature, which was entered into in the case, amounted to professional misconduct and the Court was bound to take serious notice of it. It was a case of an advocate speculating in litigation. The Court should take steps to prevent it.

The notice under S. 12 (3) of the Indian Bar Councils Act issued to Sri P. Ramanujachariar, an Advocate of the High Court of Judicature at Madras, calling upon the said Sri P. Ramanujachariar to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for his professional misconduct rendering himself liable to be dealt with under S. 10 (1) of the Indian Bar Council's Act in that,

(1) he offered his services to the plaintiff in C. S. No. 168 of 1932 on the file of the High Court (Original Side) voluntarily to finance and to conduct the case for the plaintiff and thereby solicited work in a manner inconsistent with professional good conduct;

(2) he having been engaged in C. S. No. 168 of 1932 on the file of the High Court for the plaintiff accepted a share of the profits of the litigation for his professional remuneration,

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**In re* an Advocate. 1st May, 1939.

namely, 14 per cent. of the same that may be decreed in the suit including costs;

(3) (*a*) he having been engaged for the plaintiff and having undertaken to finance the plaintiff and to render her all assistance including a stipulated periodical payment for her maintenance, he deliberately allowed himself to be used by the defendants and thereby betrayed the plaintiff's trust and interests, which it was his duty to protect and that such funds as he furnished to the plaintiff were supplied to him by the defendant in pursuance of the undertaking between him and the defendant to defraud the plaintiff;

(*b*) he wilfully managed to keep away the plaintiff's senior Counsel by deliberately defaulting to instruct him and to pay the balance of fees due to him;

(*c*) he wilfully kept the plaintiff in ignorance of the proceedings in the suit in spite of the plaintiff's letters which were left unanswered and otherwise misled the plaintiff by giving information to the plaintiff which was false to his knowledge;

(*d*) he by not keeping his engagement with the plaintiff, in such and other diverse ways combined with the defendants to defraud the plaintiff and ultimately brought about the dismissal of the plaintiff's suit;

(4) he fraudulently procured and used a false receipt dated 7th May, 1935, for Rs. 250 reciting a payment by him of Rs. 250 to his client, whereas in truth no amount was at all paid by him to his client as per the said receipt;

(5) in any event, he was guilty of wilful default and negligence in the conduct of the suit C. S. No. 168 of 1932 on behalf of his client, the plaintiff therein;

(*a*) that the senior advocate was not engaged by him in time as stipulated for;

(*b*) that he delayed compliance with the orders of Court in the said suit and in the taking out of interlocutory applications to the prejudice of the plaintiff;

(*c*) he deliberately attempted to coerce the plaintiff and her brother to enter into a compromise with the defendant in the suit, the terms of which were highly prejudicial to the plaintiff;

(6) he appearing for the plaintiff bargained and stipulated for a special remuneration from the defendants, should the case be settled out of Court, and further offered unlawful inducement

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to the plaintiff and her brother for persuading them to agree to a compromise;

came on for hearing this day, upon perusing the said notice under S. 12 (3) of the Indian Bar Councils Act the report of the Tribunal of the Bar Council dated the 12th January, 1939, the charges framed by the Tribunal of the Bar Council dated 26th August, 1936 and the written answer of the Advocate dated 21st October, 1936 and the letter of the High Court R. O. C. No. 6348 of 1935 C-1 dated 27th March, 1936, to the Bar Council and other material papers in the case and upon hearing

K. Umamaheswaram for *The Advocate-General* in support of the notice.

C. R. Rajagopalachari, Advocate for *Sri P. Ramanujachariar*.

K. Kuttikrishna Menon for the Bar Council.

The Court delivered the following

JUDGMENT.—The respondent is an advocate practising in this Court. He was charged with professional misconduct, Five charges were framed against him and these were investigated by a Tribunal constituted under the Indian Bar Councils Act. The Tribunal has reported favourably to the respondent on all the charges. We accept the report except so far as it concerns the second charge. We consider that in this case the charge has been substantiated.

The complainant is the brother of one Manickammal who instituted in 1932 a suit on the Original Side of this Court in which she asked for a decree for maintenance as a Hindu widow. She sued as a pauper. She claimed that she was entitled to maintenance at the rate of Rs. 500 per mensem and to a sum of Rs. 52,000 as arrears of the allowance. Through her brother she engaged various advocates to conduct her suit, but subsequently withdrew her instructions. In July, 1933, the complainant approached the respondent with a view to the respondent acting for his sister. The respondent agreed and the complainant alleges that it was arranged that the respondent's remuneration was to be 14 per cent. of the sum which might be decreed in the suit, including costs. The second charge is based on this agreement. The actual charge reads:

"That you having been engaged in C. S. No. 168 of 1932 on the file of the High Court for the plaintiff accepted a share of the profits of litigation for

your professional remuneration, namely, 14 per cent. of the sum that may be decreed in the suit including costs."

The Tribunal thought that no definite agreement had been entered into, but that after discussion the matter was left at large. An examination of the correspondence which passed between the complainant and the respondent shows that the conclusion of the Tribunal cannot be supported.

The complainant in the course of his evidence said:—

"I went to the respondent. This was in May, or June, 1933. That was the very first time I saw the respondent. The respondent called for the papers which I gave him, having got them from Mr. Sankaranarayana. A week later, he said he would take up the case, provided I agree to pay him 20 per cent. of the amount that may be realised in the suit. I bargained with him and ultimately reduced the demand to 14 per cent. of the moneys. I told him the suit must be finished within a month or two. He agreed to do so. He promised to pay Rs. 100 for the maintenance of the plaintiff till the suit was disposed of within the time mentioned above. He agreed to engage a senior. My sister signed a letter confirming the arrangement referred to above and I passed that letter to the respondent."

This letter is dated 26th July, 1933, and the copy of it (Ex. A) reads as follows:—

"Regarding C. S. No. 168 of 1932 I request you to kindly conduct the suit and accept my vakalat with a competent senior and I hereby agree to pay you 14 per cent. of the amount I get in the said suit for arrears of past maintenance"

The respondent says that he has no recollection of having received this letter, but there can be no doubt that he did receive it. On the 6th November, 1933, the plaintiff wrote a letter to the respondent saying that he had only paid her Rs. 23 for her maintenance whereas he had agreed to help her to the extent of Rs. 100. The letter proceeds:—

"Further as per your terms mentioned in my agreement letter taken by you about your fees, you have not till now engaged any senior counsel to conduct the suit and so I am in a fix how you are going to finish the case shortly as per your frequent promises."

In the concluding paragraph of this letter there is a further reference to the letter of the 26th July, 1933.

On the 19th January, 1934, the plaintiff wrote to the respondent a letter in which she states:—

"You took an agreement from me to pay you 14 per cent. from the amount that may be decreed in my favour and you undertook to (1) to meet all the expenses in the case, (2) to engage a senior either Mr. S Duraiswamy Iyer or Mr. K. S. Krishnaswami Aiyangar and to pay their fees, and (3) to pay me a sum of Rs. 100 for my food expenses and to finish off the case within a month from the reopening of the Court after summer vacation."

This letter was shown to the respondent but he handed it back to the plaintiff saying that he would fulfil his agreement.

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It is abundantly clear that the respondent did finance the litigation to the extent of at least Rs. 300 and advanced various other sums to the complainant and his sister. On the 14th March, 1934, he took a promissory note from the complainant and his sister for Rs. 750 which included the Rs. 300 I have just referred to. On the same date the complainant's sister signed a letter in which she authorised the respondent to take the Rs. 750 out of the amount which might be decreed in her suit. The letter adds:

"I and my brother are liable to pay you these amounts only, after obtaining decree against the defendants and not before. I further agree with my full consent and knowledge to collect the taxed costs that may be ordered in the suit and pay the Government stamp duty for the plaint and all other Court expenses, etc. and take the balance yourself."

This really amounted to a new agreement. Instead of the respondent having 14 per cent. of the proceeds of the suit he was to be paid his advances out of the moneys recovered under the decree and to have for his services the balance of the taxed costs after meeting Court charges. But here again he was not to receive anything unless the suit was successful.

There are other letters which support the charge, but it is not necessary to refer to them. Sufficient has been said to make it clear that the respondent did enter into an agreement by which he was to be paid 14 per cent. of whatever was recovered in the suit but later agreed to be remunerated on the basis of the taxed costs which might be recovered from the other side and the payment out of the decretal amount of what he had advanced. In both the cases the agreement was "No cure, no pay". The advocate was to receive nothing unless the suit was successful.

For an advocate to enter into an agreement of the nature of that embodied in Ex. A or of that embodied in the letter of the 14th March, 1934 (Ex. J-1) amounts to professional misconduct, and the Court is bound to take serious notice of it. To allow conduct of this nature to pass without punishment would only lead to the encouragement of agreements of this nature. The Court must take steps to prevent advocates speculating in litigation, and that is what the respondent has done. A great deal has been said of lack of *bona fides* on the part of the complainant and it has been suggested that the complaint filed was in the nature of blackmail. We are not concerned here with the conduct of the complainant. We are concerned with the conduct of the respondent and there is abun-

dant evidence to show that he has been guilty of professional misconduct. It is said that as the result of his connection with this litigation he has lost a large sum of money. We are told that the amount which he is out of pocket is over Rs. 4,000. This is of course punishment in itself but we consider that it is not sufficient. We consider that the conduct of the respondent has been such that he should be suspended from practice for three months from this date. We would add that the fact that the punishment inflicted by the Court is limited to suspension for three months does not mean that it will be so limited in another case. Agreements of this nature cannot be tolerated and in future the Court will not take such a lenient view.

K.C. *Advocate suspended from practice.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

In the matter of The Indian Companies Act (VII of 1913) and *In the matter of* The Travancore National Bank Subsidiary Company, Limited.

D. Sundaravaradan .. *Petitioner**

v.

M. K. Mani Iyer .. *Applicant.*

Company—Liquidation—Chit fund run by company—Successful bidder—Monies in the hands of the company of 2 other persons offered as security for due payment of future instalments—Default by bidder—Bidder, if can set off amounts due by company to the sureties—Effect of liquidation—If securities not returnable—Principle that a creditor not able to return security cannot recover the debt—Not applicable when surety and debtor are different persons.

M, a subscriber for one ticket in a chit fund conducted by a company bid for the chit at the 12th instalment for Rs. 940 To draw the bid amount, the subscriber had under the rules to furnish security, and his two brothers *R* and *V* who were subscribers in other chits conducted by the same company offered as security the monies to which they would each be entitled in respect of their respective subscriptions and further agreed that the company should be entitled to look to them for payment if there was any default in payment of any future instalments by *M*. *M* having committed default in payment, the liquidator in liquidation of the company, called on *M* to pay the balance of the instalments due and *M* claimed to set off the amounts payable by the company to the sureties and contended that by liquidation the company had reached a position in which the securities taken by it from *R* and *V* could not be returned to him and therefore could not recover any monies due from

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* Application No 643 of 1939 in O.P. No. 163 of 1938. 19th April, 1939.

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him on the principle of equity that a creditor cannot recover the amount of his debt for which security has been given when he is not in a position to return the security.

Held, that the set off cannot be allowed. The principle of equity relied on cannot apply to a case like this where the debtor and the person giving security are not the same person. Further the securities are still in existence and have not been wrongfully dealt with by the company.

Official Assignee v. *M. C. Harikrishna*, A.I.R. 1935 Rang. 201 and *Ellis & Co.'s Trustee* v. *Dixon-Johnson*, (1925) A.C. 489, discussed and distinguished.

V. V. Subramania Aiyar for Applicant.

R. Narasimhachari (*Official Liquidator*) for opposite party.

The Court delivered the following

JUDGMENT.—The applicant was the subscriber for one ticket in a chit fund conducted by the company of the nominal value of Rs. 1,000. Having been a successful bidder for the prize at the sum of Rs. 940, he withdrew the prize. Thereafter his liability to pay his subscriptions from month to month continued. He withdrew the prize money upon supplying to the company security for the amount, the security being the monies to which his two brothers would each be entitled in respect of their respective subscriptions to other chit funds conducted by the company, the two brothers being sureties. In the applicant's affidavit, he states that the two brother's non-prized tickets were to be held as security for future instalments payable by him, and the company were empowered to appropriate the amounts due to them under the two tickets belonging to the two brothers towards any future instalments if default were committed in respect of such instalments. The learned Official Liquidator has taken the objection that any arrangement which had been made between the applicant and the company together with the two brothers is contained in letters written by the two brothers and that these required stamping and the absence of the stamp renders the documents inadmissible in evidence and also their contents cannot be included in an affidavit and the facts set out therein treated as proved facts. In the light of the conclusion to which I have arrived, it is not necessary to deal with this aspect of the application, and I propose to assume for the purpose of my decision that it has been established that the applicant's two brothers were his sureties and the company is entitled to look to them if default were made by the applicant in respect of any future instalments. Under the rules of the Fund, failure

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by the applicant to pay any one instalment rendered the total amount outstanding immediately payable to the company.

The applicant contended (1) that his liability ceased at the date when his two brothers became surety inasmuch as it was to them the company agreed to look for payment and not to him. This contention is contrary to the facts which are set out by the applicant in his affidavit in which he says the company was entitled to look to the monies payable to the two brothers if default were committed by the applicant in respect of future instalments due from him. It follows that this contention fails.

Secondly, learned Counsel on behalf of the applicant contended that since the company has gone into liquidation and therefore has reached a position in which the securities which had been taken in respect of monies due from the appplicant cannot be returned to him, the Official Liquidator is not entitled to recover from the applicant any monies due from him. In support of the contention now raised two cases were cited to me, *Official Assignee* v. *M.C. Harikrishna*[1] and *Ellis & Co's Trustee* v. *Dixon-Johnson*[2]. The latter case was referred to and discussed in the Rangoon case. The facts in the *Ellis & Co.'s case*[2] were as follows:—

The firm carried on business as stockbrokers and the defendant opened with them a speculative account and he deposited as security for any debit balances which might be owing, various bonds and shares. Ellis & Co. sold some of the shares without the knowledge, authority or consent of the defendant, and he was ignorant of such sales until after the firm had become bankrupt. The trustee in bankruptcy having given credit to the defendant in respect of monies received from the proceeds of sales, claimed the balance due upon the general account and sued for this amount. It was held by the House of Lords that the stockbrokers themselves could not have maintained an action for the balance against the defendant inasmuch as they would not be entitled to be paid unless they were able to restore the security which he had furnished, since payment by the defendant would entitle him to the return of the securities which he furnished. Lord Cave, L.C., at page 491 in the course of his speech pointed out that the rule in equity being that:

"If a creditor holding a security sues for his debt, he is under an obligation on payment of the debt to hand over the security."

1. A.I.R. 1935 Rang. 201. 2. (1925) A.C. 489.

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In that case, the debtor and the person giving security for the debt was the same individual and from that aspect the observations were made and the decision given. In *Official Assignee* v. *M.C. Harikrishna*[1], the facts were as follows: The defendants maintained an account with a Chettiar firm which subsequently became insolvent. One of the partners in the defendant partnership named Chaganlal maintained with the Chettiar firm a deposit account and it was agreed between all the partners that recourse should be had to this deposit account in respect of the defendants' debt to the Chettiar firm. Chaganlal being a partner in the defendant firm was, as such, liable to pay all its debts. This obligation of course was also one which affected any other partner. When therefore Chaganlal entered into the arrangement with the Chettiar firm that his deposit account should be in effect a security for the partnership debt, he was as a debtor on the one hand, being a partner, giving security for his own debt. In the Rangoon case, it was held that the Chettiar firm having become insolvent they had dissipated the security in consequence of which it could not be returned to Chaganlal in the event of the debt from the partnership being paid, and consequently the Official Assignee of the Chettiar firm not being in a better position than the firm itself before it became insolvent failed in the action. Mr. Justice Leach as he then was followed the decision in the other authority, which I have quoted in the House of Lords in England.

In the present case, there is in my view clearly a distinction to be drawn between both the authorities I have cited. The security was not furnished by the applicant who was the debtor; it was furnished by two others. The principle in equity that a creditor is not entitled to recover the amount of his debt for which security has been given when he is not in a position to return the security applies in my view when the debtor and the person giving the security are the same person. Further, here the company has not, as Ellis & Co., in the English decision, wrongfully dealt with the securities. They are still in existence and whatever the dividends eventually may be, the two brothers would be entitled to a division from the assets realised. If the present contention were allowed to be given effect and if 16 annas in the rupee are eventually paid, it would follow that the applicant would avoid entire responsibility for his debt and his two

1. A.I.R. 1935 Rang. 201.

sureties would be paid in full. Also the two securities are still in existence and all benefits and rights which eventually will arise will accrue to them. In my view, the applicant's contention fails, and it must follow that the Official Liquidator will not set off any amounts against the indebtedness of the applicant to the company, the sum of Rs. 360, but he will remain a debtor in respect of that amount. This application is dismissed. No order as to costs, the Official Liquidator appearing in person.

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S. V. V. —— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Parvata Satyanarayanamurthy and others .. *Appellants** (*Defendants*)

v.

Sri Rajah Saheb Maharbabu-i-Doshan Sri Rajah Rao Venkata Kumara Mahipathi Surya Rao Bahadur Garu, Sardar, Rajahmundry Circar and Maharajah of Pithapur .. *Respondent* (*Plaintiff*).

Satyanarayanamurthy *v.* Maharajah of Pithapur.

Limitation Act (IX of 1908), S. 14—Suits by landlord to eject tenants after notice to quit and for mesne profits—Tenants held to be occupancy tenants—Suits thereon for rent in Revenue Court—Later suits if barred by limitation—Cause of action for suit in the two Courts not identical—Suits for rent in Civil Court—Later suits for rent for subsequent faslis—All plaints returned to be presented to proper Court—Plaints separately presented and not consolidated into one plaint—Suits not barred by O. 2, r. 2, Civil Procedure Code —Plaints to be treated as one for purposes of O. 2, r. 2.

Where a person filed suits in the Civil Court for ejectment and mesne profits treating the person in occupation as a tenant continuing wrongfully in possession after notice to quit but the plaints were returned to be presented to the Revenue Court as the proper Court on the findings that the defendants had kudiwaram right and the lands were situate in an estate, and the plaints were thereupon presented as for rent in the Revenue Court forthwith, the claims for faslis beyond three years of re-presentation are barred. The plaintiff is not entitled to claim the benefit of S. 14 with regard to rent for those faslis as the cause of action for the suits is not identical. The claim in the Civil Court was on the basis of trespass and unlawful occupation on the ground that he is no longer a tenant, but the claim in the Revenue Court is on the ground of subsisting relationship of landlord and tenant.

Mullai Thayammal v. *Subbayyan Pillai*, (1922) 16 L.W. 802, doubted and distinguished.

But suits in which in the prior litigation rents were claimed in the alternative would not be barred by limitation.

* S. A. Nos. 345 to 352, 428 to 442, 451, 462, 463, 474 and 488 of 1936. — 28th October, 1938.

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With reference to some holdings the plaintiff had instituted suits for rent in the Civil Court at an interval of three years to save the claim for them being barred. The plaints in those subsequent suits also were returned to be pre sented in the Revenue Court. In re-presenting, the plaints were presented separately and the claims for these faslis were not added to the original plaint.

Held, the subsequent suits are not barred by O. 2, r. 2, Civil Procedure Code. As per the order of return of the plaints, the plaintiff had to present the same plaints in the Revenue Court to get credit for the court-fee already paid thereon. The plaints were all presented simultaneously and they must be taken together and read as one plaint with the proper court-fee.

Appeals against the decrees of the District Court of East Godavari in A. S. Nos. 17, etc., of 1935, preferred against the decrees of the Court of the Deputy Collector of Peddapuram Division in L. S. Nos. 4 of 1934, etc.

V. Viyanna for Appellants.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *K. Subramania Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—This is a batch of 28 appeals which arise out of suits filed by the Maharajah of Pithapuram the respondent herein against his tenants the defendants for recovery of arrears of rent for occupation of lands in various villages which originally formed part of what was known as Thotapalli estate to which the plaintiff claimed title by a purchase by his predecessor-in-title. The arrears of rent were claimed from faslis 1332 to 1343. The liability to pay rent was not disputed but most of the suits were resisted mainly on the ground of limitation and some were resisted on the ground that they were barred by O. 2, r. 2, Civil Procedure Code. In answer to the plea of limitation the plaintiff relied on S. 14 of the Limitation Act on the ground that a prior litigation against the same tenants in Civil Court saved limitation. In answer to the plea raised by O. 2, r. 2, the plaintiff also relied on the pendency of the prior litigation in respect of the claims which are sought to be defeated by this technical plea. The Deputy Collector upheld the plea of the defendants as to limitation but overruled the plea as to O. 2, r. 2 and gave decrees on that basis, but the learned District Judge differed from the Deputy Collector on the question of limitation in its entirety. Against his judgment the tenants have preferred these appeals.

The material facts are few and are not in dispute. That the plaintiff owned the several villages wherein the lands in the occupation of the tenants were situate was not disputed but the

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tenants disputed the right of the landlord to the ownership of the soil of the lands, their case being they are tenants owning kudivaram right in the lands. The plaintiff's case was that he was the owner of both the warams and that he was entitled to evict the tenants from occupation of the lands after due notice to quit. He therefore issued notices to quit between 1921 and 1923 and filed suits in the Civil Court. Most of the suits were for ejectment. He combined in the same suits with the relief for ejectment reliefs for past profits and future profits; in some of them he claimed also past rents and future profits. Some of the suits were only for mesne profits though in some of them he claimed rent also in the alternative. In a few of the suits he claimed only rent. The tenants resisted the various claims. So far as the claim for ejectment was concerned, the tenants' plea was that the landlord had no right to eject as they were the owners of kudivaram right and therefore had occupancy rights. This plea was also available for them to resist the claim for mesne profits. So far as the claim for rent was concerned, their plea was that the Civil Court had no jurisdiction to entertain suits for rent. Most of the suits were launched about 1925 excepting certain suits for rent which were filed as and when the right to recover them were about to be barred. The litigation lasted for nearly ten years and it was finally decided by the High Court that the tenants had the kudivaram right and the plaintiff was not entitled to eject them. As the lands in the occupation of the several tenants formed part of an estate within the meaning of the Estates Land Act the Civil Court would have no jurisdiction to award relief on the basis of a subsisting relationship between landlord and tenant. Therefore the Court directed the plaints in the various suits to be returned to the plaintiff for presentation to the proper Court. The various plaints were accordingly taken from the Civil Courts and presented on the very same day in the Revenue Courts. In presenting the plaints to the Revenue Courts the plaintiff in some suits amended them by claiming also rent for faslis subsequent to the fasli in respect whereof claims were preferred in the Civil Court; in some cases he claimed interest which was omitted to be asked for in the Civil Court; but the amendments in some cases were not made on the day on which the plaints were presented in the Revenue Court but on a later date when the plaints were returned for some formal amendment by the

Revenue Courts and before they were re-presented again in the same Court.

The plea of limitation was presented in the lower Court and is again repeated before me thus: the claim for rent for the faslis for which mesne profits were claimed in the Civil Court is barred not having been filed within three years from the date when the said rents accrued. S. 14 of the Limitation Act would not save the said claims from being barred by limitation because the cause of action for a suit for rent is not the same as the cause of action for a suit for mesne profits; in any event, S. 14 would not save the claims in some of the suits being barred by limitation in so far as they relate to rents for faslis subsequent to those in respect whereof claims were made in Civil Court and which were claimed by way of amendment on the date of re-presentation of the plaints in the Revenue Court.

I shall first deal with the question of limitation regarding suits for rent in cases where mesne profits were claimed in the prior litigation. It is conceded on behalf of the plaintiff that but for S. 14 of the Limitation Act the claims would be barred by limitation. The question therefore is whether S. 14 saves them. S. 14 of the Limitation Act runs thus:—

> "In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal against the defendant, can be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

The three essentials therefore requisite for the application of this section are (1) identity of the cause of action, (2) good faith of the plaintiff, and (3) the absence of jurisdiction or other cause of a like nature in the Court which entertained the prior litigation. The defendants do not dispute either the good faith or the absence of jurisdiction of the Court with reference to the prior litigation. But what is disputed is that there is no identity of cause of action. The question is, is this contention tenable? It has therefore to be seen what was the substance of the claim in the prior litigation. The case of the plaintiff was that he was the owner of both the melwaram and kudivaram rights, that the defendants were in occupation under terminable leases, that he gave them notice to quit, that they were in unlawful occupation of the land and were bound to surrender possession

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and also pay mesne profits for such wrongful possession until the day on which they surrender possession. I shall give herein extracts from a plaint in one of the suits, namely, O. S. No. 267 of 1925 a suit out of which S. A. No. 345 arises, to show how the plaintiff outlined his claim. Paragraphs 6 and 7 of the said plaint run thus:—

"6 Though notice to quit was given to the defendant on 30th December, 1921, for vacating the land by the end of fasli 1331 and delivering possession thereof to the plaintiff, the defendant did not quit but cultivated for fasli 1332 also and enjoyed the produce. Notice was again given on 30th May, 1923, demanding quitting and delivering possession of the lands by the end of fasli 1332 and claiming Rs. 1,163-0-0 as damages for unlawful cultivation for fasli 1332 Though thus demanded by the plaintiff the defendant cultivated the land for fasli 1333, 1334 and enjoyed the produce. The plaintiff is in all manner entitled to eject the defendant from the suit lands, to recover damages for faslis 1332, 1333, 1334 for unlawfully cultivating them without the plaintiff's permission and to recover future damages in the same manner till the lands are put in plaintiff's possession.

"7. The cause of action arose on the 1st July, 1922, when defendant began to unlawfully cultivate the lands mentioned in the schedule in the village of Sankhavaram within your Hon'ble Court's jurisdiction. Cause of action arose on 13th January, 1923, 1924, 1925 when profits as damages for faslis 1332, 1333, 1334 were appropriated."

The claim as will be seen was distinctly for possession and damages on the basis of unlawful occupation. The claim in the present case is based on the ground of subsisting relationship between landlord and tenant and for recovery of rent on that basis Therefore in my opinion the claim for rent is not founded on the same cause of action as the claim for mesne profits. Both are founded on distinct causes of action. A claim for rent is founded upon a subsisting relationship between the landlord and tenant either based on a tenure or on contract. The claim for mesne profits is not based on such relationship but essentially on trespass. In a decision of mine reported in *Ramiah* v. *Thathiah*[1], I have explained the scope of an action for mesne profits citing a passage from Salmond on Torts. As the learned author points out:

"The claim for mesne profits was always in form a claim for damages for a continuing trespass upon the land. Such a claim was based upon and rendered possible by the doctrine of trespass by relation."

It is founded on the theory of re-entry on termination of the lease. After the service of notice to quit it must be taken that the landlord has determined the lease and has made his election in the cases in question to enter upon the land. The

1. A.I.R. 1937 Mad. 849.

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claim for profits prior to the filing of the suits in the prior litigation was therefore founded upon an unlawful occupation. In fact in some of the plaints it will be seen he claimed double the amount of the rent as damages. So far as profits claimed subsequent to the date of the suit for ejectment were concerned, there can be no question of the nature of the claim. Cole in his book on Ejectment at page 635 explains the position thus:

"By issuing and serving a writ in ejectment the claimant elects to treat the defendants as trespassers on and from the date mentioned in the writ; and he cannot afterwards sue them as tenants for rent and for use and occupation subsequent to that day. The only remedy for subsequent occupation is by an action of trespass for mesne profits."

In *Birch* v. *Wright*[1], Buller, J., observes at page 234 thus:—

"For the action for use and occupation is founded on contract; and unless there were a contract either express or implied, the action could not be maintained."

Again dealing with a cause of action in ejectment, he observes as follows:—

"The action for use and occupation, and the ejectment, when applied to the same time, are totally inconsistent; for in one the plaintiff says the defendant is his tenant, and therefore he must pay him rent; in the other he says he is no longer his tenant, and therefore he must deliver up the possession. He cannot do both. The plaintiff's Counsel admits that an action would lie for the mesne profits; it is of course after ejectment, and may be maintained without proving any title. The ejectment is the suit in which the defendant is considered as a trespasser. . . . . ."

In *Birch* v. *Wright*[1], it was held that though the landlord filed a suit in ejectment he might maintain an action for use and occupation against the defendant tenant for all that is due and unpaid as rent up to the date of his issuing a writ for ejectment, because in that case it was only by suing for ejectment he was held to have declared his election to treat the lease as at an end and the defendant a trespasser. Until then the defendant must be deemed to have been treated by the landlord as his tenant. But in the cases in question from the time notice to quit had been given the plaintiff elected to treat the defendants as trespassers and founded his cause of action thereon. The tenants resisted the landlord's claim setting up a title to the soil and there was no question of any holding over with the implied permission of the landlord, the plaintiff, so as to sustain an action for use and occupation. As stated in Woodfall's

1. (1786) 1 T.R. 378: 99 E. R. 1148.

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Landlord and Tenant, 23rd Edition, at pages 685 and 686:

"A lessee, or his assignee, who holds over after his term or tenancy has expired or been duly determined, is liable for subsequent use and occupation, provided the landlord has acted so as to raise a presumption of a continued tenancy, and *not an intention to treat the tenant as a mere trespasser.*"

The prior suits were therefore based on trespass and the present suits as already stated by me are founded on a subsisting tenure, that is, a subsisting relation of landlord and tenant. Several cases have been cited at the bar but there is no case which directly deals with the question. Some of the cases on which Mr. Viyanna relied only go to show that pendency of suit for possession does not save limitation for a suit for rent. The only cases which have some bearing on the matter are the cases reported in *Sheriff* v. *Dina Nath Mookerjee*[1] and *Rameshwar* v. *Naka Singh*[2]. In *Sheriff* v. *Dina Nath Mookerjee*[1], a suit was brought for recovery of arrears of rent from Pous 1281 (December, 1874) to Chaitro 1288 (March, 1882). The question was whether the claim for 1281 and 1288 was barred by limitation. It would admittedly be barred but the bar was sought to be got over by relying on a prior litigation. The prior litigation was that in 1284 the landlord brought a suit to set aside the *putni* and in 1285 obtained a decree declaring the *putni* invalid and giving them possession with mesne profits. But the decree was reversed in appeal in 1288. It was held that the prior litigation would not save the claim from being barred by limitation. The learned Judge observed thus:—

"There was no period during which the tenancy ceased to exist We cannot extend the time of suit on the ground that he brought a suit improperly on the allegation that the relationship of landlord and tenant between him and the tenant did not exist."

In *Rameshwar* v. *Naka Singh*[2], it was held that where a plaintiff failed in a suit to recover rent on the basis of a subsisting lease on the ground that the plaintiff failed to prove his tenancy, a later suit against the same defendant claiming compensation for use and occupation of the land would not be barred by *res judicata*. Baguley, J., took the view that the two suits were founded on mutually exclusive causes of action and when the plaintiff had sued on one of them and failed, he would be entitled to sue on the other contrary cause of action. According to him one was based on contract and the other was based on tort. Mr. K. Subramanyam on behalf of the learned

1. (1885) I.L.R. 12 Cal. 258. 2. A.I.R. 1933 Rang. 106.

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Advocate-General relied very strongly on two cases (1) a decision of Devadoss, J., reported in *Vabalareddi Mallayya* v. *Narayana Gajapathiraju*[1] and (2) a decision of the division Bench in *Mullai Thayammal* v. *Subbayyan Pillai*[2]. In *Vabalareddi Mallayya* v. *Narayana Gajapathiraju*[1], there was an alternative claim for rent. Therefore the learned Judge held that S. 14 of the Limitation Act would save the subsequent suit from being barred by limitation. The learned Judge remarked thus:—

"Inasmuch as the plaintiff did claim rent in the previous suit on the ground that the appellants were bound to pay rent, I think the cause of action in the previous suit was not different from the cause of action in this suit."

The learned Judge did not say that the cause of action for mesne profits is the same as the cause of action for rent. In *Mullai Thayammal* v. *Subbayyan Pillai*[2], Sadasiva Aiyar, J., made the following observation at page 806 which is very strongly relied on by Mr. Subrahmanyam:

"The last contention was that the learned Judge ought to have awarded at least the rent due from 1910 up to the date of the suit. I think that this is a reasonable contention because even on the footing that there was no proper notice to quit, the mere fact that a claim as for mesne profits was made is not a sufficient ground for not allowing what is clearly due as rent in the alternative after amendment of the plaint, if necessary."

In that case the action was in ejectment against certain persons on the basis that they were tenants in occupation of the land till 1910 and that notice to quit was given to them when they became trespassers after refusing to comply with the notice to quit. The defence was that the tenants had occupancy rights by virtue of S. 6 of the Estates Land Act. The finding of the lower Court was that the tenants did obtain occupancy rights. Therefore without going into the other issues the lower Court dismissed the suit. On appeal their Lordships remanded the case on some of the issues and one of the issues on which finding was called for, was what were the arrears of rent payable? The learned Judges held that the tenants had acquired occupancy rights, and gave a decree on the basis of arrears of rent. It is not possible to understand on what basis they gave a decree for arrears of rent because once it was found that the holdings formed part of an estate the Civil Court had no jurisdiction to deal with a claim for arrears of rent. Having regard to the eminence of the Counsel who appeared in that case I am inclined to think

1. (1924) 86 I.C. 13. 2. (1922) 16 L.W. 802.

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that it was almost a decree by consent without the necessity of resorting to further proceedings; or else it is legally not possible to sustain the decree in the face of the distinct provisions of the Estates Land Act. However I cannot take it as an authority for the position that a suit for recovery of mesne profits can be considered as a suit for rent and that both are founded on the same cause of action. I am therefore of the opinion that the condition of the identity of cause of action is wanting in these cases and therefore such of the suits in which there was no claim for rent in the prior litigation either independently or in the alternative must be held to be barred by limitation. In this view the question whether the claim for rent for subsequent faslis added on the date of the re-presentation of the plaints in the Revenue Court is barred by limitation would not arise. However, as the question was argued, I shall deal with it. It is now well settled that where a plaint is presented in a Court which has no jurisdiction and it is re-presented after return by that Court in a Court which has jurisdiction, the presentation in the latter Court must be deemed to be the date of its institution in the said Court. The proceedings in the former Court are of no avail and the proceedings in the latter cannot be treated as a continuation of the proceedings in the former Court —vide *Ramdutt Ramkissendass* v. *E. D. Sassoon & Co.*[1] and *Hirachand Succaram* v. *G. I. P. Railway Co., Bombay*[2]. By applying this principle it was held that the plaintiff should amend the plaint so as to include all intermediate transactions between the date of the first presentation and the date of the presentation to the competent Court. The date on which the plaints were re-presented must be the date on which such a claim should be deemed to have been made; it was on that date fresh court-fee would have been paid and accepted by the Court. I therefore hold that the rents for subsequent faslis of course excluding those which accrued within three years prior to the date of the amendment would certainly be barred by limitation. But the claims for interest in suits for rent which are saved by S. 14 of the Limitation Act would not be barred even though they were not made on the date of the presentation of the plaints in the Revenue Court but were done on the date of the re-presentation

1. (1929) 56 M. L. J. 614: L.R. 56 I.A. 128: I.L.R. 56 Cal. 1048 at 1057 (P.C.).
2. (1928) I.L.R. 52 Bom. 548

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in the said Court. Under S. 61 of the Madras Estates Land Act, an arrear of rent shall bear interest at the rate of one half per cent per mensem from the date on which the arrear fell due until it is liquidated. So, whether the plaintiff claims interest or not, the Court is bound to award interest. It is immaterial when the claims were made. There are certain suits in which in the prior litigation suits for rents were claimed in the alternative. Therefore those suits cannot be said to be barred by limitation; also those suits in which for the period for which rent was claimed in the prior litigation for faslis prior to the institution of the suit would not be barred by limitation. In all the suits claim for rents which accrued within three years prior to the date of presentation of the plaint in the Revenue Court would not be barred and no appeals were preferred in regard to the said claim.

I shall now deal with the contention based on O. 2, r. 2, Civil Procedure Code. The question arises thus: With reference to some holdings at an interval of three years the plaintiff instituted suits for rent in the Civil Court because if he failed to do so, they would be barred by limitation. The plaints in those suits were returned for presentation to a proper Court after the termination of the litigation in the High Court and re-presented in the Revenue Court. Therefore S. 14 of the Limitation Act would save them from the bar of limitation. The plea that is advanced is not limitation but one based on O. 2, r. 2, Criminal Procedure Code. It is put thus: as the date of presentation in the Revenue Court is the date of the institution of the suit in that Court, the plaint must comprise a claim for all arrears of rent up to the date of presentation because under the proviso to O. 2, r. 2, Criminal Procedure Code, successive claims arising under the same cause of action shall be deemed to constitute but one cause of action.

Therefore, as the plaintiff has not presented any plaint including all the claims of arrears of rent, the only course open to the plaintiff is to elect which of the suits he will proceed with and the rest of the suits must be dismissed. To put it concretely, if the claim is in respect of fasli 1323 to fasli 1328 both inclusive and the plaint in one suit comprises only claims for arrears of rent for faslis 1323, 1324 and 1325 and the plaint in another suit comprises the claim for arrears of rent for faslis 1326, 1327 and 1328, the plaint must elect which of the

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suits he will proceed with, as one or the other must be held to be barred by O. 2, r. 2. Both the Courts have taken the view that O. 2, r. 2 will not apply to cases where the plaints have been returned for presentation to the proper Court by a Court not having jurisdiction to try the claims in those plaints. But this view is attacked as unsound by Mr. Viyanna. The question is whether the plea is tenable. Under O. 2, r. 2, Civil Procedure Code, it is necessary that the plaintiff should have omitted to sue in respect of, or intentionally relinquished any portion of his claim. The omission to sue may be accidental or deliberate. The question is, is there such an omission in this case? What is contended is the omission to add in either of the plaints filed in the Civil Court and re-presented in the Revenue Court the claims for the earlier or subsequent faslis as the case may be. But as per the order directing the return of the plaints and for presentation to the proper Court the plaintiff had to present the same plaints in the Revenue Court. As pointed out by Sankaran Nair, J., in *Visweswara Sarma* v. *Dr. T. M. Nair*[1], the object of "the return of a plaint for presentation to a proper Court is to enable the plaintiff to present that document without paying the stamp over again." Else he would not get credit for the court-fee already paid. The plaintiff was therefore obliged to present all the plaints in the Revenue Court. When he presented them, he must be deemed to have claimed for all the faslis up to the date of the presentation. The plaints were presented simultaneously and they must be taken together and treated as one document with the proper court-fee though it was affixed on separate pieces of paper. The fact that the Court has numbered the suits separately or that the plaintiff omitted to ask the Court to treat it as one suit and give it one number does not amount to an omission to sue or relinquishment of any portion of the claim within the meaning of O. 2, r. 2, Civil Procedure Code. I am therefore of the opinion that O. 2, r. 2, Civil Procedure Code, would not operate as a bar. I accordingly overrule this contention.

The result is that S. A. Nos. 345, 434, 432, 451, 435, 433 and 474 of 1936 must be allowed. S. A. Nos. 431, 346, 347, 436 and 488 must also be allowed. The rest of the appeals must be dismissed.

1. (1911) 21 M.L.J. 533: I.L.R. 35 Mad. 567 at 575 (F.B.)

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Leave to appeal is refused.

These second appeals having been posted to be spoken to this day, the Court delivered the following

JUDGMENT.—In regard to S. A. Nos. 345, 346, 347, 431, 432, 433, 434, 435, 436, 451, 474 and 488 the appellant will get his cost from the respondent. In the rest of the appeals the appellant will pay costs to the respondent. So far as the costs in the two lower Courts are concerned, each party will bear his own costs.

S. V. V. *S. As. Nos. 345 to 347, 431 to 436, 451, 474 and 488 allowed. Other appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

Jonnala Lakshmidevamma .. *Appellant* (Plaintiff)*

v.

Jonnala Veera Reddi and others .. *Respondents (Defendants Nos. 2, 3 and 1).*

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Lakshmidevamma v. Veera Reddi.

Hindu Law—Widow's maintenance—Liability for on partition.

The widow's right to maintenance merely attaches to her husband's share and on partition she has no claim against the assets forming the shares of the other coparceners. Her claim is enforceable only against the coparcener to whom her husband's share has been allotted

Subbarayulu Chetty v. *Kamalavalli Thayaramma*, (1911) 21 M. L J. 493: I.L.R. 35 Mad. 147 and *Rangappaya* v. *Shiva*, (1933) 65 M.L.J. 410: I. L. R. 57 Mad. 250, overruled

Narasimham v. *Venkatasubbamma*, (1931) 62 M.L.J. 433: I.L.R. 55 Mad. 752, followed.

But the amount representing arrears of maintenance before the date of partition will have to be paid by all the coparceners.

Appeal under cl. 15 of the Letters Patent against the decree and judgment of the Hon'ble Mr. Justice Venkataramana Rao, dated 27th March, 1936, and passed in S.A. No. 1535 of 1931, preferred to the High Court against the decree of the District Court of Guntur in A.S. No. 250 of 1929 preferred against the decree of the Court of the District Munsif of Tenali, in O. S. No. 547 of 1927.

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*L. P. A. No. 97 of 1936. 24th March, 1939.

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V. Govindarajachari for Appellant.

P. Satyanarayana Rao and *V. Subramanyam* for Respondents.

The Court delivered the following

JUDGMENTS: *The Chief Justice.*—This appeal raises a question with regard to a Hindu widow's right to maintenance out of the family properties after partition has taken place. The appellant was the plaintiff in the suit out of which the appeal arises. Her husband died some eight years before the suit. At the time of his death the joint family consisted of the first respondent (the appellant's father-in-law), the second respondent (her brother-in-law), and the third respondent (a son of her deceased husband by a previous wife). On the 20th December, 1925, the appellant made a formal demand for maintenance. The family was still joint, but on the 17th March, 1926, a partition was effected by a registered deed. The partition was no doubt the result of the appellant's demand, but it was a genuine partition. On the death of the appellant's husband his share in the family properties devolved upon the third respondent and as the result of the partition the third respondent obtained what his father would have obtained had he lived. The appellant then filed a suit in the Court of the District Munsif, Tenali, claiming that she was entitled to a decree against all the respondents on the ground that her status as a widow gave her the right to be maintained out of the family estate as a whole and not merely out of that portion allotted to her step-son on partition. The District Munsif found in the appellant's favour and granted her a decree against all the respondents. He held that she was entitled to arrears of maintenance for seven years at the rate of Rs. 60 a year and to the payment of Rs. 90 a year from the date of the suit. In addition he awarded a sum of Rs. 20 for the purchase of utensils and directed the respondents to set aside a portion of the family house for the appellant to live in or to pay her a further sum of Rs. 100. The decree so far as the first and second respondents were concerned was a personal decree, but so far as the third respondent was concerned it was limited to his share in the family properties. The first and second respondents appealed to the District Judge of Guntur, who confirmed the District Munsif's decree with slight modifications. He directed that the sum payable as arrears of maintenance should be calculated at Rs. 60 per year for six years

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and at Rs. 84 per year for one year and that all the amounts under the decree were to be recovered from the respondents in equal shares. The District Judge also modified the order which the District Munsif had passed with regard to costs. The first and second respondents then appealed to this Court. The appeal was heard by Venkataramana Rao, J., who allowed it. In holding that the third respondent was alone liable the learned Judge followed the decision in *Narasimham* v. *Venkatasubbamma*[1], where a Division Bench of this Court (Waller and Jackson, JJ.) held that when the widow of a coparcener sues for maintenance after the family has become divided her claim is enforceable only against the coparcener to whom her husband's share has been allotted. The learned Judge felt unable to accept that decision as embodying the correct statement of the law, but as it was directly in point he felt bound by it. The decision in *Narasimham* v. *Venkatasubbamma*[1] runs contrary to the decision of White, C. J. and Munro, J., in *Subbarayulu Chetti* v. *Kamalavalli Thayaramma*[2] and the present appeal, which is an appeal from the judgment of Venkataramana Rao, J., under cl. 15 of the Letters Patent, has been placed before a Full Bench in order that the conflict may be decided.

The decision in *Narasimham* v. *Venkatasubbamma*[1], is in accordance with the statement of the law made by Bhashyam Aiyangar, J., in *Jayanti Subbiah* v. *Alamelu Mangamma*[3], where he said:—

"When an undivided Hindu family consists of two or more males related as father and sons or otherwise, and one of them dies leaving a widow, she has a right of maintenance against the surviving coparcener or coparceners, *quoad* the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving coparcener or coparceners, and though such right does not in itself form a charge upon her husband's share or interest in the joint family property yet, when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein."

As authority for this statement Bhashyam Aiyangar, J., gave the Full Bench decision in *Ramanadan* v. *Rangammal*[4]. The judgment delivered in that case did not lay down expressly that a widow's right to a charge on the family property should

1. (1931) 62 M.L.J. 433: I.L.R. 55 Mad. 752.
2. (1911) 21 M.L.J. 493: I.L.R. 35 Mad. 147
3. (1902) 12 M.L.J. 270: I.L.R. 27 Mad. 45.
4. (1888) I.L.R. 12 Mad. 260 (F. B.).

not exceed her husband's interest therein, but it was recognised that she was entitled to a charge on the family property in the hands of her son.

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I regard the statement of the law made by Bhashyam Aiyangar, J., as being correct, and before commenting on the decision in *Subbarayulu Chetti* v. *Kamalavalli Thayarammai*,[1] I will state my reasons. The Smriti Chandrika, XI, I, 34, according to the translation by the late T. Krishnaswami Aiyar, reads as follows:—

> "When the father-in-law and the like are qualified to maintain the widow and take themselves the property of the deceased undivided member of the family, they alone are to maintain the widow from the property so taken. Accordingly, Narada:—'Whichever wife (Patni) becomes a widow and continues virtuous, she is entitled to be provided with food and raiment by the elder brother of the deceased or by her father-in-law or by a Gotraja (a member born in the same family) or any other person.'
>
> In order to maintain the widow, the elder brother, or any of the others above mentioned, must have taken the property of the deceased; the duty of maintaining the widow being dependent on taking the property."

The authority of the Smriti Chandrika is accepted. There is here a clear statement that the duty of maintaining the widow devolves on the persons who take the property of the deceased undivided member of the family and it is emphasized that the duty is dependent on the taking of the property. If the obligation to maintain the widow depends on the taking of the deceased husband's share in the family estate, it follows that there can be no right in the widow to claim to be maintained out of the shares which fall to the other members. While the family remains undivided the position is different. The property is held jointly and of necessity the amount required for a widow's maintenance has to be paid out of the estate regarded as a whole, but in no circumstances can she claim an allowance greater than the income of her husband's share in the estate. An adequate allowance may be less than the income of her husband's share, but it represents the maximum available. See *Savitribai* v. *Luximibai*[2], *Madhavrav Keshav Tilak* v. *Gangabai*[3] and *Pachayammal* v. *Paramasiva Mudaliar*[4].

In *Savitribai* v. *Luximibai*[2] Westropp, C. J., observed:

> 'It would need very strong and distinct authority, in the ancient treatises of Hindu Law, to convince us that the widows of such separated husband's stand, as to maintenance out of such portion of the family estate as remains

1. (1911) 21 M.L.J. 493: I.L.R. 35 Mad. 147.
2. (1878) I.L.R. 2 Bom. 573 (F.B.). 3. (1878) I.L.R. 2 Bom. 639.
4. (1937) M.W.N. 785.

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in the hands of the other ex-parceners, in a better position than the husbands themselves occupy with regard to any right to resort to that residue for a further share, albeit under the name and guise of maintenance"

The ancient treatises of Hindu Law do not furnish such authority. In the Smriti Chandrika there is, however, strong authority to the contrary.

The learned advocate for the appellant has conceded that when there has been a partition during the husband's lifetime and the husband has dissipated his share in the family properties his widow is not entitled to be maintained out of the properties falling to the shares of the other members. If the widow is not entitled in such circumstances to be maintained out of the properties in the hands of the other members of the family, the logical deduction is that her right to maintenance merely attaches to her husband's share and on partition she has no claim against the assets forming the shares of the others.

I will now turn to examine the decision in *Subbarayulu Chetty* v. *Kamalavalli Thayarammal*[1]. In that case a widow sued for maintenance against the surviving members of her deceased husband's family and after the institution of the suit the defendants arranged a partition. The Court held that the partition suit could not prejudicially affect the plaintiff's claim. White, C.J., quoted the passage which I have quoted from the judgment of Bhashyam Aiyangar, J., in *Jayanti Subbiah* v. *Alamelu Mangamma*[2], but he was not prepared to hold that the words of Bhashyam Aiyangar, J., were intended to apply to the members of the branch of the family of which the deceased was a member and not to the members of the joint family generally. I am unable to place any restriction on the words used by Bhashyam Aiyangar, J., and I am at a loss to understand how the fact that the partition took place after suit could make any difference. It was not suggested that the partition was a sham or in any way unfair. The members of the family had the right to divide and their rights in the family properties could not be affected by the widow's suit. The decision in *Subbarayulu Chetti* v. *Kamalavalli Thayarammal*[1] was followed by Krishnan Pandalai, J., in *Rangappaya* v. *Shiva*[3] but the judgment in the latter case calls for no additional comment. In my

1. (1911) 21 M.L.J. 493: I.L.R. 35 Mad. 147.
2. (1902) 12 M.L.J. 270: I.L.R. 27 Mad. 45.
3. (1933) 65 M.L.J. 410: I.L.R. 57 Mad. 250.

opinion *Subbarayulu Chetti* v. *Kamalavalli Thayarammal*[1] was wrongly decided and *Narasimham* v. *Venkatasubbamma*[2] should be followed.

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The result is the appeal in the main fails, but the decree of the District Judge requires amendment. The provision that the maintenance be paid equally by the respondents must be set aside. The amount awarded to the appellant by the District Judge from the date of the partition, namely, 17th March, 1926, will be paid by the third respondent out of the properties which have come into his hands and represent the share of the deceased husband in the joint family estate. The amount representing arrears of maintenance before that date will have to be paid by all the respondents, and therefore there will be a charge against all the family properties in respect of the amount payable for maintenance before 17th March, 1926. In respect of the amount due for maintenance after that date the charge will be on the third respondent's share only. The first and second respondents are entitled to their costs.

Krishnaswami Aiyangar, J.—I agree.

Somayya, J.—I agree.

Krishnaswami Aiyangar, J.
Somayya, J.

K. S. *Appeal dismissed in the main.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

The Trichinopoly Varthaga Sangam, Limited, by its Secretary A. Arulanandam Pillai .. *Appellant** (*Plaintiff*)

v.

T. N. Shanmughasundaram .. *Respondent* (*5th Defendant*).

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Trichinopoly Varthaga Sangam v. Shanmughasundaram.

Transfer of Property Act (IV of 1882), S. 10—Partition of properties—Tenancy in common acted with regard to suit properties—Clause in partition deed restricting alienation—Absolute restriction—Void.

Where in a partition deed a clause referring to the suit properties ran as follows:—"(a) the three houses described in Sch. G shall be enjoyed in common by T.M.C. Pillai and his said sons as at present during the lifetime

1. (1911) 21 M.L.J. 493: I.L.R. 35 Mad. 147
2. (1931) 62 M.L.J. 433: I.L.R. 55 Mad. 752.

* Appeal No. 129 of 1935. 17th March, 1939.

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of *C*; (*b*) it shall be not competent for any one of the said sons to sell, mortgage or otherwise alienate the houses in Sch. G during *C's* lifetime; (*c*) after *C's* lifetime also the houses in Sch. G should be enjoyed by the sons in common without partition and should not be let, sold or otherwise disposed of to any stranger. If any of the sons does not want to live in the house mentioned in Sch. G he shall not be at liberty in any manner to let or lease, etc., his undivided shares to a stranger to the family but shall do so only to any of his brothers or their heirs for a sum not exceeding Rs. 1,000 The intention of all the parties to this deed being that the houses should be enjoyed only by the members of the family and their descendants and not by strangers", on the question whether the restriction on alienation mentioned by the above clause of the partition deed was legal,

Held, that the restriction imposed by the deed on alienation amounted to an absolute restriction within the meaning of S. 10 of the Transfer of Property Act and therefore should be disregarded. Consequently the sons took the property as tenants in common without fetter and the three brothers who executed a mortgage of the properties to the appellant acted within their powers.

Case-law reviewed.

Mohammad Raza v. *Abbas Bandi Bibi*, (1932) 63 M.L.J. 180: L.R. 59 I.A. 236: I.L.R. 7 Luck. 257 (P.C.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 97 of 1932.

T. V. Muthukrishna Aiyar and *K. G. Srinivasa Aiyar* for Appellant.

D. A. Shanmugasundaraswami for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice*.—The appellant was the plaintiff in a suit filed in the Court of the Subordinate Judge of Trichinopoly to enforce a mortgage executed by three brothers, Nataraja, Nilamegham and Manickavachagam Pillai, sons of one Chockalingam Pillai. Chockalingam had five sons, the other two being named Chandrasekharam and Muthuvelu respectively. The family was joint until the 30th January, 1919, when Chockalingam and his sons executed a deed of partition. The deed provided that three houses (which had been used as the family residence) should be held by the members of the family as tenants in common, but no member should have the right to dispose of his share to a stranger. Chockalingam and Muthuvelu died shortly after the execution of the deed. On the 20th August, 1925, Nataraja, Nilamegham, Chandrasekharam and Manickavachagam on behalf of themselves and their respective sons executed in favour of the appellant a mortgage of the three houses to secure a loan of Rs. 6,000. This loan was repaid in

part, but on the 25th October, 1928, a fresh mortgage of the property was executed to secure the sum of Rs. 5,000, Chandrasekharam did not join in the later mortgage as he was away at the time. On the 10th August, 1932, the plaintiff instituted a suit to recover what was due to him on this mortgage. Nilamegham was then dead and his son, the sole respondent in this appeal, was made a party as his legal representative.

At the time of the institution of the suit the respondent was still a minor and his mother was appointed to act as his guardian *ad litem*. She took no steps, however, to defend the suit and as the result an *ex parte* decree was passed against the respondent, limited of course, to his interest in the property in suit. The suit was contested by certain of the other defendants on various grounds, but it is not necessary to state them. It is sufficient to say that the issues did not embrace the question now before the Court and were all decided in favour of the plaintiff. A decree as prayed was passed against the other defendants, except Chandrasekharam and his sons, who were dismissed from the suit as they were not parties to the second mortgage. The respondent then filed an application for an order setting aside the *ex parte* decree. The application was granted and the respondent submitted a written statement in which he contended that his father had only a life interest in the property. At the hearing the respondent abandoned this plea, but contended that by reason of the partition deed the sons of Chockalingam had no right to effect a mortgage and therefore his interest was not charged. This contention was upheld and the respondent's interest in the property was exonerated from the mortgage. The preliminary decree was accordingly amended.

The plaintiff has appealed. The validity of the decision of the Subordinate Judge is challenged on two grounds. In the first place it is contended that the Subordinate Judge was wrong in holding that the partition deed operated to prevent the sons from mortgaging their interests in the property. It is said that the restriction on alienation amounts to an absolute restriction and therefore is void under S. 10 of the Transfer of Property Act. In the second place it is said that the facts did not warrant the setting aside of the *ex parte* decree passed against the respondent. The second contention cannot be supportd because the appellant has not printed the evidence on which the Subordinate Judge based his order setting aside the *ex parte* decree

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or even the order itself. There being no materials before us from which it can be shown that the order is wrong it must stand.

The clause in the partition deed referring to this property is cl. 4, which reads as follows:—

"(a) The three houses described in Sch. G shall be enjoyed in common by T. M. Chockalingam Pillai and his said sons as at present during the lifetime of Chockalingam Pillai. (b) It shall not be competent for any one of the said sons to sell, mortgage or otherwise alienate the houses in Sch. G during Chockalingam Pillai's lifetime. (c) After Chockalingam Pillai's lifetime also the houses in Sch. G should be enjoyed by the sons in common without partition and should not be let, sold or otherwise disposed of to any stranger. If any of the sons does not want to live in the house mentioned in Sch. G, he shall not be at liberty in any manner to let or lease, etc., his undivided share to a stranger to the family but shall do so only to any of his brothers or their heirs for a sum not exceeding Rs. 1,000 (Rupees Thousand). The intention of all the parties to this deed being that the houses should be enjoyed by only the members of the family and their descendants and not by strangers."

The estate here created is admittedly a tenancy in common and if the restriction on alienation amounts to an absolute restriction it cannot stand.

I consider that the contention that the restriction is absolute is well founded. The prohibition against alienation to strangers is not limited to the father's lifetime, but is intended to continue in perpetuity. The concluding words of the clause stating the intention of the parties places this beyond doubt. It is true that a right to sell within the family is given, but there is no obligation to buy and a maximum price which is obviously below the real value is fixed. The property was mortgaged in 1925 for Rs. 6,000, and it may be taken that the mortgagee required a substantial margin of security. It follows that it may safely be assumed that the property was worth considerably more than Rs. 6,000 at the time of the mortgage. There is no evidence to justify an inference that the property had increased in value between the date of the partition deed and the date of the mortgage and consequently the only conclusion open to the Court is that the property was worth considerably more than Rs. 6,000 at the date of the partition. Taking the value to be only Rs. 6,000 each son's share at the death of the father was worth Rs. 1,200, but in view of the amount of the first mortgage the figure of Rs. 6,000 cannot be accepted as the proper figure. On the basis of the mortgage the full value was more likely to be in the region of Rs. 9,000, which would make the share of

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each of the five sons worth about Rs. 1,800. At the date of the mortgage one son had died and the shares of the surviving sons had consequently increased in value. The prohibition against a co-tenant selling his share for more than Rs. 1,000 would mean a sale at a great sacrifice, even if the maximum were realised, but there is the further consideration that there is no obligation to buy even at Rs. 1,000, and this puts a member of the family wishing to sell at a further disadvantage. There is ample authority that provisions such as we have here amount to an absolute restriction on alienation and therefore are void.

In the case of In re *Rosher. Rosher* v. *Rosher*[1], a testator devised an estate to his son in fee subject to the proviso that if the son, his heirs or devisees, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof during the lifetime of the testator's wife, she should be given the option to purchase the estate at the price of £3,000 for the whole, and at a proportionate price for any part or parts thereof. The selling value of the estate at the date of the will and at the time of the testator's death was £15,000. It was held that the proviso compelling the son to sell at such an undervalue amounted to an absolute restraint on alienation during the lifetime of the widow and was consequently void. The same principle was applied by Eve, J., in In re *Cockerill*: *Mackaness* v. *Percival*[2]. In that case a testator, by his will, devised land subject to the proviso that if within twenty years of his death the devisee should desire to sell the land he was to give the governors of a certain school the option of purchasing it at the price of £300 an acre. The total area was about 22 acres and was worth £670 an acre. It was held that the condition amounted to a restraint on alienation and was void for repugnancy. In In re *Elliot*: *Kelly* v. *Elliot*[3], a testator gave his plantations in Assam and all his other estate to the plaintiff absolutely subject to the payment of his debts, but provided that on a sale by the plaintiff of the plantations the plaintiff should pay to the testator's brother a sum of £1,000 out of proceeds of the sale and another sum of £500 to the testator's sister. Chitty, J., held that the testator had by the direction to pay these legacies imposed no obligation on the plaintiff to sell and that the direction was void for repugnancy. The testator

1. (1884) 26 Ch. D. 801. 2. (1929) 2 Ch. D. 131.
3. (1896) 2 Ch. D. 353.

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had attempted to create an estate unknown to the law. The owner of property has, as an incident of his ownership, the right to sell and to receive the whole of the proceeds for his own benefit. By providing that the plaintiff should make the payments to his brother and sister he had created a condition which was repugnant to the estate which he had conferred. In *Attwater* v. *Attwater*1, Romilly, M.R., held that where a testator left an estate to the eldest son of his niece with an injunction never to sell it out of the family, but, if it had to be sold at all, it was to be sold to one of his brothers, the restriction amounted to a total restraint on alienation and was void.

In *Gayasi Ram* v. *Shahabuddin*2, Sulaiman, C.J., pointed out that in order to ascertain whether there is an absolute restraint or not, the Court has to examine the effect of all the conditions and find whether for all practical purposes alienation is prohibited. The mere fact that there may be some remote contingency in which there may be a possibility of an alienation taking place would not necessarily take the case out of the prohibition contained in S. 10 of the Transfer of Property Act. In that case a house had been sold for a sum of Rs. 150 with a condition that the vendee was not to transfer, mortgage, give or sell it to any one but the vendor or his heirs. In the event of a breach of this condition the vendor (or his heirs) was to have the right to a reconveyance of the property on payment of Rs. 175. Sixteen years after the conveyance the purchaser sold the property for Rs. 1,000 and the transferee later disposed of it for Rs. 800. The sons of the original vendor sued to recover possession of the property from the ultimate purchaser on payment to him of Rs. 175. It was held that there was an absolute restraint on alienation and therefore the provision for reconveyance was void.

In the case before us the respondent's advocate has placed great reliance on the decision of the Judicial Committee in *Mohammad Raza* v. *Abbas Bandi Bibi*3, but when that decision is examined it cannot be regarded as an authority in support of the plea that the provisions of the partition deed in this case with regard to the family house are valid in law. The facts

1. (1853) 18 Beav. 330: 52 E.R. 131.
2. (1935) I.L.R. 57 All. 861.
3. (1932) 63 M.L.J. 180: L.R. 59 I.A. 236: I.L.R. 7 Luck. 257 (P.C.)

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there were these. One Sughra Bibi brought a suit against her cousin, Afzal Husain, claiming a half share in certain immovable properties in Oudh. The litigation ended in a compromise which was embodied in a decree of the Court. Under the terms of the compromise decree the defendant, who already had a wife, was to marry the plaintiff and the properties were to be held by the two wives in equal shares, but neither was to have power to transfer her moiety to a stranger. After her marriage to the defendant, the plaintiff, in breach of the terms of the compromise decree, alienated her half share to strangers. After her death the respondent in the appeal to the Privy Council, as a legal representative of Sughra Bibi, filed a suit for the recovery of two-thirds of her share from the appellant on the ground that the deceased had no right to alienate her moiety. The appellant's answer was that the restriction on alienation was bad and Sughra Bibi was therefore free to dispose of her moiety as she pleased. The Privy Council held that the condition that the deceased was not to alienate outside the family constituted only a partial restriction on alienation and therefore did not offend against S. 10 of the Transfer of Property Act. The Board was only considering the effect of the prohibition so far as the deceased herself was concerned and the observations in the judgment went no further. In the course of the judgment reference was made to In re *Macleay*[1] and *Doe* v. *Pearson*[2]. In the former of these cases there was a devise of an estate to a brother on condition that he should never sell it out of the family. Jessell, M.R., held that this only amounted to a partial restriction and made the following observations:—

"You may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not therefore, limited in the sense of there being only one person to buy; the will shows there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time,

1. (1875) L.R. 20 Eq 186. 2. (1805) 6 East. 173: 102 E.R. 1253.

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except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation."

In the case before us the restriction against the alienation outside the family applies to the parties to the deed and their descendants and there is the further restriction with regard to price without any obligation to buy. In the course of his judgment, Jessell, M.R., discussed at length the decision in *Attwater* v. *Attwater*[1]. It is evident that he was inclined to think that the decision in *Attwater* v. *Attwater*[1] went too far, but came to the conclusion that Romily, M.R., did not intend to place a different interpretation on the law from that given by Lord Ellenborough in *Doe* v. *Pearson*[2]. There property was left to two sisters to be held by them as tenants in common, subject to the condition that if they had no issue they should have no power of alienation except to their sisters or their sisters' children. Lord Ellenborough held this condition was good. The restriction on alienation disappeared with issue and therefore was only partial restriction.

The facts in *Mohammad Raza* v. *Abbas Bandi Bibi*[3] and the cases cited therein were very different from the facts in the present case and those authorities have no application here. I hold that the restriction imposed by the deed now under consideration amounts to an absolute restriction on alienation within the meaning of S. 10 of the Transfer of Property Act and therefore must be disregarded. Consequently the sons took the property as tenants in common without fetter, and the three brothers who executed the mortgage to the appellant acted within their powers.

The appeal will be allowed and the suit will be decreed against the respondent also, with costs in favour of the appellant here and below. The period allowed for redemption will be six months.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree.

Somayya, J.

Somayya, J.—I agree.

K. C. —— *Appeal allowed.*

1. (1853) 18 Beav. 330: 52 E.R. 131.
2. (1805) 6 East. 173: 102 E.R. 1253.
3. (1932) 63 M.L.J. 180: L.R. 59 I.A. 236: 7 Luck. 257.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Ramaswami Chettiar and others .. *Appellants** (*Petitioners*)

v.

Meyyappan Servai .. *Respondent*

Ramaswami Chettiar *v.* Meyyappan Servai.

Civil Procedure Code (V of 1908), S. 47 and O. 43—Sale set aside—Auction purchaser whether representative of any party to continue the execution application—Appealability of an order for refund of purchase money in the circumstances.

In a case where a sale was set aside, the auction-purchaser cannot be regarded as a representative of the judgment-debtor within the meaning of S. 47 of the Civil Procedure Code. The case not being within S. 47 of the Code, the order of Court for refund of the money is not an order which is appealable.

Krishna Bhupati Devu Garu v. *Venkatasami* 3 L.W. 105 and *Kunhamed* v. *Chathu* 9 M. 437 followed.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Horwill dated 26th February, 1937 and passed in appeal against Appellate Order No. 132 of 1934 preferred to the High Court against the order of the Court of the Subordinate Judge of Tanjore dated 27th March, 1934 and made in A. S. No. 165 of 1933 (A. S. No. 36 of 1933 District Court, West Tanjore) preferred against the order of the Court of the District Munsif of Pattukottai dated 30th January, 1933 and made in E. A. No. 494 of 1932 in O. S. No. 498 of 1921.

G. Gopalaswamy for Appellants.

K. S. Sankara Aiyar for Respondent.

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The appellants are the legal representatives of a person who purchased property at a sale held in execution of a decree. The sale was set aside on the ground of irregularity in its conduct. The amount for which the property had been sold was paid into Court and was withdrawn by the decree-holder. The auction-purchaser died before the sale was set aside and the appellants are his legal representatives. They applied for the refund of the money and obtained an order for repayment from the District Munsif in whose Court the execution proceedings had been instituted. The question which we have to consider is whether the District Munsif's order can be made the subject-matter of an appeal.

* L. P. A. No. 70 of 1937. 7th March, 1939.

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The sale took place on the 24th June, 1922, and was confirmed on the 25th of the next month. The auction-purchaser then paid into Court the money and it was drawn out by the decree-holder immediately. As the result of the application of the judgment-debtor in that behalf the sale was set aside on the 17th December, 1923. The decree-holder and the appellants (the legal representatives of the auction-purchaser who had died) appealed to the District Judge. The appeals were dismissed and a second appeal to this Court met with the same fate. The appellants were allowed to file an appeal under cl. 15 of Letters Patent and this appeal was also dismissed, the final decision being given on the 13th September, 1929. It was not until the 29th August, 1932, that the appellants applied to the execution Court for an order under O. 21, r. 93 of the Code of Civil Procedure directing the decree-holder to refund the amount due to them as the result of the setting aside of the sale. The decree-holder resisted the application on the ground that it was barred by the law of limitation. His contention was that time began to run from the date of the order of the District Munsif setting aside the sale, namely, the 17th December, 1923. The District Munsif, however, held that time began to run from 13th September, 1929, the date of the dismissal of the Letters Patent Appeal and therefore the application was in time. The decree-holder appealed to the Subordinate Judge and also filed an application for revision to this Court in the event of it being held that an appeal did not lie. The Subordinate Judge held that the appeal did lie and allowed it. In his opinion time began to run from the date of the setting aside of the sale by the District Munsif. The appellants then appealed to this Court and the appeal was heard by Horwill, J., who accepted the decision of the Subordinate Judge, but gave a certificate permitting the present appeal. There are really two questions involved in this appeal, namely, (1) whether the order of the District Munsif directing the refund is appealable, and (2) whether time began to run from 17th December, 1923, or from 13th September, 1929. If the first question is answered in the appellants' favour the second question will not need consideration because in that case the order of the District Munsif must stand. For reasons which I shall indicate we are of opinion that the first contention is well founded.

An order passed on application filed under O. 21, r. 93 is not appealable under O. 43. The question then is whether the matter is one which comes within S. 47. If it does the order is appealable. The appellants say that the case does not fall within S. 47, because it is not a matter which relates to the execution, discharge or satisfaction of a decree and in any event an auction purchaser cannot be regarded as the representative of the decree-holder or judgment-debtor in a case like this. It is conceded by the learned advocate for the respondent that the matter is not one which relates to the execution of the decree; but he says it does relate to its discharge or satisfaction. We are unable to accept this argument. As the result of the setting aside of the sale the position was restored to what it was at the time the decree-holder asked for the attachment of the property. The person to whom the property had been sold could no longer be regarded as the auction-purchaser. The sale had gone and he had no further concern with the matter beyond getting back from the decree-holder the money which he had paid, as the purchase consideration. As the result of the order setting aside the sale the decree was left entirely undischarged. Of course, it cannot be denied that the application for refund of the money was a matter arising out of the execution proceedings but it was not a matter relating to the execution, discharge or satisfaction of the decree.

This view has been taken by this Court on two previous occasions. In *Krishna Bhupati Devu Garu* v. *Venkataswami*[1], Sadasiva Aiyar and Moore, JJ., held that an order made under r. 93 of O. 21 for the repayment of purchase money when the sale has been set aside is not a question between the parties to the suit relating to the execution, discharge or satisfaction of the decree as it has no legal effect on the rights and liabilities as between the decree-holder and the judgment-debtor. In *Kunhamed* v. *Chathu*[2], Collins, C.J. and Brandt, J., gave a similar decision. Horwill, J., refused to follow these cases, although he was clearly bound by them, because he considered that there was a very strong tendency to give a wide application to S. 47 and to bring within its scope questions arising between the parties to the suit and the auction-purchaser. The auction-purchaser comes within S. 47 when he is standing in the shoes either of the decree-holder or of the judgment-debtor. Unless he can in

1. (1916) 3 L.W. 105. 2. (1886) I.L.R. 9 Mad. 437.

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law be regarded as a representative of either he certainly does not come within the section, and in this case the auction-purchaser cannot be regarded as a representative of the judgment-debtor because the sale has been set aside. According to decisions of this Court he became the representative of the judgment-debtor when he became the auction-purchaser, but as the result of the sale having been set aside he lost that character. The case cannot be brought within S. 47 and therefore the order directing the refund is not an order which is appealable. The appeal will therefore be allowed and the order of the District Munsif restored. The appellants are entitled to their costs here and below.

The position with regard to the revision petition filed by the respondent remains to be considered. As the result of his decision on the question whether an appeal lies Horwill, J., dismissed this petition. Although it was dismissed merely on the ground that an application in revision was no longer necessary we consider that the dismissal order must stand. The only contention that can be advanced in support of the application is that the District Munsif misinterpreted the law of limitation. Assuming that the District Munsif was wrong in holding that the period of limitation started to run from the date when the auction sale was set aside it does not mean that the respondent was entitled to have that order revised. If he made a mistake —I do not say that he did—the application would not lie. As it had been often pointed out a mere error of law does not bring a case within the provisions of S. 115 of the Code of Civil Procedure. The application will therefore stand dismissed, but there will be no order here as to costs.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Vudaru Pedda Pulla Reddi .. *Appellant* (3rd Respondent)*

v.

Peddugari Chinna Venkata Reddi and others .. *Respondents (Petitioners and Respondents 1, 2, and 4 to 8).*

Pedda Pulla Reddi v. Chinna Venkata Reddi.

Court-Fees Act (VII of 1870), Sch. II, Art. 11—Civil Procedure Code (V of 1908), O. 20, r. 12—Application to enquire into future mesne profits—

* Check Slip No. 471 of 1936 in A. A. O. No. 329 of 1938. 17th March, 1939.

Pedda Pulla Reddi v. Chinna Venkata Reddi.

Rejection of—If a "decree" under S. 2 (d), Civil Procedure Code, or order in or arising from execution—Appeal against rejection—Court-fee payable.

In a suit for partition and possession including a prayer for future mesne profits a preliminary decree was passed on 30th July, 1931. The question of mesne profits was left open. A final decree was passed on 15th January, 1932, and the plaintiff obtained possession in execution of that decree. On 30th January, 1934, the plaintiffs made an application purporting to be under O. 20, r. 12, Civil Procedure Code, asking for an enquiry into the future mesne profits and for an order to direct the defendants to pay what was found to be due from them. The District Munsif dismissed the application on the ground that there was no direction for an enquiry into the mesne profits either in the judgment or in the decree. An appeal was preferred to the District Judge with a court-fee of one rupee only. On behalf of the Government it was contended that the plaintiff should estimate the amount at which they valued their relief and pay *ad valorum* court-fee on the figure stated by them.

Held, the order rejecting the application would not amount to a "decree" as defined in S. 2 (*d*), Civil Procedure Code, or an order having the force of a decree. The fact that a final decree had beed passed in regard to a partition does not deprive the Court of the power of ordering an inquiry into future mesne profits and of passing a second final decree. The application under O. 20, r. 12 or an appeal from an order rejecting such application cannot be regarded as having been made or arising from an order in execution. The appeal was rightly valued under Art. 11, Sch. II of the Court-Fees Act.

Kandunni Nair v. *Raman Nair*, (1930) 58 M.L.J. 497 : I.L.R. 53 Mad. 540, applied.

Check-slip issued by court-fee Examiner in A.S. No. 37 of 1936 on the file of the District Court of Kurnool preferred against the order of the Court of the District Munsif of Kurnool dated 13th March, 1936 and made in I.A. No. 985 of 1934 in O. S. No. 203 of 1928 (A. A. O. No. 329 of 1938 on the file of the High Court).

K. Srinivasa Rao for Appellant.

J. V. Srinivasa Rao for Respondents.

K. R. Rama Aiyar for *The Government Pleader* (*B. Sitarama Rao*) for the Government.

The Court made the following

ORDER.—The question whether the appellants in A. S. No. 37 of 1936 should have been asked to state the amount of future mesne profits claimed by them and to pay court-fee thereon has come up before me for decision in consequence of a difference between the Court-Fee Examiner and the learned District Judge of Kurnool.

A suit for partition and possession (O.S. No. 203 of 1928) which also included a prayer for the grant of future mesne

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profits, was instituted by the plaintiffs in the Court of the District Munsif at Kurnool. It was decided in their favour and a preliminary decree was passed on the 30th July, 1931; but the question of future mesne profits was ordered by the District Munsif to be left open. The property was partitioned and the partition was followed by a final decree. This was passed on the 15th January, 1932. After the plaintiffs had obtained possession in the execution of this decree, they applied to the Court on the 30th July, 1934, asking for an enquiry into the future mesne profits and for an order to direct the defendants to pay what was found to be due from them (E. P. No. 391 of 1932). This application which purported to be under O. 20, r. 12, Civil Procedure Code, was opposed by the defendants mainly on the ground that there was no direction for an enquiry into the mesne profits either in the judgment or in the decree. This contention found favour with the District Munsif and the application was dismissed on the 13th March, 1936. An appeal was preferred by the plaintiffs against this order to the District Judge on which they affixed a court-fee of one rupee only. The Court-Fee Examiner objected to this as insufficient as according to him the order passed by the District Munsif on the 13th March, amounted to a decree, and since the relief claimed in the appeal was unascertainable, he contended that the plaintiffs should be ordered to estimate the amount at which they valued their relief and to pay an *ad valorem* court-fee on the figure stated by them. The learned District Judge was of opinion that since the plaintiffs were asking for future mesne profits only, they could not be required to estimate the relief, the value of which was unknown to them and the court-fee paid by them was sufficient. The correctness of this order has been questioned before me.

It might be mentioned here that the appeal from the order passed by the District Munsif on the 13th March, 1936, was accepted by the learned District Judge as he was of opinion that the words in the preliminary decree under which the determination of the future mesne profits was left open must be taken to mean that the matter "was left open to be agitated in a subsequent enquiry constituting a continuation of the suit".

This order was appealed against and was confirmed by me on the 25th January, 1939, as I found that the Court which had passed the preliminary decree had not omitted to give a direc-

tion in regard to the future mesne profits and that in view of the terms in which the preliminary decree was passed they could be ascertained by the Court which had passed the decree. The words in the preliminary decree were, to put differently, taken as being tantamount to a direction for the ascertainment of the future mesne profits and it is only on that basis that I would have to consider the point which has been raised on behalf of the Government.

It has been pointed out in *Doraiswamy* v. *Subramania*1 that the power of the Court to award future mesne profits is discretionary. The provision contained in O. 7, r. 2 refers to mesne profits which have accrued before the institution of the suit. S. 9 of Madras Act V of 1922 which replaces the second paragraph of S. 11 of the Court-Fees Act provides that no decree determining the amount of mesne profits falling due after the institution of a suit would be executable until the requisite court-fee is paid on the amount claimed in execution. It would therefore follow that if the Court had exercised a discretion in the plaintiff's favour and ordered the future mesne profits to be ascertained, they could not have been required to pay any court-fee until the decree had been passed and they had applied for execution. The reason behind the rule contained in S. 9 of the Madras Act apparently is that persons asking for future mesne profits were not considered to be able to estimate the value of their claims firstly because they could not anticipate the rate at which the mesne profits would be granted by the Court and secondly they could not be aware of the period for which these would be found due and payable. If the plaintiffs could not be asked to pay a court-fee for the future mesne profits in a suit before a final decree was passed, can they be asked to do so simply because they had to prefer an appeal, if one lay against the order refusing to hold an enquiry. If the value of the relief asked for in the suit and in the appeal happens to be the same and it must be so in this case as the plaintiffs' prayer both in the trial and the lower appellate Court was the same, the court-fee payable in either court would also be the same. Since no court-fee is required as stated above for this relief in the suit, it would appear to follow that no Court-fee could be required for the same relief for the purposes of the

1. (1917) 33 M.L.J. 699: I.L.R. 41 Mad. 188 (F.B.).

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appeal. The inability of the plaintiffs to estimate the mesne profits continued even at the time when the appeal was preferred by them before the learned District Judge.

The lower appellate Court had, in coming to the same conclusion, based its decision on a Division Bench case of this Court given in *Kandunni Nair* v. *Raman Nair*[1]. While dealing with the question of future mesne profits, the learned Chief Justice and another learned Judge of this Court observed as follows:—

> "Where, however a preliminary decree only makes provision for the subsequent determination of the mesne profits, we think that the apt occasion for requiring a defendant to pay a court-fee in this respect would be, if and when the profits have been determined by a final decree."

This observation would cover the case of a plaintiff also who is asking for future mesne profits and seems to conclude the point raised now. It has been contended on behalf of the Government however, that this does not apply as the plaintiffs had applied for an ascertainment of mesne profits under O. 20, r. 12, Civil Procedure Code, and appealed against the order refusing to entertain that application. A reference to this rule would show that in a suit for the recovery of possession of immovable property when an inquiry as to mesne profits from the institution of the suit has been directed at the time when the decree is passed, the Court would have to pass a final decree in accordance with the result of such enquiry. It has been held already in this case that the Court which passed the preliminary decree in this case must be taken to have directed an enquiry into future mesne profits. Why should then an application on behalf of the plaintiffs entail the consequence of their having to pay a court-fee either in the suit or in the appeal? The enquiry although ordered or deemed to have been ordered by the Court has not taken place so far and a final decree could not therefore have been passed so far as the future mesne profits were concerned in accordance with the result of such enquiry. The application by the plaintiff under O. 20, r. 12 must be taken to be a reminder to the Court to do its duty as required by this rule. The case decided by the Division Bench cannot therefore be distinguished on the ground that the plaintiffs had made an application under O. 20, r. 12, Civil Procedure Code.

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1. (1930) 58 M.L.J. 497: I.L.R. 53 Mad. 540.

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This order rejecting the application does not fall within the definition of a 'decree' as defined in S. 2 (*d*) of the Code of Civil Procedure and would not therefore, as alleged by the Court-fee Examiner, amount to a decree. If the plaintiffs could not be forced to estimate the value of the relief for which they had prayed in the trial Court, they could not have been asked to do so in the appellate Court either. When the trial Court had not done what it was legally bound to do, the plaintiffs' remedy was to make the application under O. 20, r. 12 in the first instance and either appeal against the order or have it revised when this application was dismissed. It would have been a different matter if the trial Court had been found not to have given any direction for an inquiry into future mesne profits. In that case no order could have been passed for this purpose and the application under the provisions of this rule would not have been maintainable. The order passed by the first Court cannot in the circumstances be regarded to be even an order having the force of a decree.

It would make no difference in my opinion if a final decree in regard to partition had been passed already. The learned Counsel for the plaintiffs was for that reason inclined to urge that the order passed by the trial Court was in execution. But this contention is incorrect inasmuch as there was no final decree for mesne profits which could have been executed. An inquiry into future mesne profits had still to be held before the Court could have been in a position to pass a final decree. The fact that a final decree had been passed in regard to partition does not deprive the Court of the power of ordering an inquiry into future mesne profits and of a passing a second final decree. The application made by the plaintiffs under O. 20, r. 12 or an appeal from an order rejecting that application cannot be regarded as having been made in or arising from an order in execution.

In view of what has been said, I must find that the appeal, if it was competent—as to which I express no opinion, was rightly valued under Art. 11 of Sch. II of the Court-Fees Act and the order passed by the learned District Judge was correct.

K. S. —— *Order of the District Judge affirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE GENTLE.

N. M. Muthuvasu Chettiar .. *Appellant** (*Plaintiff*)

v.

Velumuruga Nadar and others .. *Respondents* (*Defendants*).

Muthuvasu Chettiar v. Velumuruga Nadar.

Transfer of Property Act (VI of 1882), S. 53—Mortgage—Nominal transaction to shield properties from creditors—If valid to the extent supported by consideration.

It was found that the suit mortgage represented only a nominal transaction. Defendants 6 and 7 were simple money decree-holders who had attached the mortgaged properties. Another mortgage in favour of the fifth defendant was also admitted by the fifth defendant to be a nominal transaction. The learned Subordinate Judge gave a mortgage decree against the first defendant and his sons defendants 2 to 4 for the sums found to have been actually advanced by the plaintiff and declared the right of the plaintiff under the suit mortgage to be subject not merely to a pre-existing mortgage in favour of the seventh defendant but also to the rights of defendants 6 and 7 under the attachment in execution. On the plaintiff's appeal,

Held, it is well-established law that if a transaction offends S. 53, Transfer of Property Act, it cannot ordinarily be upheld even to the extent to which it may be found to be supported by consideration.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in O. S. No. 47 of 1933.

Ch. Raghava Rao for Appellant.

K. V. Krishnaswami Aiyar and *P. N. Appuswami Aiyar* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal arises out of a suit for the recovery of money due under a mortgage bond, Ex. A, executed on 5th October, 1929, by the first defendant and the second defendant in favour of the plaintiff. Defendants 1 to 4 are members of a joint Hindu family, the first defendant being the father and defendants 2 to 4 his sons. The fifth defendant was impleaded, as a document Ex. I had been executed by the first defendant in his favour on 7th October, 1929, and according to its tenor it purported to be a puisne mortgage. But the fifth defendant admitted that it was a nominal transaction and he has accordingly taken no part in the suit except that he was examined as D. W. 1 and has deposed not merely to the fact that Ex. I was a nominal transaction but also to a conversation

* Appeal No. 128 of 1935. 23rd January, 1939.

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that took place between himself and the first defendant about the time when Exs. A and I were thought of. The first defendant raised some objections in respect of certain portions of the amounts claimed by the plaintiff to be due. But, on these points, he has acquiesced in the finding of the lower Court. The real contesting defendants were defendants 6 and 7 who had obtained a money decree against the first defendant in O. S. No. 43 of 1929 and had attached the properties hypothecated under Ex. A in execution of their money decree. As attachment was effected only in 1933, the claim under Ex. A would have had precedence, if the mortgage was otherwise valid. Defendants 6 and 7 contended that Ex. A only evidenced a nominal transaction and that, in any event, it had been executed to defraud the sixth defendant and other creditors of the first defendant.

On the contention of defendants 6 and 7, the third issue in the case was raised. The learned Subordinate Judge was of opinion that Exs. A and I had been brought into existence in pursuance of a common object to help the first defendant as against his creditors including the sixth defendant, and that Ex. A was not supported by consideration even in respect of the two amounts of Rs. 1,600 said to be due from the first defendant to the plaintiff and of Rs. 2,300 said to have been advanced by the plaintiff to the first defendant contemporaneously with Ex. A. He felt no doubt that Ex. A had been brought into existence to be used as a shield against the sixth defendant in respect of the money claim he had against the first defendant and in respect of which the suit O. S. No. 43 of 1929 was instituted within a month after the date of Ex. A. In the result he gave a mortgage decree against defendants 1 to 4 for the sums that he found to have been actually advanced by him and declared the plaintiff's right under Ex. A to be subject not merely to the pre-existing mortgage under Ex. II in favour of the seventh defendant but also to the rights of defendants 6 and 7 under the attachment made by them in execution of the decree in O. S. No. 43 of 1929. It is against this part of the decree which makes the plaintiff's rights subject even to the attachment in O. S. No. 43 of 1929 that this appeal has been preferred by the plaintiff.

[His Lordship then discussed the evidence and concluded.]

In the light of these circumstances, the inference drawn by the lower Court seems to us to be the only reasonable inference,

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that Ex. A must be held to have represented only a nominal transaction. But it is sufficient for the purposes of this case even if it is held to be a transaction operative between the parties but voidable as against the creditors under S. 53 of the Transfer of Property Act.

Even in the view that the transaction was voidable under S. 53 of the Transfer of Property Act, Mr. Raghava Rao contended that to the extent to which Ex. A was shown to have been supported by consideration, the plaintiff was entitled to a mortgage decree not merely against defendants 1 to 4 but even against sixth and seventh defendants. As we have already stated that the item of Rs. 1,600 referred to in the mortgage bond does not represent a real debt, this argument will be of no avail to the plaintiff in respect of that sum. It will arise only in respect of the sum of Rs. 2,300 which the learned Judge has found must have been drawn by the first defendant some months after the date of Ex. A and utilised in paying off some of his debts. It is well established law that if a transaction offends S. 53 of the Transfer of Property Act, it cannot ordinarily be upheld even to the extent to which it may be found to be supported by consideration; because, whatever may be the importance of the question of consideration, when dealing with the question of fact, namely, whether the transaction was one that offended S. 53 or not, it has little bearing once the conclusion is reached that the transaction does offend S. 53. An exception has however been made in the transferee's favour in cases in which any part of the consideration for the document has been applied in the discharge of pre-existing secured debts, and it has been held that the transferee might in such cases be entitled to the benefit of the doctrine of subrogation. A distinction has also been suggested between sales and mortgages and it has been held that whereas a sale might have to be wholly set aside if it offends S. 53, a mortgage might be upheld as a valid security to the extent of the debt actually due on the date of the mortgage. This distinction has been based on the ground that to that extent the transaction would merely amount to a preference and as such would not fall under S. 53 of the Transfer of Property Act. This we understand is the basis of the decision in *China Pitchiah* v. *Pedakotiah*[1]. But no case has

1. (1911) I.L.R. 36 Mad. 29.

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gone the length of holding that even when there was no pre-existing debt, the mere fact that some consideration passed under a mortgage which on the evidence has been held to be in fraud of creditors will justify the view that the mortgage can be held to constitute a valid security to the extent of the contemporaneous advance. Reliance was however placed by Mr. Raghava Rao in this connection on certain observations in *Loorthi Odayar* v. *Gopalasami Aiyar*[1]. Some of the observations there seem to be widely expressed but the contrast which the learned Judges emphasise between the decision in *Chidambaram Chettiar* v. *Sami Aiyar*[2], which was affirmed by the Privy Council in *Chidambaram Chettiar* v. *Srinivasa Sastrigal*[3] and the decisions in *Musabur Sahu* v. *Lala Hakim Lal*[4] and *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[5], makes it clear that they had in mind the distinction between a transaction in fraud of creditors and a transaction only amounting to a preference. If the learned Judges intended to lay down the law in the sense now contended for by Mr. Raghava Rao, we venture to think, with all respect, that it would be difficult to reconcile the decision with the weight of authority. Where a person lends money *for the first time* under a mortgage like the present, it will not be possible to regard it as a case of *preference*, merely because that money is utilised by the transferor to pay off some of his simple debts. We may add that on the facts we have above stated, the sum of Rs. 2,300 can scarcely be regarded as even amounting to a contemporaneous advance. It was in our opinion only money which the plaintiff held for the benefit of the defendants and to that extent it was a secret advantage for the debtors' benefit. The fact that subsequent to the institution of O. S. No. 43 of 1929 by defendants 6 and 7, the first defendant drew some moneys from the plaintiff and utilised the same to pay off some of his creditors cannot in our opinion improve the plaintiff's position in respect of Ex. A.

The appeal fails and is dismissed with costs of respondents 6 and 7.

K. S. —— *Appeal dismissed.*

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1. (1923) 46 M.L.J. 125.
2. (1906) 16 M.L.J. 427: I.L.R. 30 Mad. 6.
3. (1914) 26 M.L.J. 473: I.L.R. 37 Mad. 227 (P.C.).
4. (1915) 30 M.L.J. 116: L.R. 43 I.A. 104: I.L.R. 43 Cal. 521 (P.C.).
5. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.)

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD THANKERTON, LORD PORTER AND SIR GEORGE RANKIN.

Monghibai .. *Appellant**

v.

Cooverji Umersey .. *Respondent.*

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Monghibai *v.* Cooverji Umersey.

Civil Procedure Code (V of 1908), O. 1, r. 10—Mortgage granted by partnership—Dissolution—Unregistered assignment of partnership property to new partnership by retiring partners—Retiring partners' interest in mortgaged property not transferred because assignment not registered—Action by new partnership to enforce mortgage security—Amendment of plaint by adding retiring partners as co-defendants with mortgagor—Whether action maintainable—Duly registered assignment of partnership property executed by retiring partners pendente lite—*Whether effective to entitle new partnership to sue.*

A firm consisting of nine partners in 1925 granted a mortgage of two houses. In 1926 seven of the partners retired from the firm, purporting one of them orally and the other six by a written document to assign to the remaining partners the plaintiffs, their whole interest in the partnership property. Neither the written nor the verbal assignment was registered under the Indian Registration Act and they were not effective to transfer to the plaintiffs the assigning partners' interest as mortgagees in the mortgaged property. In 1927, the new partnership, consisting of the two plaintiffs as continuing partners, brought an action against the mortgagees by way of enforcing the mortgage against the mortgaged property. The trial judge having upheld the defendants' objection that the retiring partners' interest in the mortgaged property had not passed to the plaintiffs, so that all the necessary parties had not been joined in the action, granted leave to amend by adding the seven retiring partners as co-defendants. Those partners thereupon executed a new deed of assignment in favour of the plaintiffs, which was duly registered. At the resumed hearing, the trial judge dismissed the action because the only proof of the plaintiffs' title to the mortgaged property was the unregistered document of 1926, and he refused to have regard to the subsequent registered assignment made by the retiring partners *pendente lite.*

Held, (1) that, while it would have been more satisfactory that the retiring partners should have been joined as co-plaintiffs, yet, when once they had been joined as co-defendants, all the necessary parties were before the Court, which could accordingly grant the plaintiffs the appropriate relief.

(2) That the effect of the second registered deed of transfer was to make the plaintiffs the persons entitled to sue although, at the beginning of the suit, the appropriate persons had been the nine partners of the old partnership

Appeal from a judgment and decree of the High Court, Bombay, dated 16th March, 1937 (Beaumont, C.J. and Black-

* P.C. Appeal No. 51 of 1938. 2nd May, 1939.

well, J.) reversing a decree of that Court in its original civil jurisdiction dated 13th February and 30th July, 1936.

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The appellant, Monghibai, and her husband since deceased, in 1925 borrowed Rs. 1,20,000 from a partnership called Cooverji Umersey & Co. The loan was secured in the first place on a quantity of cotton, with a right in the lenders to have recourse for any deficiency to certain house property of the borrowers. In November, 1926, the partnership was dissolved, six of the retiring partners executing a transfer purporting to assign their interest in the partnership property to the respondents, Cooverji Umersey and his father who were also partners. That document, not being registered under S. 17 (1) (*b*) of the Indian Registration Act, 1908, was accordingly ineffective to transfer an interest in immovable property, and therefore did not operate to transfer the retiring partners' interest as mortgagees in the mortgaged property. An oral assignment by the seventh retiring partner of all his interest in the partnership to the respondent and his father was similarly ineffective for the same reason.

The respondent and his father continued to carry on the partnership under the same name, and in January, 1927, they brought an action against the mortgagors to recover the sum due to them and to realise the mortgaged property. The matter came before Wadia, J., who on the first hearing upheld an objection by the defendants that all the parties necessary were not before the Court, but granted the plaintiffs leave to amend by adding the retiring partners as co-defendants. On the resumed hearing, he dismissed the action on the ground that the plaintiffs' only evidence of title to the mortgaged property was the document of 1926 which was inadmissible because unregistered, and that the plaintiffs could not rely on the assignment executed between the two hearings in writing by all the retiring partners, in favour of the respondent (his father having died), and duly registered.

The plaintiff appealed from that decision to the High Court in its appellate jurisdiction, and the appeal was allowed. The defendant mortgagor, Monghibai, now appealed to His Majesty in Council.

C. S. Rewcastle, K.C. and *P. V. Subba Row* for Appellant.—*Prima facie* the respondent had no right to sue to realise the mortgaged property, for he sued as the representative of the new firm. The document of 1926 because unregistered was not operative to effect any transfer of the partnership interest in immovable property away from the retiring partners. Therefore the mortgagees' interest never passed to the respondent, but remained in the nine original partners including the respondent. The necessary

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parties were accordingly not before the Court. Even if that defect could be cured, which, it is submitted, it could not, because the unregistered assignment was the only evidence of the plaintiffs' title to the mortgaged property and it was inadmissible for that purpose because unregistered, the retiring partners had debarred themselves from bringing any action to enforce the mortgage by virtue of the assignment in writing executed in August, 1934, which transferred their whole interest in the partnership property to the respondent. On any view, therefore, it is submitted, the action was not maintainable.

A. M. Dunne, K. C., Sir Thomas Strangman, K.C. and *C. Bagram* for Respondent.—It is submitted that if any defect of title resulted from the failure to register the assignments of 1926, the adding of all the retiring partners as co-defendants cured it. Its effect was to bring before the Court all the parties interested in the mortgaged property, and there was accordingly no reason why the suit should not proceed. That result accords entirely with the realities of the situation, which, it is submitted, the appellant's argument does not. The retiring partners having disclaimed all interest in the question, it is only proper for the remaining partner to be able to enforce the rights which are expressed in that disclaimer to be vested in him alone.

Further, the respondent was entitled to sue by virtue of the assignment made in August, 1934, and duly registered. Whatever effect it may have had on the interest in the subject-matter of the suit of the retiring partners, as assignors, it surely enables the respondent, as assignee, to enforce rights in respect of property which has been assigned to him. That document, therefore, was, it is submitted, in itself sufficient to entitle the respondent to maintain the suit.

2nd May, 1939. Their Lordships' judgment was delivered by

Lord Porter.

LORD PORTER.—This case raises a short point for the decision of the Board. It is an appeal from a judgment and decree of the High Court at Bombay in its appellate jurisdiction dated the 16th March, 1937. By its judgment the Appeal Court affirmed a decree of the High Court in its ordinary original civil jurisdiction dated the 30th July, 1936.

Up to and after the year 1925, a firm called Cooverji Umersey & Co. were carrying on business in partnership in Bombay. In 1925 it consisted of nine partners, Cooverji Umersey, the respondent, his father Umersey Katchra, and seven others who were the defendants Nos. 4 to 10 below.

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On the 30th September, 1925, one Mawji Waghji and his wife, the appellant, borrowed Rs. 1,20,000 from the firm and gave a promissory note for that sum in favour of the firm. The advance was secured by certain bales of cotton, and at the same time the title deeds of two houses belonging to the appellant and to her husband, and situated at King Lane and Borah Bazar Street, were deposited with the firm by way of equitable security and as further cover for the loan. In case of default the firm was to have recourse to the bales of cotton in the first instance and against the house property for any deficiency.

In pursuance of this arrangement the firm sold the bales of cotton, leaving, however, a large portion of the debt unpaid.

In November, 1926, seven members of the firm retired, leaving the respondent and his father the only remaining members.

Of those seven the tenth defendant, Bhulabhai Devi, pursuant to an oral agreement made on the 6th November, 1926, with the respondent and his father, retired from the firm, paid to them the sum of Rs. 17,000 for his share of the losses of the business, released all his share, right, title and interest in the assets, outstandings, property and goodwill of the partnership business in favour of the respondent and his father, and agreed to execute in their favour all such transfers as might become necessary for better and more effectively assigning and transferring his share, right, title and interests.

On the 17th November, 1926, the other six defendants—Nos. 4 to 9—executed a document purporting to assign their interest in the partnership property to the respondent and his father.

This document was not registered in accordance with the terms of S. 17 (1) (*b*) of the Indian Registration Act, 1908; and it was contended by the appellant, and was not disputed by the respondent, that neither the tenth defendant's oral agreement nor the written document of the 17th November were effective to transfer an interest in immovable property. The mortgage rights in the house property therefore remained in all the original partners.

After November, 1926, the respondent and his father continued to carry on business in the firm name. On the 21st January, 1927, the firm as then constituted brought the present

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suit in the High Court of Bombay against the appellant and her husband for a declaration that the plaintiffs were equitable mortgagees of the two houses, for an order that the defendants pay them the sum of Rs. 1,33,500 with interest on Rs. 1,20,000 at 9 per cent. per annum from the 1st January, 1927, until judgment, and that in default of payment the mortgaged properties might be sold and the proceeds applied in and towards payment of the plaintiffs' claim. In this action the respondents raised a counter-claim. No question now arises with regard to the cotton, the promissory note or the counter-claim, but it was and is contended on behalf of the appellant that the suit in respect of the equitable mortgage of the houses was not maintainable inasmuch as the proper parties to the suit had not been joined. In her submission, the houses not having passed under the unregistered assignment of the 17th November, 1926, still remained vested in the original partners and could only be recovered in an action in which they were plaintiffs or, at least, were parties.

Pending the trial of the action the respondent's father Umersey Katchra died on or about the 21st October, 1928, leaving the respondent solely entitled beneficially to all the assets, outgoings, property and goodwill of the partnership business, to the sum of Rs. 1,20,000 and to the benefit of the mortgage securing it.

The case came on for hearing before Wadia, J., on the 28th June and 9th August, 1934, and the appellant thereupon raised the contention that the transfer was ineffective as it had not been registered, and that the property had never passed from the original partners to the present respondent and his father. With this contention the learned Judge agreed, but he allowed the suit to proceed and oral evidence to be given in case the respondent could prove some oral terms of dissolution which should be admissible.

To meet the objection that all the necessary parties had not been joined, the plaintiffs applied that the seven retiring partners should be placed on the record as co-plaintiffs or as co-defendants. Upon this application the learned Judge granted leave to amend the title of the suit by adding the retiring partners as defendants and by making the necessary consequent amendments in the plaint. Following this order the seven

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retiring partners were added as defendants, and the appropriate amendments made.

Defendants 4 to 10 put in a joint written statement referring to the document of the 17th November, 1926, and stating that they had transferred all their interest in the assets of the firm and had no further interest in the amount due from their co-defendants.

It appears that, after the hearing before the learned Judge and before the making of the written statement, all the seven retiring partners had executed a fresh deed dated the 22nd August, 1934, transferring the assets of the firm to the respondent as sole owner of the business. This deed was duly registered and was relied upon by the respondent and defendants 4 to 10.

The case came on for hearing before the learned Judge for the second time on the 11th December, 1934, when two of the retiring partners, one of whom had, and the other of whom had not, executed the document of 17th November, 1926, gave evidence and stated that they made no claim to any of the assets of the firm. The respondent also attempted to put in evidence the documents of the 17th November, 1926, and of the 22nd August, 1934, but this evidence was rejected.

After hearing the evidence the learned Judge delivered judgment, holding that the only proof of the respondent's title was to be found in the document of the 17th November, 1926, and that as it required to be registered it could not transfer the property and was inadmissible in evidence. He also rejected the contention based on the second document since it had been executed subsequently to the institution of the suit. He accordingly held that the suit was not maintainable.

From this judgment the respondent appealed on the ground that the learned Judge should have allowed the defendants 4 to 10 to be made co-plaintiffs, but that in any case, once they had been made defendants, all parties interested were before the Court and appropriate relief could have been given.

The Appeal Court allowed the appeal on the ground that, as soon as the application to join the other seven partners was granted by the learned Judge and the amendment made, the Court had before it all persons interested in the equitable mortgage the creation of which was not in dispute.

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The learned Chief Justice stated that the respondent was clearly before the Court as plaintiff, although, in his view, inaccurately described as Cooverji Umersey & Co. Moreover the Court had all the other persons interested in the equitable mortgage before it as defendants, and in those circumstances why the Court could not grant a decree enforcing the equitable mortgage he had great difficulty in understanding. In his view, with which Rangnekar, J., agreed, the action in which the plaintiffs were described as Cooverji Umersey & Co. must in the circumstances be considered to have been brought by the respondent and his father. At that time, however, the right to recover had not passed from the original nine partners since the oral and written but unregistered transfers were ineffective to bring about that result. The suit, however, could and would logically have been properly constituted if it had been amended by making the nine partners plaintiffs. But the same result could be achieved by making the seven retiring partners defendants since in that case all the parties would be before the Court. Technically the respondent's name should be substituted for that of the firm, inasmuch as the father was dead and the respondent was the sole owner of the partnership property, but such a change constituted only a formal amendment, and once it was made judgment could be entered for the respondent since he alone was beneficially entitled and the defendant partners disclaimed any interest.

The Appeal Court accordingly ordered the plaint to be amended by inserting the name of Cooverji Umersey in place of Cooverji Umersey & Co., and the suit was remitted to the lower Court for the trial of the issue raised by the counter-claim.

After hearing issues the learned Judge on the 30th July, 1936, passed the usual preliminary mortgage decree ordering payment of a sum of Rs. 1,37,287-2-8 with interest and, in default of payment, that the respondent should be entitled to apply for a decree absolute for the sale of the mortgage security. The second defendant appealed against the preliminary mortgage decree, and this appeal was dismissed with costs; and the decree passed accordingly, on the 16th March, 1937. It is from this decree that the present appeal is brought.

The only question argued before their Lordships was whether this suit was maintainable by the present respondent.

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By O. 1, r. 10, of the Code of Civil Procedure:—

"(1) . . . the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

"(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

It was not disputed that the bringing of the action in the names of the two remaining partners as plaintiffs was due to a genuine mistake, and in any case this order gives the Court full power to amend the parties at any time. If, as was admitted in argument and as their Lordships think, the mortgagee's interest in the two houses did not pass to the respondent and his father by reason of the unregistered document of the 17th November, 1926, and the oral agreement made by the 10th defendant, that property remained in the nine original partners. In those circumstances their Lordships agree with the Appeal Court in thinking that it would have been more satisfactory that the seven retiring partners should have been made co-plaintiffs instead of co-defendants, but it may be that they objected to being so joined, or there may be other reasons which do not appear on the record for joining them as co-defendants. In any case they were so joined, the record was amended, and no appeal from the learned Judge's order was made. The whole of the necessary parties were therefore before the Court, and there seems no reason why the appropriate relief should not have been given.

It has long been recognised that one or more of several persons jointly interested can bring an action in respect of joint property, and, if their right to sue is challenged, can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Such cases as *Luke* v. *South Kensington Hotel Company*[1] and *Cullen* v. *Knowles*[2] are examplesof this principle. Nor indeed would it matter that a wrong person had originally sued though he had no cause of

1. (1879) 11 Ch. D. 121.
2. (1898) 2 Q.B. 380.

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action. See *Hughes* v. *The Pump House Hotel Co., Ltd.*, *(No. 2)*[1]. Once all the parties are before the Court, the Court can make the appropriate order, and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants. *Prima facie*, therefore, the trial Court in the present case should have given judgment in favour of the eight of the original partners who survived, though some of them had been made defendants. (See *Cullen* v. *Knowles*[2].)

But it was argued that, even if this view be true, seven of the original partners had, by the transfer of the 22nd August, 1934, made *pendente lite*, assigned all their rights and interest in the mortgaged houses and could not thereafter maintain an action for sale in respect of them. No doubt it is true that parties who have assigned the whole of their interest *pendente lite* cannot ask for judgment in respect of an interest which is no longer theirs. But it does not follow that their assignees are thereby precluded from recovering. If it were so, no assignments of property during the course of a trial would be possible. Such a contention is, on the face of it, improbable, and it is now dealt with by O. 17, r. 1, of the Rules of the Supreme Court, which states:—

"A cause or matter shall not become defective by the assignment of any estate or title *pendente lite*."

But apart from that rule the principle has long been established in English law, and examples will be found in such cases as *Seear* v. *Lawson*[3] and *Campbell* v. *Holyland*[4]. The same principle is applied in India and is now embodied in O. 22, rr. 10 (1) and 11, which provides:—

"In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

"In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal."

Therefore, though at the beginning of the suit the appropriate persons to recover were the nine original partners, once the transfer of the 22nd August, 1934, was made, the party entitled to sue was the present respondent. As their Lordships

1. (1902) 2 K.B. 485.
2. (1898) 2 Q.B. 380 at 382.
3. (1880) 16 Ch. D. 121.
4. (1877) 7 Ch. D. 166.

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have indicated, apart from the assignment of the 22nd August, 1934, a decree should *prima facie* have been passed for the eight survivors of the original partnership, but all eight were before the Court, the respondent after amendment in fact alone was plaintiff, and the retired partners expressly disclaimed any interest.

In these circumstances, their Lordships think that the Appeal Court were right in looking at the substance of the matter and ordering the decree to be passed in favour of the respondent alone. But in any case once the assignment of the 22nd August, 1934, was executed, the respondent alone was entitled to recover, and the decree was rightly passed in his favour.

One further argument urged on behalf of the appellant was that to grant the relief asked for would be to make the registration law of India of no effect.

In their Lordships' view, having regard to the grounds which they have given for affirming the judgment of the Court of Appeal, no such objection can be sustained.

They will humbly advise His Majesty that the appeal be dismissed and the order of the Appeal Court affirmed. The appellant must pay the costs of this appeal.

Solicitors for Appellant: *Harold Shephard.*

Solicitors for Respondent: *T. L. Wilson & Co.*

R.C.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Noor Mahomed Mohideen Pillai Taragan and another .. *Appellants* in both (Petitioners in both)*

v.

Pechi Ammal .. *Respondent in both (Respondent in both).*

Noor
Mahomed
Mohideen
Pillai
Taragan
v.
Pechi
Ammal.

Civil Procedure Code (V of 1908), O. 21, r. 54—Attachment of immovable property—Prohibitory order necessary—Procedure of.

To effect an attachment of immovable property it is necessary (1) to pass an order prohibiting the judgment-debtor from transferring or charging the property in any way, and (2) to have that order proclaimed by beat of tom-tom near the property, and to have copies of the prohibitory order

* A.A. A. O. Nos. 36 and 37 of 1935. 28th April, 1939.

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affixed on a conspicuous part of the property, on a conspicuous part of the Court-house, and also in the office of the Collector of the District. It is not enough for the Court to say 'attach', nor can the report by the Court amin that 'I have attached', be sufficient to presume that everything needful to effect a valid attachment must have been done.

Appeals against the decrees of the Court of the Subordinate Judge of Tinnevelly in A. S. Nos. 59 and 60 of 1934 respectively (E. A. Nos. 1213 and 1214 of 1933 respectively in O. S. No. 93 of 1930, District Munsif's Court, Tenkasi).

R. Krishnaswami and *R. Srinivasan* for Appellants.

T. E. Ramabhadrachariar for *S. T. Srinivasagopalachariar* for Respondent.

The Court made the following

ORDER.—I must refuse to allow the appellants to raise at this stage the contention that the District Munsif had no jurisdiction to attach because of some infirmity in the notice issued on 17th February, 1932. That plea has never yet been advanced and it is too late to advance it now.

The other question is whether any attachment was in fact validly effected on 1st March, 1932. From the learned District Munsif's judgment it does not appear that this question was discussed before him. But it was discussed before the learned Subordinate Judge and it is important. Ex. A does not purport to be an order for the attachment of anything. It is apparently *part* of Form 5, Appendix F of the Code of Civil Procedure, translated into Tamil. Attachment of immovable property can only be made by means of prohibitory orders of which Form 24, Appendix E of the Code of Civil Procedure is a specimen. Were any such prohibitory orders ever issued in this case? The learned Subordinate Judge says they were, but that was only what he *presumed*. The learned advocate for appellants says they were not: the learned advocate for respondent says they were. This was a matter of evidence and not for mere presumption.

A finding will be called for from the Court of the District Munsif of Tenkasi on the question "Was the attachment said to have been effected on 1st March, 1932, made by means of prohibitory orders (O. 21, r. 54 of the Code of Civil Procedure)?".

Evidence may be adduced by both sides. Time for submission of finding is six weeks from the date of receipt of this order. Time for filing of objections will be 10 days.

Noor Mahomed Mohideen Pillai Taragan v. Pechi Ammal.

In pursuance of the directions contained in the above order the District Munsif of Tenkasi submitted the following findings:

* * * * *

These appeals coming on for final hearing after the return of the finding of the District Munsif of Tenkasi upon the issues referred by this Court for trial on Friday, the 21st day of April, 1939, and the case having stood over for consideration, The Court delivered the following

JUDGMENT.—That the attachment made by the Amin on the 1st of March was invalid is I think quite clear. There was no order passed by the District Munsif under O. 21, r. 54. If any such order had been passed it would have been in the records of the Court. The Amin's evidence is unreliable and also inconclusive, for at one moment he says that he affixed a copy of "the warrant" (that is, the warrant in Form 5 of Appendix F) and at another moment he says he affixed a prohibitory order in Form 24 of Appendix E. Moreover, the actual warrant issued to the Amin did not authorize him to attach anything. To effect an attachment of immovable property it is necessary (1) to pass an order prohibiting the judgment-debtor from transferring or charging the property in any way, and (2) to have that order proclaimed by beat of tom-tom near the property, and to have copies of the prohibitory order affixed on a conspicuous part of the property, on a conspicuous part of the Court-house, and also, in such cases as this, in the office of the Collector of the District. The prohibitory order must be passed by the Court; it is not enough for the Court to say "attach" nor am I prepared to assume, as learned Counsel for the respondent wishes me to do, that since the District Munsif said "attach" and the Amin reported "I have attached" therefore everything needful to effect a valid attachment must have been done. That would be to assume the very point in dispute.

These appeals are accordingly allowed with costs throughout but Vakil's fee in one only A. A. A. O. No. 36. The orders of the lower Courts are set aside, and the appellants' claims allowed.

Leave asked for, and refused.

K. C. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

His Holiness Peria Koil Kelvi Appan Tiruvengada Ramanuja Pedda Jiyangarlu Varlu .. *Petitioner** (*2nd Appellant —Respondent*)

v.

Prathivadi Bayankaram Venkatacharlu and others .. *Respondents* (*Respondents —Appellant*).

Tiruvengada Ramanuja Pedda Jiyangarlu Varlu *v.* P.B. Venkatacharlu.

Civil Procedure Code (V of 1908), S. 109 (2)—Question of religious rites in an important temple—If one contemplated by the section.

The question as to whether in the Tirupathi temple the Thengalais alone have the exclusive right to sing Thengalai mantrams or the Vadagalais have also the right to sing their own mantrams at the same time as the Thengalai mantrams are being sung is a matter relating to religious rights and ceremonies at a temple of national importance which cannot be reduced into terms of money and is a matter contemplated by S. 109 (*c*) of the Civil Procedure Code when the questions in issue are in themselves of great public and private importance.

Radhakrishna Aiyar v. *Swaminatha Aiyar*, (1920) 40 M.L.J. 229: L.R. 48 I.A. 31: I.L.R. 44 Mad. 293 (P.C.), relied on.

Petition under S. 109, cl. (*c*) and S. 110 and O. 45, rr. 2 and 3 of the Code of Civil Procedure praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to grant leave to the petitioner herein to appeal to His Majesty in Council against the judgment of the High Court in Appeals Nos. 466 of 1925 and 119 of 1926 preferred against the decree of the Court of the Subordinate Judge of Chittoor in O. S. No. 23 of 1919.

T. M. Krishnaswami Aiyar and *V. N. Venkatavaradachariar* for Petitioner.

D. Ramaswamy Aiyangar for *C. S. Venkatachariar* and *C. Narasimhachariar* for Respondents.

The order of the Court was made by

Leach, C.J.

The Chief Justice.—This is an application for a certificate permitting an appeal to His Majesty in Council. The petitioner is the legal representative of the plaintiff who died during the pendency of the appeal. The plaintiff was the head of an important mutt and as such had the right of conducting

* C. M. P. No. 2237 of 1938. 19th April, 1939.

Tiru-vengada Ramanuja Pedda Jiyangarlu Varlu v. P.B. Venkatacharlu.

Leach, C.J.

public worship at the Tirupathi temple in the Chittoor District. Both sides are agreed that the Tirupathi temple is the most important Vaishnavite temple in the whole of India and pilgrims in large numbers visit it every year in order to worship there. The Vaishnavite community is divided into two sects, the Thengalais (Southerners) and Vadagalais (Northerners). It is also common ground that the adherents of each sect are counted by millions. The suit was filed by the plaintiff in order to establish his right to conduct public worship at the temple according to the Thengalai ritual. Before the recitation of the Tamil scriptures (Prabandam), mantras are sung. The mantras sung by the Thengalais are different from those sung by the Vadagalais. After the recitation of the scriptures, mantras are again sung. Here also the mantras sung by the Thengalais differ from the mantras sung by the Vadagalais. There are other points of difference in the worship, but it is unnecessary to pause to state them. The plaintiff's case was that the Thengalai mantras should only be sung at the worship in this temple. The contesting respondents say that the Vadagalai sect has the right of singing its own mantras at the same time as the Thengalai mantras are being sung. The trial Judge held that the plaintiff was right in his contention that only the Thengalai mantras should be sung before the recitation of the scriptures, but he considered that after the recitation of the scriptures the Vadagalais on certain occasions had the right of singing their mantras at the same time as the Thengalais sang theirs. On appeal to this Court it was held that the trial Court was wrong in holding that the Thengalai sect had the right to have their mantras sung at the commencement of the service. The Vadagalais had the same rights as the Thengalais both before and after the recitation of the scriptures.

The plaintiff valued the relief claimed in the plaint at Rs. 10,500 and in the appeal to this Court the relief was valued at a like amount. It is, however, obvious that no monetary value can be attached to the relief and the petitioner rests his case on the provisions of S. 109 (*c*) of the Code of Civil Procedure. It is said that the questions involved in the appeal are questions of great public and private importance, but the contesting respondents deny this, and maintain that on a previous occasion this Court refused leave and the Privy Council refused special leave to appeal. The case referred to by the learned

Tiru-vengada Ramanuja Pedda Jiyangarlu Varlu v. P.B. Venkata-charlu.

Leach, C. J.

Advocate for the contesting respondents is *Venkatavaratha Thathachariar* v. *Ananthachariar*[1]. An examination of the judgment there shows that the question in issue was entirely different. The question was whether the Thengalais or the Vadagalais were entitled to an office in a certain temple. The decision therefore does not help the contesting respondents in any way. There can be no doubt that the form of ritual at the Tirupathi temple is a matter of both public and private importance and consequently we are of opinion that the case does fall within S. 109 (*c*). If there were any doubt, the doubt would be removed by the decision of the Privy Council in *Radhakrishna Aiyar* v. *Swaminatha Aiyar*[2], where Lord Buckmaster in delivering the judgment of the Board said:

> ". . . . . it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money. Sub-section (*c*) of S. 109 of the Code of Civil Procedure contemplates that such a state of things exists, and r. 3 of O. 45 regulates the procedure."

As this case relates to religious rights and ceremonies at a temple of national importance and the questions in issue are in themselves of great public and private importance, the application will be granted on the usual conditions. Costs of the applicant will be made costs in the appeal.

S. V. V. ——— *Application granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Rathnammal *alias* Rajamani Ammal.. *Appellant*—Nil*

v.

The Secretary of State for India in Council represented by the Collector of Coimbatore .. *Respondent (Defendant)*.

Rathnammal v. Secretary of State for India in Council.

Madras Irrigation Cess Act (VII of 1865)—Land classified as 'single crop wet'—Authorised source of water-supply, a channel from a tank—Water taken for second crop without permission—If penalty can be levied—Water taken from a different channel but from the same tank—If liable for penalty.

1. (1893) 3 M.L.J. 150: I.L.R. 16 Mad. 299 (P.C.).
2. (1920) 40 M.L.J. 229: L.R. 48 I.A. 31: I.L.R. 44 Mad. 293 (P.C.).

* L. P. A. No. 26 of 1937. 1st May, 1939.

The Revenue authorities of the Province have no power to impose a penalty under the Madras Irrigation Cess Act, 1865, when water is taken without permission during the second crop season for the purpose of irrigating land classified as "single crop wet" and the source from which the water is taken is the source authorised for the irrigation of one crop. The case where water is taken from a channel connected with the same tank from which the authorised channel flows but the channel is different from the authorised channel stands on a different footing as it would then be a different source.

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Kopalli Krishna Row Garu v. *Collector of Kistna*, (1914) 26 M.L.J. 210 and *Kanniappa Mudaliar* v. *The Secretary of State for India*, (1935) I.L.R. 59 Mad. 107, distinguished.

Kanakamma v. *The Secretary of State for India*, (1927) 54 M.L J. 230, doubted.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice King dated 18th December, 1936 and passed in S. A. No. 146 of 1933 preferred to the High Court against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 7 of 1932 preferred against the decree of the Court of the District Munsif of Tiruppur in O. S. No. 637 of 1930.

K. S. Sankara Aiyar for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *The Government Pleader* (*B. Sitarama Rao*) for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises the question whether the Revenue authorities of the Province have the power to impose a penalty under the Madras Irrigation Cess Act, 1865, when water is taken without permission during the second crop season for the purpose of irrigating land classified as "single crop wet" and the source from which the water is taken is the source authorised for the irrigation of one crop. One Krishnammal was the pattadar of lands in the village of Sulur, Coimbatore District. The lands, which are registered as Survey Nos. 182 and 269, are single crop wet lands. For many years betel leaves have been grown on Survey No. 182 and cocoanut trees on Survey No. 269. The surrounding lands are all registered as double crop wet lands. On 1st February, 1928, Krishnammal applied to the Collector for permission to convert her lands into double crop wet lands, but she died before her application could be considered. Her daughter Venkatalakshmi Ammal then made a similar application, but she was told to present it again after the patta had been registered in her name. The lands were

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irrigated by water flowing through a channel constructed by the Government from a tank known as the Sulur Tank. In the year 1925-26 permission had been given to Krishnammal to take water from the channel during the second crop season, but in the following year she took extra water without permission, which resulted in the Revenue authorities charging her twice the water cess ordinarily payable for a first irrigated crop under the rules framed by the Government in purported exercise of the powers conferred by the Madras Irrigation Cess Act. For the year 1927-28 water was again taken without permission by Krishnammal and on this occasion a penalty of five times the ordinary water cess was imposed. In the year 1928-29 her daughter Venkatalakshmi Ammal took water without permission during the second crop season and on this occasion the penalty imposed was ten times the ordinary water cess, amounting to Rs. 257-10-0. This resulted in Venkatalakshmi Ammal filing a suit in the Court of the District Munsif of Tirupur for the recovery of the amount on the ground that the infliction of the penalty was unlawful. The District Munsif dismissed the suit and his decision was upheld by the Subordinate Judge of Coimbatore. Venkatalakshmi had died in the meantime and the appeal was preferred by her daughter, as her legal representative. Having lost before the Subordinate Judge the appellant appealed to this Court. The appeal was heard by King, J., who concurred in the decisions of the District Munsif and the Subordinate Judge, but granted a certificate permitting the present appeal under cl. 15 of the Letters Patent.

The decision of the appeal depends upon the interpretation to be placed upon the second proviso to S. 1 of the Madras Irrigation Cess Act. This section, omitting the first proviso which has no bearing here, reads as follows:—

"1 (a) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by Government and also,

(b) whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and, in the opinion of the revenue officer empowered to charge water cess, subject to the control of the Collector, the Board of Revenue and the Government such irrigation is beneficial to, and sufficient for the requirements of the crop on such land, it shall be lawful for the Government before the end of the revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water, and the

Government may prescribe the rules under which, and the rates at which, such water cess as aforesaid shall be levied; and alter or amend the same from time to time:

* * * * *

Provided also that no cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated by using without due authority water from any source herein before mentioned and such source is different from or in addition to that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land."

The appellant's case is that inasmuch as her mother had the right to take water for one crop from the channel from the Sulur tank, no penalty could be imposed upon her for taking water during the second crop season. It is said that the Government's power to impose a penalty is limited by the proviso to a case where water is taken from a different source or a source in addition to that assigned. On behalf of the respondent it is said that if a source has been assigned for a single crop and the same source is used during the second crop season it must be deemed to be a different source within the meaning of the proviso. It is also urged that the rules framed by the Government under S. 1 govern the interpretation of the section, as there is, it is said, ambiguity in the wording. It is further contended that the Court should read the word "and" which follows the words "from any source hereinbefore mentioned" in the proviso as meaning "or".

The present rules were promulgated in 1917 and are set out at page 136 of Volume 1 of the Standing Orders of the Board of Revenue (Fourth Edition). R. 1 says:—

"Water from a Government source or work is said to be irregularly taken to or used for the irrigation of any land—

(a) when it is taken to or used for such land without the permission of any officer authorised by Government to grant such permission, or

(b) when it is taken or used, contrary to the orders of any authority authorised to give such orders, or

(c) when it is taken or used in breach of any rule or regulation directing from what source or under what conditions water may be taken to or used for such land."

R. 2 provides for the imposition of twice the water cess ordinarily payable for the first infringement of the rules. R. 3 says that for the second infringement five times the ordinary cess shall be imposed, and r. 4 provides for a penalty of ten times the ordinary cess for an infringement on the third or any

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subsequent occasion. If the appellant's contention is correct these rules cannot be applied in a case like the present one, as they go beyond the section. It has been impressed upon us by the learned Advocate-General that the rules have been in force for many years and a decision adverse to the respondent would mean the discontinuation of a course of practice which has been followed in the Presidency for a long time. It has not been suggested, nor could it be, that the appellant is not entitled to raise the question now, and the Court must decide it without regard to the bearing which the decision will have in other cases.

I consider that the wording of the proviso is free from ambiguity and that its effect is this. No cess shall be leviable under the Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the land be irrigated by using without due authority water from a source mentioned in the first part of the section *and* the source is different from or in addition to that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of the land. A source which is in addition to the assigned source must necessarily be a different source. To enable the Revenue authorities to impose a penalty in respect of land held under ryotwari settlement and classified and assessed as wet there must be unauthorised use of water from a source other than the authorised source. The mere taking of extra water from the authorised source does not come within the exception to the proviso. The authorised source of irrigation in this case is the Sulur tank and the channel leading from it. The application of Krishnammal for the transfer of her holdings from dry to wet classification has been put in evidence. The source of irrigation is stated therein to be the Sulur tank and the Revenue Inspector recommended that the application be granted. The application was granted by the Collector, whose order is in these words:—

"The transfer of the fields to single crop wet under the Sulur supply channel and tank is sanctioned."

The words "from any source hereinbefore mentioned" which appear in the proviso can therefore only be read in this case as meaning the Sulur tank and the channel connected therewith. To prevent any misconception I will here say that I do not suggest that if water were taken from an unauthorised

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channel connected with the Sulur tank that this would not be a different source within the meaning of the proviso. I think that it would be a different source, but that question does not arise. The extra water taken by the appellant's mother was taken from the authorised channel. This being the case the appellant is clearly outside the mischief of the section if the words used are to be given their ordinary meaning.

In support of his contention the learned Advocate-General has referred to a statement in Craies on Statute Law (4th Edition, page 146) where it is said that where the language of an Act is ambiguous and difficult to construe, the Court may, for assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are by the statute authorising them directed to be read as part of the Act. This statement is based on the observation of Mellish, L. J., in Ex parte *Wier*: In re *Wier*[1], where he said:—

"We do not think that any other section of the Act throws any material light upon the proper construction of this section, and if the question had depended upon the Act alone we should have had great doubt what the proper construction was; but we are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction."

In this case the rules are not made part of the Act and the knowledge of the person who framed them is not a factor. What is important is that there is no ambiguity in the wording of the proviso. Therefore the Court does not need to call in aid the rules in the matter of interpretation. In fact it is clear that the rules go beyond the Act in a case where the facts are as they are here.

Neither can I see any justification for the Court changing the word 'and' into the word 'or'. It is pointed out in Maxwell on the Interpretation of Statutes (8th Edition, page 209) that to carry out the intention of the Legislature, it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other, and several instances are given. I will not pause to examine them because the law is clearly stated by Lord Halsbury in *Mersey Docks and Harbour Board* v. *Henderson Brothers*[2]. In that case the Court was called upon to construe the following words in a statute:—

"Vessels arriving in ballast, but trading outwards, and also vessels built

1. (1871) 6 Ch. Ap. 875. 2. (1888) 13 A.C. 595 at 603.

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within the port of Liverpool, *or trading outward*, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards, and vessels built within the said port on first trading outwards shall be liable to one moiety only of such rates, but shall thereafter pay full rates."

The Court of Appeal had read 'or' as 'and' and in expressing his dissent Lord Halsbury said:—

"In the first place I know no authority for such a proceeding unless the context makes the necessary meaning of 'or' 'and', as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence, unless some other part of the same statute or the clear intention of it requires that to be done, as in the case of *Fow er* v. *Padget*[1], where the Act of Jac 1, c. 15, made it an act of bankruptcy for a trader to leave his dwelling house to the intent or whereby his creditors might be defeated or delayed. These words if construed literally would have made every trader commit an act of bankruptcy if he casually left his dwelling house and some creditor called for payment during his absence. It may indeed be doubted whether some of the cases of turning 'or' into 'and' and *vice versa* have not gone to the extreme limit of interpretation, but I think none of them would cover this case."

If the word 'and' is read as 'or' in the proviso to S. 1 of the Madras Irrigation Cess Act, it would alter entirely the effect of the proviso, and there is nothing in the Act which justifies such a reading. Moreover to give the proviso, the meaning which the words used justify would not mean that the Government would be without remedy. It would still have the rights open to all persons whose proprietary rights are infringed.

In the course of his argument the learned Advocate-General quoted three decisions of this Court on questions arising under the Act. The first decision is that in *Kopalli Krishna Row Garu* v. *Collector of Kistna*[2]. There a ryot had irrigated his land from two pipes instead of the one which was authorised and it was held that he was liable to a penalty under the rules. Ayling and Tyabji, JJ., regarded the additional pipe as being an unauthorised source of supply, but the judgments which they delivered do not discusss the proviso or the rules. The decision of the learned Judges does not apply to this case because here the extra water came entirely from the authorised source of supply. In *Kanniappa Mudaliar* v. *Secretary of State for India*[3], a sluice was erected to allow two and half inches of water to pass through. The sluice was forced open with the result that water two feet deep passed

1. (1798) 7 T.R. 509: 101 E.R. 1103. 2. (1914) 26 M.L.J. 210.
3. (1935) 69 M.L.J. 728: I.L.R. 59 Mad. 107.

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into the distributory channel and irrigated the plaintiff's land. Ramesam and Venkatasubba Rao, JJ., held that this was water from a different source from, or in addition to, that which had been assigned by the Revenue authorities as the source of irrigation. We are not called upon to decide whether a sluice is a source within the meaning of the Act, because in the present case the Government has declared the source to be the Sulur tank and the channel connected therewith. The third case is *Kanakamma* v. *Secretary of State for India*[1], which was decided by Devadoss, J., sitting alone. The case has been cited because in the course of his judgment Devadoss, J., observed:—

"In order to bring the ryotwari tenant in possession of lands classified and assessed as wet within the meaning of the section, he must do something in order to let water into his lands or must raise or attempt to raise a crop with the help of the water from a source to which he is not entitled or at a time when he is not entitled to get water from his legitimate source."

Emphasis has been laid on the words "at a time when he is not entitled to get water from his legitimate source". There is nothing in the proviso which makes the time of the taking of the water a factor. The proviso has merely regard to the source and Devadoss, J., read into the section something which was not there.

The statute being one entailing penal consequences the Court ought not to do violence to its language to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language. (*London County Council* v. *Aylesbury Dairy Company*[2].) I consider that it would be doing violence to the wording of the proviso to hold that this case falls within the exception. The plaintiff did nothing to justify the imposition of a penalty under the Act and consequently I hold that the suit was rightly instituted.

The appeal should be allowed and a decree passed in favour of the appellant with costs here and below. From the amount claimed Rs. 20-5-6 will be deducted as the appellant is admittedly liable for this by way of land revenue.

Somayya, J.—I agree. Somayya, J.

S.V.V. —— *Appeal allowed.*

1. (1927) 54 M.L.J. 230.
2. (1898) 1 Q.B. 106.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Kokkonda Venkata Rama Surya Gopala Krishnamurthy and others .. *Appellants** (*Defendants 2, 9, 11, 13, 14, 21 and 22*)

v.

Surabhi Satyanarayana .. *Respondent* (*Plaintiff*).

Gopala Krishnamurthy *v.* Satyanarayana.

Hindu Law—Reversioner—Suit by reversioner to set aside alienation by widow—Portion of consideration found binding but alienation held void—Decree for possession on payment of binding portion of consideration—Mesne profits—Right to claim, from date of widow's death but subject to law of limitation—Interest on consideration found binding also for period for which mesne profits awarded.

Where in a suit by a reversioner to recover possession of properties belonging to the estate from an alienee from the widow on the ground that the alienation is not binding on the reversioner it is found that the alienation is supported by consideration to a certain extent and it is decreed that the reversioner is entitled to recover possession subject to payment of the binding portion with interest on the amount up to the date of the alienee's obtaining possession, the alienee must be treated as being in possession without title from the date of the widow's death d the reversioner will be entitled to mesne profits as from that date but on a ount of the law of limitation, the Court can award mesne profits on y for three years prior to the date of the institution of the suit. The alienees in possession are, entitled to claim interest on the amount held to be binding on the estate and payable by the reversioner and are not on that account any the less liable for mesne profits, but the interest need not be allowed for the period for which mesne profits are not awarded

Bhagwat Dayal Singh v. *Debi Dayal Sahu,* (1908) 18 M.L.J 100: L R. 35 I.A. 48: I L.R. 35 Cal. 420 (P C.), applied.

Banwari Lal v. *Mahesh,* (1918) L.R. 45 I.A. 284: I.L.R. 41 All. 63 (P.C.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in O. S. No. 6 of 1932.

K. Kameswara Rao and *D. Narasa Raju* for Appellants.

B. Somayya for Respondent.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal arises out of a suit instituted by a reversioner for recovery of possession of the properties of one Lakshmayya who died in January, 1889, eaving

*Appeal No. 25 of 1935. 3rd February, 1939.

Gopala Krishnamurthy v. Satyanarayana.

Varadachariar, J.

a widow Subbamma who died in February, 1926. The first defendant is the widow of Subbamma's brother. She obtained the suit properties by a conveyance from her husband, that is, Subbamma's brother, who in turn had taken possession in execution of a foreclosure decree obtained by him against his sister Subbamma in O. S. No. 51 of 1903, on the file of the District Court, Godavari. The other defendants claim under the first defendant and their case need not be separately considered. The plaintiff contended that the document Ex. V, which was sought to be enforced in O. S. No. 51 of 1903 was not binding on the reversioner, that the decree obtained in O. S. No. 51 of 1903 was likewise not binding on him and that he was accordingly entitled to possession from the date of the widow's death. Against this claim it was alleged that the widow Subbamma was obliged to incur debts from time to time for various purposes and that Ex. V was executed to secure repayment of a consolidated amount representing these debts and that the same was binding on the plaintiff as also the decree obtained in O. S. No. 51 of 1903.

The learned Subordinate Judge held that the decree in O. S. No. 51 of 1903 was not binding on the plaintiff, that out of the consideration for Ex. V only a sum of Rs. 656-5-0 was binding on the estate and that the same with interest due thereon from the date of the widow's death could be set off against the mesne profits to which the plaintiff was held entitled for three years before the date of the institution of the suit. He also held that for the period during which the first defendant's husband and the first defendant had been in possession in pursuance of the foreclosure decree, they were not entitled to interest even on the amount found to be binding on the estate. On these findings, he gave the plaintiff a decree for possession and for mesne profits subsequent to the date of the institution of the suit. Against this decree some of the contesting defendants have filed this appeal. The plaintiff has purported to file something which is described as memorandum of objection, but it is not really in the nature of a memorandum of objections. It only suggests arguments on which the decree of the lower Court can be supported even apart from the grounds taken in the lower Court's judgment. It is therefore unnecessary to deal further with the so-called memorandum of objection.

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The learned Counsel for the appellants has not seriously challenged the conclusion of the lower Court that the decree in O. S. No. 51 of 1903 was not binding upon the plaintiff. The lower Court's decree for possession must therefore stand. The arguments before us have been directed mainly to the question of the terms on which the plaintiff was entitled to recover possession. On behalf of the appellants, it has been contended that the decree for possession should be made conditional on payment with interest of the amounts due as per Exs. II and III, two of the earlier documents executed by the widow, in addition to a sum of Rs. 360 borrowed by the widow at the time of Ex. IV and another sum of Rs. 195-12-0 borrowed by her at the time of Ex. V. It has also been contended that the lower Court was not justified in directing the amount that might be found payable by the plaintiff to be set off against mesne profits accrued due prior to the date of the suit, because, it was maintained, in a suit of this description the plaintiff was not entitled to claim mesne profits prior to the date of suit.

[Their Lordships here discussed the evidence and held that]

Making a rough calculation of the amounts due as per Ex. XXIII with reasonable interest thereon and of some amount which must have been spent as stated in Ex. V but deducting therefrom the costs amount of Rs. 100 realised by the father, we think that the nearest approximation to a reasonable figure will be a liability for Rs. 900 on the date of Ex. V.

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On the hypothesis we have adopted above, it must also be held that on the sum of Rs. 900, the estate was liable to pay a reasonable rate of interest. Here again, the rate stipulated for in Ex. V is clearly excessive having regard to the nature of the security offered; and when it is remembered that from 1895 onwards, the father or his son has been in management or possession of Subbamma's estate, first on her behalf and later in pursuance of the foreclosure decree obtained in O. S. No. 51 of 1903, we feel no compunction in fixing the liability for interest of a moderate rate. We think it will be reasonable to calculate interest on the sum of Rs. 900 at 12 per cent. per annum.

The learned Subordinate Judge has found that in 1905, Subbamma's brother took possession of the estate in pursuance

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of the foreclosure decree except of a portion thereof which was outstanding with the mother-in-law under Ex. E. This last item seems to have come into his possession only in 1916. We are of opinion that after 1905, there is no justification for calculating any interest as against the estate up to the date of the widow's death. The result will be that on the date of the widow's death, the reversioner would have been entitled to demand possession subject to payment of Rs. 2,200 for principal and interest calculated as above.

It remains to deal with the plaintiff's right to mesne profits. The learned counsel for the appellants contends that as the plaintiff is entitled to possession only after payment of a certain sum of money to the defendants, the plaintiff should not be allowed any mesne profits at all till such payment is made. Alternatively, they contend that in any event, the plaintiff is not entitled to mesne profits prior to the date of the institution of the suit, because an alienation by the widow being 'voidable', the plaintiff can claim to treat the defendant in possession as not being entitled to possession, only from the time that the reversioner institutes a suit or gives notice repudiating the binding character of the widow's alienation. The learned counsel for the respondent has, however, contended that in the case of a reversioner suing for possession on the ground that an alienee from the widow has not derived a title binding on the estate, the alienee must be treated as being in possession without title from the date of the widow's death and the reversioner is entitled to mesne profits as from that date, though on account of the law of limitation, the Court can award mesne profits only for three years prior to the date of the institution of the suit. Even in cases in which the reversioner is directed to pay a certain sum of money as representing the portion of the consideration found binding on the estate, it has been contended that the persons in possession are only entitled to claim interest on the amount found payable and are not on that account any the less liable for mesne profits.

In support of their first contention, the learned counsel for the appellants has relied on the decision of the Judicial Committee in *Banwari Lal* v. *Mahesh*[1]. In support of the alternative contention that the reversioner is not in any event entitled to

1. (1918) L.R. 45 I.A. 284: I.L.R. 41 All. 63 (P.C.).

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mesne profits prior to the date of the institution of the suit, they have relied on the decision of the Bombay High Court in *Mohanlal* v. *Jagjivan*[1]. On behalf of the plaintiff (respondent) reliance has been placed upon *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*[2] and it has also been pointed out that the decree of lower Court which was confirmed by the Judicial Committee in *Deputy Commissioner of Kheri representing the Court of Wards* v. *Khanjan Singh*[3], recognised the reversioner's right to mesne profits. It seems to us that *Deputy Commissioner of Kheri representing the Court of Wards* v. *Khanjan Singh*[3] does not give us much help; because there is no reference to this question in the judgment of the Judicial Committee and it is not possible to gather from the report whether what was set off against the sum directed to be paid by the plaintiff represented mesne profits prior to the institution of the suit. There can, however, be no doubt that, *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*[2], supports the plaintiff's contention. Mr. Somayya tried to distinguish it on the ground that in that case, the alienee claimed to be in possession not under a title derived from the limited owner (Jilab Koer) but from another lady (Etraj Koer) who it was stated was in possession adversely to the widow. We do not think the case can be distinguished on this ground. It is true the alienees did plead in the lower Court a title derived from Etraj Koer; but the sale-deed in their favour had been executed not merely by Etraj Koer, but also by Jilab Koer and the judgment of their Lordships proceeded on the footing that the defendants were alienees from a limited owner. Dealing with the claim to mesne profits, their Lordships observed at page 430 that

"As the deeds of sale are not good as such, the claim for mesne profits is well founded."

In respect of the sums found payable by the plaintiff to the defendants, their Lordships held that the defendants were, on their side, entitled to interest at 6 per cent. per annum. In *Banwari Lal* v. *Mahesh*[4], the litigation related to an alienation by a Hindu father. When it was found that the sale was not wholly for justifiable or necessary purposes, the Court held that the plaintiff was entitled to possession on payment of a certain

1. I.L.R. (1938) Bom. 292.
2. (1908) 18 M.L.J. 100: L.R. 35 I.A. 48: I.L.R. 35 Cal. 420 (P.C.).
3. (1907) 17 M.L.J. 233: L.R. 34 I.A. 72: I.L.R. 29 All. 331 (P.C.).
4. (1918) L.R. 45 I.A. 284: I.L.R. 41 All. 63 (P.C).

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portion of the consideration which was found binding. Dealing with that situation, their Lordships observed at as the sales were to be set aside only upon payment of certain sums:

"The defendants must be deemed to be lawfully in possession until they are set aside and are therefore not accountable for mesne profits."

At the first blush, the observations in these two cases seem not easily reconcilable and indeed in one case, a learned Judge of the Nagpur High Court thought that they were irreconcilable. (See *Maroti* v. *Abhiman*[1].) In this Court, a Division Bench sought to get over *Banwar Lal* v. *Mahesh*[2], but suggesting that the case had been heard *ex parte*. (See *Ponnuswami Pillai* v. *Subramania Pillai*[3].) We do not think that either of these ways of distinguishing *Banwari Lal* v. *Mahesh*[2] can be regarded as satisfactory. In the course of the arguments in the present appeal, our attention has been drawn to several other decisions by way of analogy. (Cf. *Deivachilai Aiyangar* v. *Venkatachariar*[4], *Mallappa* v. *Anant*[5], *Subba Goundan* v. *Krishnamachari*[6], *Vadivelam* v. *Natesam*[7], *Bhirgu Nath Chaube* v. *Narsingh Tiwari*[8], *Ramaswami Aiyar* v. *Venkatarama Aiyar*[9], *Visweswara Rao* v. *Surya Rao*[10], *Subraya Bhatta* v. *Sripathi Bhatta*[11], *Satgur Prasad* v. *Mahant Har Narain Das*[12] and *Nagappa Chettiar* v. *Brahadambal Ammani*[13].) Some of these decisions proceed on the footing that being in the nature of damages, mesne profits may be awarded according to the justice of the case without reference to any hard and fast rule. An examination of the other cases seems to us to suggest that it may not be right to place all cases of what are described as 'voidable' alienations on one and the same footing for the purpose of determining the right of a successful plaintiff to mesne profits. As pointed out by the Judicial Committee in *Satgur Prasad* v. *Mahant Har Narain Das*[12], a voidable trans-

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1. (1920) 61 I.C 543.
2. (1918) L.R. 45 I.A. 284: I.L.R. 41 All. 63 (P.C.).
3. (1919) 53 I.C. 412.
4. (1925) 49 M.L.J. 317.
5. A.I.R. 1936 Bom. 386.
6. (1921) 42 M.L.J. 372: I.L.R. 45 Mad. 449.
7. (1912) 23 M.L.J. 256: I.L R. 37 Mad. 435.
8. (1916) I.L R. 39 All. 61.
9. (1923) 45 M.L.J. 203: I.L.R. 46 Mad. 815.
10. (1935) 70 M.L.J. 360: I.L.R. 59 Mad. 667.
11. (1928) M.W.N. 51.
12. (1932) 62 M.L.J. 451: L.R. 59 I.A. 147: I.L.R. 7 Luck. 64 (P.C.).
13. (1935) 68 M.L.J. 452: L.R. 62 I.A. 70: I.L.R. 58 Mad. 350 (P.C.).

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action does not necessarily and always imply a good title until avoided. Speaking of a widow's alienation, their Lordships explained in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[1] the sense in which it is to be regarded as voidable. They point out that it was not absolutely void in the sense that it could not even be ratified by the reversioner; they went on to add that the reversioner might at his pleasure treat it as a *nullity* without the intervention of any Court and he showed his election to do the latter, by commencing an action to recover possession of the property. They emphasised a principle which they thought had been lost sight of by the High Court when applying Art. 91 of the Limitation Act to such a transaction and they stated that in such a case there was nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. The observations in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*[2] have to be understood in the light of these observations. Alienations by a father in a Mitakshara joint family and by the guardian of a minor might well be placed on a different footing; and it is significant in this connection to note that while Arts. 44 and 126 of the Limitation Act describe the suits there dealt with as suits to set aside an alienation, the language of Art. 141, which applies to suits by reversioners, is very different. The article merely refers to a suit for possession and does not suggest that the reversioner has got to set aside any transaction before he becomes entitled to possession. We are accordingly of opinion that there is no necessary inconsistency between *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*[2] and *Banwari Lal* v. *Mahesh*[3] and that in the present case the rule applicable is that laid down in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*[2].

In the above view, the plaintiff will be entitled to mesne profits for three years prior to the date of the institution of the suit. The learned Subordinate Judge has assessed these profits at Rs. 359 per annum and found that for the three years prior to suit, plaintiff was entitled to Rs. 1,077. As we are not allowing any mesne profits in plaintiff's favour for the period of two years between the widow's death and the commencement

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1. (1907) 17 M.L.J. 154: L.R. 34 I.A. 87: I.L.R. 34 Cal. 329 (P.C.).
2. (1908) 18 M.L.J. 100: L.R. 35 I.A. 48: I.L.R. 35 Cal. 420 (P.C.).
3. (1918) L.R. 45 I.A. 284: I.L.R. 41 All. 63 (P.C.).

of three years prior to the date of the institution of the suit; no interest need be allowed in defendant's favour either during that period. Against the sum of Rs. 1,077 interest at 6 per cent. per annum on Rs. 2,200 will be set off and the balance deducted from the principal amount of Rs. 2,200. The balance thus ascertained will carry interest from the date of suit at 6 per cent. per annum, but as against it, the defendants will be liable for mesne profits at the rate allowed by the lower Court for future mesne profits. The right to the amount thus found payable by the plaintiff as well as the liability for the mesne profits will be worked out as between the various sets of defendants in the proportion indicated in paragraph 30 of the lower Court's judgment.

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We direct the appellants to pay one half of the costs of this appeal to be divided between the contesting defendants. In the lower Court also, the plaintiff will be entitled to one half of his costs to be apportioned in the manner indicated in its decree. So far as parties who have died during the pendency of the appeal are concerned, the decree of the lower Court will stand confirmed except in cases where legal representatives have been duly brought on record.

S.V.V. ——— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

The Board of Commissioners for Hindu Religious Endowments, Madras .. *Appellant** (*Defendant*)

v.

His Holiness Sri Vidyaranya Satchidananda Abhinava Sankara Bharathi Swamulu Varu, Trustee of Sri Virupakshaswaraswami, etc., Temples at Hampi .. *Respondent* (*Plaintiff*).

Board of Commissioners for H. R. E., Madras *v.* Trustee of Sri Virupakshaswaraswami, etc., Temples at Hampi.

Madras Hindu Religious Endowments Act (II of 1927), S. 63 (2)—Framing of scheme—Power of Board to appoint additional trustees—Provision in Amending Act XII of 1935—Whether takes retrospective effect—Appointment of manager with large powers—Rights of hereditary trustee cut down—Validity of appointment.

Under cl. (2) of S. 63 of the Madras Hindu Religious Endowments Act of 1927 the Board has no power to appoint additional or associate trustees.

* Appeal No. 317 of 1935. 24th March, 1939.

Board of Commissioners for H. R. E., Madras v. Trustee of Sri Virupakshaswaraswami, etc., Temples at Hampi.

And the provision in the Amending Act XII of 1935 which permits such appointment does not take retrospective effect.

Naranna Naidu v. *Venkataramayya*, (1934) 68 M.L.J. 722: I.L.R. 58 Mad. 862, relied on.

Where in framing a scheme the Board appointed a manager with large powers and it appeared that if the appointment should be allowed to remain the powers of the hereditary trustee would be effectively set at naught,

Held; that the provision in the scheme appointing the manager with important duties of management was *ultra vires* of the Board because it had the effect of placing the management of the institution in the hands of some one not appointed by the trustee and not responsible to him, and would thus displace the trustee from management.

Appeal against the decree of the District Court of Bellary in O. S. No. 5 of 1934.

P. V. Rajamannar for Appellant.

P. Chandra Reddi for Respondent.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This is an appeal by the Board of Commissioners for Hindu Religious Endowments, Madras, from the decree of the District Judge of Bellary dated 18th February, 1935, in O. S. No. 5 of 1934, a suit by the trustee of Sri Virupakshaswaraswami, etc., temples at Hampi in Hospet taluk against the Board for cancelling or modifying a certain scheme framed by the Board on the 4th August, 1933. It was alleged in the plaint that the Board had no power to frame the scheme and that in any case there was no justification for the framing of a scheme. This formed the subject-matter of the first issue in the suit. That allegation, however, was withdrawn at the trial and the Court below has found that a scheme was necessary and the need for a scheme is not now questioned before us on behalf of the respondent.

The appeal relates to two matters, namely, the appointment of additional or associate trustees provided in the scheme and the appointment of a manager by the Board and the allotment of certain duties to him in the scheme. As regards these two matters the learned District Judge was of opinion that the provisions in the scheme relating thereto were *ultra vires* of the Board and accordingly directed the deletion of those parts of the scheme which related to these matters. As regards the appointment of additional or associate trustees, though under the Act as amended by Act XII of 1935 such an appointment is allowed in terms, nevertheless, before the Act was amended, that is to say, when the scheme now under discussion was

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framed by the Board, no such power had been expressly conferred on the Board. On the other hand, in construing cl. 2 of S. 63 of the Act of 1927, a Bench of this Court held in *Naranna Naidu* v. *Venkataramayya*[1], that the Board had no power to appoint additional or associate trustees. We see no reason to differ from that decision as regards the interpretation of this particular provision of the law in question as it stood before the Act was amended. The amending Act does not say that the amendment shall have retrospective effect or that the law must be deemed to have been always as laid down in the amending Act. It was perfectly open to the legislature to have declared its intention to make the new provision retrospective if it had that intention. The amending Act does not, however, disclose any such intention and we are unable to see any reason for departing from the general rule against giving retrospective effect to legislation. The learned District Judge was therefore right in coming to the conclusion that the appointment of additional or associate trustees is *ultra vires* of the Board. Though he does not quote the Bench decision above referred to, it is probable he had it in mind.

As regards the second point, the appointment of a manager by the Board and the allotment of certain important duties to him under the scheme, the provisions in the scheme are such that, if they are allowed to remain, the powers of the hereditary trustee could be practically set at naught and what could not be done directly would be allowed to be done indirectly by the appointment of a manager by the Board and entrusting all the most important duties of management to him under the scheme itself, he being removable only by the Board. These provisions would reduce the powers of the trustee to a cipher, or at least the provisions may be so worked as to produce this result; and we are of opinion that in this view the provisions in the scheme relating to the appointment of a manager by the Board and the allotment of important duties of management to him must also be deemed to be *ultra vires* because they have the effect of placing the management of the institution in the hands of some one not appointed by the trustee and not responsible to him, and would thus in fact displace the trustee from the management of the affairs of the temple. Nevertheless it is but right that we should express our view that the trustee would do well to

1. (1934) 68 M.L.J. 722: I.L.R. 58 Mad. 862.

Board of Commissioners for H. R. E., Madras *v.* Trustee of Sri Virupakshaswaraswami, etc., Temples at Hampi.

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see that an efficient man is appointed as local manager to look after the actual management of the affairs of the temple as it would appear that the trustee himself is not in a position to look after the management personally throughout, and we wish to make it clear that if there is any mismanagement of the affairs of the institution in future the powers of the Board to rectify such mismanagement will remain unaffected by the result of this appeal.

It follows from what we have said that the appeal must fail as both the points raised have to be decided against the appellant. The appeal is accordingly dismissed with costs.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

S. Viswanatha Aiyar and others .. *Appellants** (*Petitioners*)

v.

Narayanaswami Aiyar and another.. *Respondents* (*Respondents*).

Viswanatha Aiyar *v.* Narayanaswami Aiyar.

Madras Agriculturists Relief Act (IV of 1938), S. 23—Order under—Appealability—Application whether falls under S. 47, Civil Procedure Code (V of 1908).

No appeal lies from an order under S. 23 of the Madras Agriculturists Relief Act (IV of 1938). And the question decided by such an application not being one relating to the execution, discharge or satisfaction of the decree, S. 47, Civil Procedure Code, is inapplicable

Appeal against the order of the Court of the Subordinate Judge of Tanjore dated 7th October, 1938, and made in E. A. No. 167 of 1938 in E. P. No. 79 of 1937 in O. S. No. 14 of 1936.

N. Suryanarayana for Appellants.

S. Thiagaraja Aiyar and *S. Narasimha Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—We uphold the preliminary objection that no appeal lies from the order under S. 23 of the Madras Act IV of 1938. This is not a question relating to the execution, discharge or satisfaction of the decree under S. 47 of the Civil Procedure Code.

* A. A. O. No. 471 of 1938. 27th April, 1939.

Viswanatha Aiyar v. Narayanaswami Aiyar.

Moreover, on the merits, the appellants have no case. They had no interest in the 8th item of property sold, either at the time of the sale or even at the time the suit was filed. They had parted with all their interest in the 8th item in 1931, at least five years before the suit was filed.

This appeal is dismissed with costs of the respondents (two sets).

We are asked to treat this as a Civil Revision Petition but there is no question of jurisdiction and we are unable to accede to this request.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Gooru Narayana and another .. *Petitioners* (Petitioners—Defendants 2 and 3)*

v.

Vaikuntam Chinna Lakshmayya .. *Respondent (Counter-Petitioner—Plaintiff).*

Narayana v. Lakshmayya.

Practice—Affidavit evidence—Objection by one party—Procedure—Examination of witnesses necessary—Civil Procedure Code (V of 1908), O. 33.

Affidavits cannot properly be acted upon unless both parties agree to have them treated as evidence. Where in an application for leave to file an appeal *in forma pauperis* the affidavits filed in support of the petition are objected to, the proper course is to summon the witnesses.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Bellary dated 12th March, 1937, and made in O. P. No. 58 of 1936 (petition for permission on behalf of the minor petitioners to prefer an appeal *in forma pauperis* to the District Court, Bellary, against the decree in O. S. No. 355 of 1936 on the file of the Additional District Munsif, Bellary).

A. Gopalacharyulu for Petitioners.

The Government Pleader (B. Sitarama Rao) and *K. R. Gupta* for Respondent.

The Court delivered the following

JUDGMENT.—The learned District Judge ought, I think, to have summoned the witnesses, since the petitioners objected to

* C. R. P. No. 463 of 1937. 29th July, 1938.

Narayana v. Lakshmayya

the statements of the Reddi and the Karnam. Affidavits cannot properly be acted upon unless both parties agree to have them treated as evidence. The order will be set aside and the petition restored to file for disposal according to law as provided for in O. 33 of the Civil Procedure Code. The costs of this petition will abide and follow the result.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Vellayya Konar (died) and another .. *Appellants* (Plaintiff and his legal representative)*

v.

Ramaswami Konar and another ..*Respondents (Defendants).*

Vellayya Konar v. Ramaswami Konar.

Court-Fees Act (VII of 1870 as amended in Madras), S. 7 (iv-A) and Sch. II, Art. 17-A—Applicability—Suit by creditor under S. 53, Transfer of Property Act, 1882—Prayer for declaration—Court-fee payable—Distinction between suits by parties to deed or decree and by third parties.

A suit by a creditor under S. 53 of the Transfer of Property Act for a declaration that an alienation by the debtor is void against the creditors is not a suit for cancellation of a document securing money or property falling under S. 7 (iv-A) of the Court-Fees Act as amended in Madras, but is one to obtain a declaration that so far as plaintiff is concerned the transfer is not binding, and it is leviable to court-fee under Art. 17-A of Sch. II of the said Act.

When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then he must get that decree or deed cancelled or declared void *in toto*, and his suit is in substance a suit for the cancellation of the decree or deed, even though it be framed as a suit for a declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled *in toto*. That is a thing which can only be done by parties to the decree or deed, or their representatives. His proper remedy in order to clear the way with a view to establish his title is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must in that case sue for a declaration and not for the cancellation of the decree or deed.

Unni v. *Kunchi Amma*, (1890) I.L.R. 14 Mad. 26; *Chathu Kutty Nair* v. *Chathu Kutty Nair*, (1923) 19 L.W. 249 and *Venkatasiva Rao* v. *Satyanarayanamurthi*, (1932) 63 M.L.J. 764: I.L.R. 56 Mad. 212, relied on.

Venkatakrishniah v. *Alli Sahib*, A.I.R. 1938 Mad. 921, distinguished.

* S.A. No. 959 of 1935. 3rd April, 1939.

Vellayya Konar v. Ramaswami Konar.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in A. S. No. 115 of 1934 preferred against the decree of the District Munsif of Koilpatti in O. S. No. 60 of 1934.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Appellants.

S. Ramaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The question raised in this appeal is whether a suit brought by a creditor under S. 53 of the Transfer of Property Act for a declaration that an alienation by the debtor is void against the creditors is a suit for cancellation of a document securing money or property falling under S. 7 (iv-A) of the Court-Fees Act as amended in Madras, or whether it is a suit to obtain a declaration where no consequential relief is prayed, falling under Art. 17-A of Sch. II of the same Act. Both the Courts below have found that the suit falls under S. 7 (iv-A). The plaint recites that the properties in suit are in the possession and enjoyment of the second defendant against whom the plaintiff got a decree on a promissory note, the suit being filed on 2nd August, 1924 and decreed on 12th November, 1924. It is alleged that on 19th June, 1924, the second defendant, collusively and with a view to cheat the plaintiff's claim, executed a sale deed in favour of his brother-in-law, the first defendant, conveying all his properties *benami* and for no valid consideration, there being no intention that the sale deed should be given effect to. The plaintiff therefore prays for a declaration that the properties conveyed to the first defendant are liable to be attached in realisation of the decree debt obtained by the plaintiff against the second defendant and the plaint recites that the plaintiff sues for himself and as representing the other creditors of the second defendant. The judgments of both the Courts below seems to me to have proceeded on a misunderstanding of the cases quoted, one case in particular being quoted under one reference as supporting the plaintiff and the same case under another reference as supporting the contesting defendants and both the learned Judges seem not to have grasped the difference between a suit for the cancellation of an instrument and a suit for a declaration that the instrument is not binding upon the plaintiff. Leaving aside for the moment the complication due to the fact that the plaintiff in this suit sues in a representative capacity, the distinction between

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the two classes of suits seems to me to be well established by the decisions. When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void *in toto* and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled *in toto*. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy therefore, in order to clear the way with a view to establish his title is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed. This distinction was made clear in *Unni* v. *Kunchi Ammal*[1], which is followed in *Chathu Kutty Nair* v. *Chathu Kutty Nair*[2], and the distinction is clearly observed in the cases quoted by the Court below, except that there is some obscurity arising from a decision of Ramesam, J., in *Balakrishna Nair* v. *Vishnu Nambudiri*[3], where though the learned Judge quite clearly has this distinction in mind, he frames his formula in rather more general terms than were perhaps desirable and on those grounds has been criticised by the Bench which decided the case of *Venkatasiva Rao* v. *Satyanarayanamurthi*[4]. My attention has not been drawn to any decision which throws any real doubt on the general proposition that when a person seeks to establish title which cannot be established without removing a decree or an instrument to which he is himself a party, then whatever be the garb in which he dresses his suit, its substantial character must be a suit for the cancellation of the decree or instrument; but if the establishment of his title is being impeded by the effect of a transaction between other parties, he cannot legitimately ask for the cancellation of that transaction but can only ask for a declaration that so far as he is concerned, it is not binding.

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1. (1890) I.L.R. 14 Mad. 26. 2. (1923) 19 L.W. 249.
3. (1930) M.W.N. 509.
4. (1932) 63 M.L.J. 764: I.L.R. 56 Mad. 212.

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The respondent has quoted a decision of mine reported in *Venkatakrishniah* v. *Alli Sahib*[1], which on the facts falls clearly within the rule laid down in the decisions which I have quoted. It was a case of a minor whose lawful guardian on his behalf made an alienation, which the minor on attaining majority wished to get rid of as a preliminary to recovering possession of the properties alienated. He was through his guardian a party to the alienation and necessarily had to get the conveyance cancelled before he could get possession of the properties. The document of alienation, as I then stated, was an insuperable obstacle to the prayer for possession and it had to be declared void or cancelled. Therefore, the relief came under S. 7 (iv-A) of the Court-Fees Act. Now on the basis of my observations in that case, it is contended that here the alienation from the second defendant to the first defendant is an insuperable obstacle to the attachment of the property as the properties of the second defendant in execution of a decree against the second defendant and that therefore the relief which the plaintiff prays for is in effect the relief of cancellation; more especially as the suit is filed not only in the interests of the plaintiff himself but also of the other creditors, namely, of the second defendant. It seems to me however that the same rule must be applied to suits under S. 53 of the Transfer of Property Act. The matter is made clear by taking an extreme case. Suppose that the creditors together have debts amounting to Rs. 10,000 and that in fraud of the creditors the debtor alienates properties worth Rs. 50,000, are we to take it that the creditors by their suit under S. 53 of the Transfer of Property Act are entitled or required to pray for the cancellation of this alienation *in toto*? I do not think that they are. The form of the prayer would be for a declaration that the alienation is not binding or is void so far as the creditors are concerned. Except in so far as the creditors are concerned the alienation will stand and the creditors have no power to ask for its complete cancellation. The only circumstances in which a suit under S. 53 of the Transfer of Property Act would in effect bring about the complete avoidance of the transfer would be in the case when the value of the properties alienated is less than the amount of debts. But as between the alienor and the alienee, the transfer stands, subject

1. A.I.R. 1938 Mad. 921.

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only to the right of the creditors, established by the decree, to enforce their debts by the sale of the property just as if the transfer had not been made. What the creditors therefore seek is not the cancellation of the sale, but a declaration that it is not valid so far as their claims are concerned. In other respects, it may be perfectly good; that is a matter which does not concern the creditors; and the fact that they are creditors and that this transaction was entered into with the motive of defrauding them would not give them the right to have the sale cancelled except to the extent to which they have been defrauded. From this reasoning it seems to me to follow that the proper prayer in such a suit as that now filed is a prayer for a declaration that the sale is not binding upon the creditors to the extent of their debts and not a prayer for the cancellation of the sale-deed.

In this view, I hold that the suit falls in substance under Art. 17-A (1) of the Second Schedule of the Court-Fees Act and that the plaint has been wrongfully rejected by the Courts below. The appeal is therefore allowed and the suit remanded to the trial Court. Costs throughout will abide by the result of the suit. Court-fee paid here and in the lower appellate Court to be refunded.

B. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Karuppiah Kone .. *Petitioner* (Complainant)*

v.

Chitran Servai and others .. *Respondents (Accused).*

Karuppiah Kone v. Chitran Servai.

Indian Penal Code (XLV of 1860), Ss. 352 and 353—Voluntary hurt to process-server while discharging his duties—Conviction by Taluq Magistrate—Order of retrial by Joint Magistrate in the circumstances of the case—Order not wrong.

Where a process-server of a Court was belaboured by the accused and the Taluq Magistrate convicted the accused under Ss. 225, 323 and 353 of the Indian Penal Code, but on objection raised before the Joint Magistrate that since the facts disclosed made the case not only one coming under S. 353 but also S. 352 of the Indian Penal Code, which was not cognisable by the Taluq Magistrate he ordered retrial,

Held, that the evidence disclosed a voluntary hurt to a public servant while discharging his duty and the Joint Magistrate's order was not wrong in the circumstances.

* Crl. R. C. No. 713 of 1938. (Crl. R. P. No. 678 of 1938). 5th January, 1939.

Karuppiah Kone v. Chitran Servai.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Ramnad Division dated 8th March, 1938 and passed in Criminal Appeal No. 5 of 1938 preferred against the judgment of the Court of the Taluq Magistrate of Sivaganga in C. C. No. 19 of 1937.

V. Ramaswami Aiyar for Petitioner.

K. Venkataraghavachari for *The Public Prosecutor* on behalf of the Crown.

Respondents not represented.

The Court made the following

ORDER.—The complainant in the case is the petitioner before me. He is a process-server and the case for the prosecution was that he and another person, namely, P. W. 2 in the case, were beaten and that they received injuries when the complainant was about to effect the arrest of the first accused in pursuance of a warrant. There appear to have been two complaints, one by the process-server and another by P. W. 2 and they were both inquired into at the same time by the Taluq Magistrate of Sivaganga who convicted the three accused under Ss. 225, 323, Indian Penal Code, two of the three accused being also convicted under S. 353, Indian Penal Code.

On appeal by the accused the Joint Magistrate of Ramnad without going into the merits of the case ordered a retrial, presumably after reversing the convictions and sentences on the ground that the offence disclosed against accused 2 and 3 was not merely an offence under S. 353, Indian Penal Code, which was within the cognisance of the Taluq Magistrate but an offence under S. 352 which is not within his cognisance. I am unable to say after going through the evidence that the view of the Joint Magistrate is wrong though it must not be understood that I concur in his opinion that the Taluq Magistrate acted without jurisdiction. I concur in his view that the facts disclose the voluntary causing of hurt to P. W. 1, a process-server while he was discharging his duty as a public servant. The Medical certificate obtained by the process-server shows that he had five abrasions and one contusion on the back. There are sufficient *prima facie* evidence of the causing of hurt and the circumstances do not suggest that the hurt was caused otherwise than volun-

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tarily. In these circumstances I see no reason to interfere with the judgment of the Joint Magistrate. The petition is therefore dismissed.

K. C. —— *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.

PRESENT:—LORD THANKERTON, LORD PORTER AND SIR GEORGE LOWNDES.

C. P. Matthen and others .. *Appellants**

v.

The District Magistrate of Trivandrum and another .. *Respondents.*

P.C. Matthen v. District Magistrate of Trivandrum.

Habeas corpus—*Common law prerogative writ in matters contemplated by S. 491 of the Code of Criminal Procedure (V of 1898)—Jurisdiction of the High Court to issue—High Courts Act (1861) and Act X of 1875—Effect—Competency of a single Judge of the High Court to issue such writs—Madras High Court Appellate Side Rules, r. 2-A—Effect—Applications for directions under S. 491, Criminal Procedure Code—If covered by "All applications for issue of* habeas corpus" *in r. 2-A—Person entitled to obtain custody of the accused*—Locus standi *of to intervene in proceedings for writ of* habeas corpus *and competence to present petition for questioning rule* nisi *—Indian Extradition Act (XV of 1903), S. 7—Warrant under—Form of warrant—Essentials—Objections to validity—Procedure—Absence of date on warrant—Effect.*

Warrants (reciting that the accused stood charged with offences punishable under sections of the Travancore Penal Code corresponding to Ss. 409, 418, 420, 477-A, 109 and 114 of the Indian Penal Code) were issued by the Resident for the Madras States under S. 7 of the Indian Extradition Act (XV of 1903) to the Presidency Magistrate, Madras (the second respondent) directing him to apprehend and surrender the appellants to the Frontier police station of the Travancore State for production before the District Magistrate, Trivandrum (the first respondent). The warrants were not dated.

A petition under S. 491 of the Criminal Procedure Code, for a writ of *habeas corpus* and, another petition asking for stay of execution of the warrant were presented by the sons of the first and second appellants to a Judge of the High Court, Madras, at his residence. Interim stay was ordered and the appellants were remanded to custody pending further orders. On the same day the Crown Prosecutor presented a petition praying that the stay order should be vacated on the ground mainly that jurisdiction under S. 491 of the Criminal Procedure Code could not be exercised by a single Judge according to r. 2-A of the Appellate Side Rules of the Madras High Court. The Judge (Pandrang Row, J.) following In re *Govindan Nair*, (1922) 43 M.L.J. 396: I.L.R. 45 Mad. 922 (F.B.), held that jurisdiction to issue the common law writ existed and vested in each of the Judges of the High Court and refused to vacate the order. The Bench (Burn and Stodart, JJ.) before whom the petition under S 491 of the Criminal Procedure Code came

* P.C. Appeal No. 102 of 1938. 6th June, 1939.

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up refused to proceed with it as Pandrang Row, J., was seized of it. Then Pandrang Row, J., heard the petition and issued a writ *nisi* to the second respondent on 26th October, 1938, returnable on 28th October, 1938, before himself. The first respondent presented a petition on the 26th October, 1938, under S. 561 (A) of the Code of Criminal Procedure and S. 223 of the Government of India Act praying that the orders of Pandrang Row, J., should be quashed as having been made without jurisdiction. On this petition the Bench (Burn and Stodart, JJ.) stayed further proceedings in the petition for issue of a writ of *habeas corpus* and referred the questions of law to a Full Bench, which *held* that In re *Govindan Nair*, (1922) 43 M.L J. 396: I.L.R. 45 Mad. 922 (F.B.), must be overruled and "(*i*) the common law writ of *habeas corpus* does not run in British India in a case like this. Assuming that the Court formerly had the power to issue such a writ in a case like this that power has been taken away and powers conferred by S. 491 of the Code of Criminal Procedure substituted. (*ii*) Rr. 2 and 2-A of the Appellate Side Rules of the Madras High Court are *intra vires* the Court's powers. (*iii*) Pandrang Row J.'s order issuing a rule *nisi* was passed without jurisdiction and consequently null and void. (*iv*) The petition under S. 491, Criminal Procedure Code, must be dealt with by the Criminal Bench. The Criminal Bench then heard and dismissed the petition under S. 491, Criminal Procedure Code.

On appeal against those judgments,

Held, (*i*) the first respondent being entitled to vindicate his right to obtain the custody of the appellants has a *locus standi* to intervene in the petition for the issue of a writ of *habeas corpus* and his petition to have the order *nisi* quashed was competently presented by him.

(*ii*) The High Courts Act, 1861, authorised the Legislature to take away and the Acts of the Legislature passed in 1875 and subsequent years have taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by S. 491 of the Code of Criminal Procedure, 1898 [*Girindra Nath Banerjee* v. *Birendra Nath Pal*, (1927) I.L.R. 54 Cal. 727, approved] and the petition must be treated as an application under S. 491 of the Code of Criminal Procedure.

(*iii*) "All applications for writ of *habeas corpus*" in r. 2-A of the Madras High Court Appellate Side Rules covers applications for directions under S. 491 of the Code and a single judge has no jurisdiction to deal with such applications.

(*iv*) Where the persons, against whom warrants under the Indian Extradition Act have been issued by the Agent of the Government of India suggest that the Resident did not satisfy himself by preliminary inquiry or otherwise that there is *prima facie* a case against the accused, it would not properly be the subject of inquiry by the Court, but should be stated to the Magistrate on an application to him to report to the Local Government under S. 8 (A) of the Extradition Act.

(*v*) No form of warrant is prescribed in the Act or the rules and where the warrant clearly describes the offences charged with it is sufficient. A "Police Station" is a perfectly lucid description of the authority to whom the surrender is to be made and while it will be the usual and better practices to date the warrants no provision in the Act or the rules appears to require that the warrants must be dated.

Appeal from the judgment[1] of (1) the Full Bench of the High Court, Madras, dated 4th November, 1938 (*Sir Alfred*

1. (1939) 2 M.L.J. 135.

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Henry Lionel Leach, C. J., Madhavan Nair, Varadachariar, Wadsworth and Lakshmana Rao, JJ.); (2) a judgment of the Division Bench implementing a judgment of the Full Bench; and (3) a consequential judgment[1] of that bench dismissing an application for a writ of *habeas corpus* of 7th November, 1938 (*Burn and Stodart, JJ.*).

D. N. Pritt, K.C., C. Sidney Smith and *Krishna Menon* for Appellants.

Sir William Jowitt, K.C. and *John Foster* for 1st Respondent.

J. M. Tucker, K.C., W. Wallach and *J. Megaw* for 2nd Respondent.

The facts appear fully from the reports of the High Court judgments 1 and 2.

6th June, 1939. Their Lordships' judgment giving their reasons for dismissing the appeal on 3rd April, 1939, was delivered by

Lord Thankerton.

LORD THANKERTON. This is an appeal from (1) a judgment[2] of the Full Bench of the High Court of Madras, dated the 4th November, 1938, in Criminal Miscellaneous Petition No. 1003 of 1938, which, on a reference by a Division Bench of the same Court, held that the orders of Pandrang Row, J., a single Judge of the Court, on an application for writ of *habeas corpus* and relative applications, and dated the 21st, 24th and 26th October, 1938, made in Criminal Miscellaneous Petitions Nos. 986, 990 and 985 of 1938 respectively, were null and void; (2) a judgment and order of the said Division Bench, dated the 7th November, 1938, made in petition No. 1003 in implement of the above judgment; and (3) a judgment and order of the said Division Bench, dated the 7th November, 1938, made in petition No. 985, dismissing the application for a writ of *habeas corpus*.

The appellants challenge the validity of certain warrants issued by the Resident for the Madras States under S. 7 of the Indian Extradition Act (XV of 1903) to the Chief Presidency Magistrate of Madras, under which they were arrested, and they ask to be discharged. The course of procedure which has been followed has raised important questions as to the jurisdiction of the High Court of Madras to issue a writ of *habeas*

1. (1939) 2 M.L.J. 169. 2. (1939) 2 M.L.J. 135.

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corpus in the present case, and as to the competency of a single Judge of the High Court to issue such a writ or the analogous writ under S. 491 of the Code of Criminal Procedure (V of 1898).

* * * *

[After setting out the facts and course of proceedings in the High Court their Lordships continued.]

This appeal is taken against (1) the judgment of the Full Bench, dated the 4th November, 1938, on the questions referred to them in petition No. 1003, (2) the judgment of the Division Bench, dated the 7th November, 1938, in petition No. 1003, and (3) the judgment of the Division Bench, dated the 7th November, 1938, dismissing petition No. 985.

Counsel for the appellants submitted four contentions, namely:—

1. That the first respondent had no *locus standi* in the matter raised in the appellants' petition No. 985, and that, for the same reason, his petition No. 1003 was incompetent and should not have been entertained.

2. That rr. 2 and 2 (*a*) of the Appellate Side Rules were *ultra vires*, or, in any event, were not applicable to the present case.

3. That the warrants were illegal and invalid for the following reasons, (*a*) that there is definite jurisdiction in the High Court to examine, on evidence, whether the conditions laid down by the Extradition Act and the rules made thereunder for issue of the warrants have been complied with, (*b*) that, when thus examined, it would be found that such conditions had not been complied with, (*c*) that, in any event, the warrants were *ex facie* invalid, in respect that—

(i) they did not show that the conditions had been complied with,

(ii) that they did not show sufficiently with what offences the appellants were charged, or when they were committed,

(iii) that they did not sufficiently show where and to whom the appellants were to be delivered up, and

(iv) that they were undated.

4. That jurisdiction to issue the common law writ of *habeas corpus* in a case such as the present still subsisted, and

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that Pandrang Row, J., had jurisdiction to order the issue of the writ *nisi*.

On the first contention, their Lordships are clearly of opinion that the first respondent was entitled to intervene in the appellants' petition No. 985, and that the petition No. 1003 was competently presented by him. Counsel for the appellants referred to the rules made by the Governor-General in Council, under S. 22 of the Indian Extradition Act, 1903, as to the Procedure of Political Agents for Surrender of Accused Persons to Native States (No. 1862 I. A., dated the 13th May, 1904), and in particular r. 2, which provides as follows:—

"2. The Political Agent shall not issue a warrant under S. 7 of the said Act except on a request preferred to him in writing either by or by the authority of the person for the time being administering the Executive Government of the State for which he is a Political Agent, or by any Court within such State which has been specified in this behalf by the Governor-General in Council, or by the Governor of Madras or Bombay in Council, as the case may be, by notification in the official Gazette".

He maintained that the only parties who were entitled to take part in the proceedings relative to the warrants in the present case were (*a*) the appellants, (*b*) the second respondent, the Chief Presidency Magistrate, (*c*) the British Resident for the Madras States, and (*d*) the Government of Travancore. But their Lordships are of opinion that the terms of the warrants show that the authority to whom, in terms of S. 7 of the Act, the appellants are to be delivered, is truly the first respondent, who will control their custody, though the police of Travancore at the frontier station will receive the delivery on his behalf. R. 7 of the rules above referred to makes this sufficiently clear; it provides as follows:—

"7. In the case of an accused person made over for trial to the Court of the State, the Political Agent shall satisfy himself that the accused receives a fair trial, and that the punishment inflicted on conviction is not excessive or barbarous; and if he is not so satisfied he shall demand the restoration of the prisoner to his custody, pending the orders of the Governor-General in Council."

It is clear that, if occasion arose for such an application in the present case, it would fall to be made to the Court of the first respondent. Their Lordships are of opinion that the first respondent is entitled to vindicate his right to obtain the custody of the appellants, and that this contention of the appellants fails.

It will be convenient to dispose next of the fourth contention of the appellants. On this point their Lordships agree

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with the conclusions of the Full Bench in the present case which are stated in the judgment delivered by the learned Chief Justice as follows:—

"The High Courts Act of 1861 authorised the Legislature if it thought fit to take away the powers which this Court obtained as the successor of the Supreme Court, and Acts of the Legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the Legislature has taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by S. 491 of the Code of Criminal Procedure of 1898."

Indeed counsel for the appellants stated that he found difficulty in pressing this contention, and the reasoning of the learned Chief Justice, on which he based the above conclusion, is so clear and convincing, including his narration of the legislative Acts referred to in his conclusion, that their Lordships are content to adopt it, as also to state that, like the learned Chief Justice, they are in entire agreement with the judgment of Rankin, C.J., in *Girindra Nath Banerjee* v. *Birendra Nath Pal*1. Accordingly the appellants' fourth contention also fails. It follows that the appellants' petition No. 985 must be treated as an application under S. 491 of the Code of Criminal Procedure.

The second contention of the appellants related to the Appellate Side Rules of the Madras High Court. S. 491 of the Code of Criminal Procedure, so far as material, provides:—

"491.—(1) Any High Court may, whenever it thinks fit, direct—

(*b*) that a person illegally or improperly detained in public or private custody within such limits" (*i.e*, the limits of its appellate criminal jurisdiction) "be set at liberty;

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section."

The material rules of the Appellate Side Rules are as follows:—

"2. The following matters may be heard and determined by a Bench of two Judges provided that if both Judges agree that the determination involves a question of law they may order that the matter, or question of law, be referred to a Full Bench:—

. . . .

(4) (*c*) for issue of a writ of *habeas corpus*.

2-A. All applications for writ of *habeas corpus* shall go before a Bench of Judges dealing with criminal work."

In view of their Lordships' opinion, already expressed, as to the incompetence of the issue of a common law writ in the present case, the appellants' contention, that these rules are

1. (1927) I.L.R. 54 Cal. 727.

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ultra vires' so far as they affect the issue of such a writ, does not arise, but the appellants maintain that, on proper construction, these rules do not apply to an application for directions under S. 491, which they maintain is not covered by the words "all applications for writ of *habeas corpus*." Their Lordships are unable to accept this contention, and their view is confirmed by the terms of the statutory notifications in the Fort St. George Gazette as to r. 2-A, which first appeared in a somewhat different form in the Gazette, 1925, Part II, p. 307, under date the 3rd January, 1925, in which it is expressly described as an amendment to the rules regulating proceedings under S. 491 (1) of the Code of Criminal Procedure, and it was as follows, "All applications for writ of *habeas corpus* shall go before a Bench of three Judges, of which the Chief Justice, unless otherwise ordered, shall be one". The alteration of the rule to its present form appeared in the Gazette, 1929, Part II, p. 1309, under date the 17th August, 1929, and the description of the amendment is identical with that in the earlier notification. Accordingly, Pandrang Row, J., as a single Judge, had no jurisdiction to deal with petition No. 985.

It only remains to deal with the appellants' contentions as to the warrants:—In the first place, they maintained that the Court is entitled to examine, on evidence, whether the conditions laid down by the Extradition Act and the rules made under S. 22 of the Act have been complied with, and that the appellants were entitled to an opportunity to satisfy the Court (*a*) that the offences must have been committed in Madras, and (*b*) that, in reality, the Travancore authorities desired to get the appellants into their jurisdiction in order to charge them with political offences, which would not be extraditable offences. It must be remembered that the warrants are issued by the agent of the Government of India, and not by an agent of the Travancore State, and this executive act is safeguarded in various ways by the Act and by the rules. For instance, r. 4 provides that the Political Agent shall, in all cases before issuing a warrant under S. 7 of the Act, satisfy himself, by preliminary inquiry or otherwise, that there is, *prima facie*, a case against the accused person. The appellants do not suggest that the Resident did not so satisfy himself in the present case. But, if such a suggestion were to be made, their Lordships are of opinion that it would not be properly the subject of inquiry by the Court, but

should be stated to the Magistrate on an application to him to report to the Local Government under S. 8-A of the Extradition Act. Their Lordships see no reason why the offences charged cannot have been committed in Travancore, and what they have stated above directly applies to the suggestion that the true object of the extradition is to enable the appellants to be charged with political offences. It may be added that a bogus trial of the offences, in respect of which the extradition is made, would appear to fall within r. 7, and to make it the duty of the Political Agent, in such an event, to demand the restoration of the prisoners to his custody.

Lastly, the appellants contend that the warrants are illegal *ex facie* in respect (*a*) that they do not sufficiently show with what offences the appellants were charged or when they were committed, (*b*) that they do not sufficiently identify the place where, and the person to whom, the appellants were to be delivered up, and (*c*) that they are undated.

As regards (*a*), no form of warrant is prescribed by the Extradition Act or the rules, and the warrants clearly describe the offences with which the appellants are charged, which is all that is required by the ordinary form of warrant of arrest prescribed by S. 75 and form II of schedule V of the Code of Criminal Procedure. Their Lordships may also refer to the explanation to S. 477-A of the Indian Penal Code. This objection fails. As regards (*b*), S. 7 (1) of the Extradition Act uses the words, "for his arrest and delivery at a place and to a person or authority indicated in the warrant", and their Lordships are of opinion that all that is required is that the place and person shall be sufficiently indicated to enable the Chief Presidency Magistrate, to whom the warrants are addressed, to act in pursuance of such warrants and to give directions accordingly. It is clear that the second respondent has no difficulty in this regard, and, if there were any doubt on the warrants taken by themselves, which their Lordships are not prepared to assume, the matter is placed beyond doubt by the Government of Madras (Home Department) Order No. 1293, 10th March, 1938, under which the Government direct that in future all persons extradited should be handed over at "the nearest frontier police station in the Travancore State". That order was addressed, among others, to the second respondent. There can be no difficulty in identifying the nearest frontier police station

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of the Travancore State for production before the District Magistrate, Trivandrum, and, in their Lordships' opinion, a police station is a perfectly lucid description of the authority to whom the surrender is to be made. Contention (*c*) as to the absence of date also fails, in their Lordships' opinion. While it undoubtedly would be the usual and better practice to date the warrants, no provision in the Act or the rules appears to require directly or implicitly that the warrants must be dated; no period is expressed as running from the date of the warrants. This disposes of all the appellants' objections to the validity of the warrants.

Their Lordships have now stated the reasons which led them on the 3rd April, 1939, humbly to advise His Majesty that the appeal should be dismissed.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Sanderson Lee & Co.* and *The Solicitor, India Office.*

R.C.C. —— *Appeal dismissed.*

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Andra Venkatayya .. *Appellant**

v.

The Official Receiver, Anantapur and another .. *Respondents.*

Venkatayya *v.* Official Receiver, Anantapur.

Appeal—Order of single Judge under S. 75 (3), Provincial Insolvency Act, 1920—Refusal to grant leave to appeal—Appealability.

There is no right of appeal from an order of a single Judge of the High Court refusing to grant leave to appeal from an order falling within S. 75 (3) of the Provincial Insolvency Act.

Madhava Aiyar v. *Muthia Chettiar*, (1916) 5 L.W. 168 and *Ramanayya* v. *Kotayya*, (1929) 57 M.L.J. 398: I.L.R. 52 Mad. 952, relied on.

Appeal under cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice King dated 8th February, 1937 and made in C. M. P. No. 5013 of 1936—petition praying that in the circumstances stated in the Memorandum of Appeal, S. R. No. 27004 of 1936, sought to be preferred to the High Court against the order of the District Court of Anantapur, dated 18th August, 1936 and made in I.A. No. 92 of 1936 in I. P. No. 68

*L.P.A. No. 40 of 1937. 9th March, 1939.

of 1934, leave to appeal against the said order dated 18th August, 1936, to this Court may be granted.

Venkatayya v. Official Receiver, Anantapur.

P. Chandra Reddi for Appellant.

John and Row and *P. Basi Reddi* for Respondents.

The Order of the Court was made by

Leach, C. J.

The Chief Justice.—This is an appeal against an order of King, J., refusing to grant leave to appeal from an order which admittedly falls within S. 75 (3) of the Provincial Insolvency Act. The preliminary objection has been taken that no appeal lies and it is abundantly clear that this objection is well founded. There are two Bench decisions of this Court which are in point—*Madhava Aiyar* v. *Muthia Chettiar*[1] and *Ramanayya* v. *Kotayya*[2]. The first case related to an order which fell within S. 46 (3) of the Provincial Insolvency Act, 1907, which corresponds to S. 75 (3) of the present Act, and in the second case the Court held that there was no appeal from an order refusing to give leave to appeal under cl. 15 of the Letters Patent. There is no difference in principle, here. The law does not recognise a right of appeal from a refusal to grant leave where leave is necessary and therefore this appeal does not lie. The appeal will be dismissed with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GENTLE.

Padalinga Mudaliar .. *Appellant** (*Defendant*)

v.

Arumugha Mudaliar .. *Respondent* (*Plaintiff*).

Padalinga Mudaliar v. Arumugha Mudaliar,

Civil Procedure Code (V of 1908), S. 47, sub-S. (1)—Transferee from purchaser—Later suit—Defendants in the suit purchasing properties subject to mortgage proceedings—Application of S. 47—Suit forbidden.

In a mortgage suit against a father and two minor sons a decree was passed in favour of the mortgagee on 23rd January, 1928. On 1st May, 1931, in execution, properties were put up for sale and purchased by the second plaintiff and the sale certificate granted to him. Delivery of the properties was obtained except one item and because of obstruction from the defendant the purchaser filed an application to remove the obstruction. Subsequently the second plaintiff sold and transferred his rights in the properties to the first plaintiff and the transferee filed an application to remove the resistance of the defendant pertaining to the particular item in his possession. In the meantime another creditor of the mortgagor family obtained a decree in a later Small Cause suit and sold the properties to the defendants who were

1. (1916) 5 L.W. 168.
2. (1929) 57 M.L.J. 398: I.L.R. 52 Mad. 952.

* S. A. No. 510 of 1935. 23rd February, 1939.

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the same as defendants in the mortgage suit. On the question whether S. 47, Civil Procedure Code, would apply to the proceedings mentioned above,

Held, that defendants in the Small Cause suit would have leave to treat the proceedings in the suit as an application made under O. 21, r. 95, Civil Procedure Code, and if any court-fee was necessary by reason of the direction it should be paid within the time fixed.

Parmeshari Din v. *Ram Charan*, (1937) 2 M.L.J. 359 (P.C.), followed.

Defendants purchased in the Court auction in the execution of Small Cause suit properties subject to the mortgage of the previous suit and which belonged to the mortgagors (defendants) and thereby became the representatives of those parties to the suit. The defendants had become within the contemplation of sub-S (1) of S. 47 the representative of a party to the suit. Therefore the present suit is forbidden by that section.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 79 of 1934 preferred against the decree of the Court of the District Munsif of Ambasamudram in O. S. No. 99 of 1933.

B. Pocker and *T. R. Abdul Ghani* for Appellant.

N. Panchanatha Aiyar and *R. Krishnaswami Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—In the suit the claims made by the plaintiff were for a declaration that certain plots of land set out in Ex. H belonged to the plaintiff for recovery of possession of two plots 1-B and 1-D from the defendant and an injunction restraining him from interfering with the plaintiffs' possession of other plots. The first Court decreed the suit in favour of the plaintiff and the appeal to the lower appellate Court was dismissed. The defendant presents this second appeal and contends (1) that a suit does not lie by reason of the provisions of S. 47, Civil Procedure Code, and (2) that on account of the dismissal of an execution application filed by the first plaintiff against the defendant all remedies in the suit are barred.

The facts shortly are as follows:—An adult and two minor members of a Mudaliar family owned certain properties which they mortgaged to the second plaintiff on 26th January, 1923. The mortgagee filed a suit and a decree was passed in O. S. No. 302 of 1927 on 23rd January, 1928. On 1st May, 1931, in execution of the decree the properties were put up for sale and were purchased by the second plaintiff, the sale certificate Ex. C being granted on 26th June, 1931. Delivery of the properties was obtained except one plot 1-B. The defendant obstructed and resisted possession and in consequence the second plaintiff filed a petition to remove the resistance, which was dismissed. On 6th September, 1931, by Ex. A the second plaintiff

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sold all his rights in and his claim to the properties so purchased to the first plaintiff. This plaintiff filed an execution application on 17th October, 1931, to remove the resistance of the defendant in regard to plot 1-B which application was dismissed on 6th January, 1932. It is now necessary to refer to another suit S. C. S. No. 297 of 1928 filed by a stranger against the adult member only of the joint family who was one of the mortgagors in the earlier mentioned mortgage and a decree was obtained. This decree was passed on 3rd May, 1928, a date subsequent to the decree in the earlier mortgage suit. In execution of that decree, the properties belonging to the Mudaliar family were put up for sale and were purchased by the defendant on 20th January, 1930, on which date the sale certificate was granted. The proceedings in respect of the Small Cause suit and the execution for sale of the properties thereunder were subsequent to the decree in the mortgage suit and during the proceedings arising thereout.

The plaintiff not having obtained possession of plots 1-B and 1-D filed the present suit on 19th February, 1932. I propose now to deal with the points of objection made under S. 47 of the Civil Procedure Code, the relevant provisions of which are as follows:—

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. (2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

When the suit and the appeal from the Court of first instance were before the lower appellate Court, this point having been raised, a decision was given in favour of the present respondents, namely, the plaintiffs, following the decisions, *Meyyappa Chetti* v. *Meyyappan Servai*[1] and *Basappa Budappa Halavalad* v. *Bhimangowda Shiddangowda Patil*[2]. Since the disposal of this matter by the lower appellate Court, the point has come before their Lordships of the Privy Council in *Parmeshari Din* v. *Ram Charan*[3] in which it was held that

1. (1921) M.W.N. 698. 2. (1927) I.L.R. 52 Bom. 208.
3. (1937) 2 M.L.J. 359, (P.C.).

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where a person obtains property by a transfer from the defendant *pendente lite*, he should be treated as a representative in interest of the transferor-defendant and he is bound by the result of the decree. And the mere circumstance that he got possession from the defendant in pursuance of a transfer which was invalid as against the plaintiff cannot detract from their rights under the decree. Defendant purchased in the Court auction in execution of the Small Cause decree, the property subject to the mortgage and which belonged to the defendants in the mortgage suit, namely, the members of the Mudaliar family and thereby became the representatives of those parties to the suit. In my view therefore the defendant has become, within the contemplation of sub-S. (1) of S. 47, the representative of a party to the suit. The first plaintiff has purchased from the second plaintiff that person's interest and he has therefore become his representative. The effect of the decision of their Lordships of the Privy Council in *Parmeshari Din* v. *Ram Charan*[1] is dealt with in *Gopal Sattu Tippe* v. *Dnyanu Maruthi Khade*[2] in the observations of Sir Charles Beaumont, the Chief Justice, in the course of his judgment with which I may say with respect I entirely agree. There can be no doubt as to the representative character of the parties in the present suit. Their position is covered, in my opinion, by S. 47, sub-S. (1). The result must be that the present suit is forbidden by that section. The earlier application E. A. No. 715 of 1931 was made under the provisions of O. 21, r. 97 which provides the procedure when obstruction is made to a person who attempts to obtain possession of property. It was dismissed on 6th January, 1932, not on the merits but upon the grounds that the obstruction took place on 2nd August, 1931 and the previous application by the first plaintiff's predecessor-in-title had not been made within 30 days of the obstruction under the provisions of Art. 167 of the Limitation Act. Argument at some length has been addressed by learned counsel on behalf of the respondents regarding the effect of rr. 97, 98, 101 and 103 of O. 21 with which I do not consider it necessary to deal.

The learned Counsel on behalf of the respondents applies to me that in the event of my coming to the conclusion that the present suit was prohibited by the provisions of S. 47, that it should be treated as an application under O. 21, r. 95, Civil

1. (1937) 2 M.L J. 359 (P.C.). 2. I.L.R. (1938) Bom. 649.

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Procedure Code by reason of the provisions of sub-S. (2) of S. 47. Learned counsel on behalf of the appellant has conceded that on 19th February, 1932, the date when this suit was filed, the plaintiffs were then entitled to have is sued an application under O. 21, r. 95 of the Civil Procedure Code. I can see no objection to such an application being filed or that there was any further obstacle by way of limitation or otherwise which would have prevented it. The objection which has been taken is one of no merits as the first plaintiff acquired from the second plaintiff properties which were sold under the mortgage decree, the defendant's claim being under a sale in execution of a decree passed against the mortgagor of the mortgage whose properties must have been subject to the charges under that mortgage. The objection relating to the procedure which is made is one of mere technicality and not on the merits. In the first instance therefore I hold that the respondents will have leave to treat the proceedings in the suit as an application made under O. 21, r. 95, Civil Procedure Code. If any additional court-fee is payable by reason of the direction that I have just given, I direct that it should be paid within 28 days from to-day.

I now come to the second point, namely, that the execution application 715 of 1931 prevents relief being granted. In my view it does not. The dismissal was one not upon the merits, the application was to prevent resistance by the obstructor and to attempt to gain possession. If the plaintiffs are entitled to possession, the continuance by the defendant in occupation of the premises is therefore a wrong of which the plaintiffs complain *de die in diem*. Since it is conceded that on the date when the plaintiff filed the suit, the plaintiffs were entitled then to have taken proceedings under r. 95, it must follow that the objection raised regarding the dismissal of the execution application 715 of 1931 fails.

Objection was made that on the merits and the facts, the learned Subordinate Judge had committed errors in the decision at which he had arrived. The properties, the subject of the suit are set out in the plan Exhibit H, which was filed with the plaint. The first plaintiff as plaintiff's first witness in the witness-box identified the plan as that which was filed in the suit. The plaint sets out the claims regarding the properties mentioned therein and delineated in the plan. When formally identifying the plan, that witness was also testifying that the

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plan was accurate. No cross-examination was directed by the defendants' learned counsel, in the Court of first instance, suggesting that the plan was inaccurate and contained omissions or additions and did not correctly set out the actual position of the properties. Learned counsel to-day before me wishes to suggest that the plan is inaccurate. In the absence of any attack being made upon it in the trial Court I cannot listen to any argument in that respect to-day. The learned District Munsiff and the learned Subordinate Judge who have examined all the documents and all the evidence have both come to the conclusion that the plaintiff is entitled to the relief which he sought in the suit. It is unnecessary for me to repeat all those matters. In my view they have both come to the correct conclusion.

It was argued that so far as plot 1-D is concerned that particular matter was entirely ignored and not dealt with by the learned Subordinate Judge. His judgment is quite clear that he did fully consider the matter and decided against the contentions of the defendants.

A claim was also made to an easement in regard to plot 1-C. That claim was rejected and rejected on the facts which sitting here I do not propose to question or interfere with.

The result of the above is that the appeal is dismissed, but the papers will be remitted to the Court of first instance in order that the proceedings may be regularised in accordance with the view I have expressed. The respondents are entitled to their costs in this appeal. Leave to appeal is refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Ramaswami Goundan and others .. *Appellants* (Respondents 2, 4 and 5)*

v.

Lakshmana Reddi and others .. *Respondents (Appellants 2 and 3 and 3rd Respondent).*

Ramaswami Goundan v. Lakshmana Reddi.

Civil Procedure Code (V of 1908), S. 9—Right to lead horse during festival in temple—No corresponding obligations laid—Suit to enforce right —Whether maintainable in Civil Court.

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* L. P. A. No. 53 of 1937. 13th March, 1939.

Ramaswami Goundan *v.* Lakshmana Reddi.

Where a person claimed the right to lead a horse on a particular festival day in a temple whenever that festival was performed, but it appeared that the festival was performed not every year or at stated intervals but only whenever funds permitted, and it was further found that the plaintiff could not be compelled to bring the horse or to lead it if he chose not to do either,

Held, that what was claimed was not an office but merely an honour inasmuch as there was no corresponding obligation to perform the duties of the office, and that it could not be made the subject-matter of a suit in a Civil Court under S. 9, Civil Procedure Code.

Srinivasa Thathachariar v. *Srinivasa Aiyangar*, (1899) 9 M.L.J. 355, referred to.

Appeal under cl. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice King in S. A. No. 50 of 1933 preferred to the High Court against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 41 of 1930 (O.S. No. 759 of 1927, District Munsif's Court, Salem).

S. S. Ramachandra Aiyar for Appellants.

K. S. Desikan for Respondents.

The judgment of the Court was delivered by

Somayya, J.

Somayya, J.—There is a Mari Amman temple in a village called Thammampatti and a Selli Amman temple in Koneripatti, a hamlet of the above village. The two plaintiffs claimed two different rights but we are concerned in this appeal only with the right claimed by the first plaintiff. The right claimed by him is the right to lead the horse on a particular festival day whenever that festival is performed. It is said that this festival is not performed every year or at stated intervals but it is performed whenever funds permit. The right that is claimed is not a right to worship but a right to an office. It is claimed that leading the horse is an office, that the plaintiff and his predecessors have been performing this office from generation to generation and that therefore the plaintiff is entitled to be protected against disturbance from the defendants. The District Munsif of Salem decreed the suit holding that the plaintiff had established his right. On appeal the Subordinate Judge of Salem upheld the contention but he made a very important addition to the decree of the trial Court. He held in effect that the first plaintiff could not be compelled to perform this act of leading the horse and that if he did not bring a horse at the time of the festival and was not willing to lead it, the defendants would be entitled to make other arrangements for the conduct of the festival. The decree of the Subordinate Judge accordingly directs that in the event of the first plaintiff's

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Somayya, J.

failure or refusal to lead the horse, the Perithanakars and Kariakars are entitled to make other necessary arrangements for the conduct of the festival. With this modification the Subordinate Judge confirmed the decree granted by the trial Court. There was a second appeal filed in this Court and the appeal was disposed of by King, J. He confirmed the decree of the Subordinate Judge but granted a certificate under cl. 15 of the Letters Patent.

We are concerned in this appeal with the question whether the right that is claimed by the first plaintiff is to an office which can be made the subject-matter of a suit in a Civil Court under S. 9 of the Code of Civil Procedure. That section says that,

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature except suits of which their cognizance is either expressly or impliedly barred."

An explanation is added that a suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. The point that we have got to decide is whether the suit in this case is of a civil nature and whether it is for a right to an office. There are admittedly no emoluments attached to the office. As was held by this Court in *Srinivasa Thathachariar* v. *Srinivasa Aiyangar*[1], the conception of an office involves a corresponding obligation to perform the duties of the office. It was pointed out by the learned Officiating Chief Justice at page 358 that,

"The term, office, in the sense with which we are concerned, implies, of course, a duty in the office-holder to be discharged by him as such—*see* if authority were necessary, Kent's Commentaries where it is pointed out, 'offices consist in a right, and correspondent duty, to execute a public or private trust and to take the emoluments belonging to it'."

In this case on the findings of the Subordinate Judge which were accepted by King, J., there is no compellable duty on the part of the first plaintiff. He cannot be compelled to bring a horse or to lead it if he chooses not to do either. Provision is accordingly made that if he did not bring a horse or if he refused to lead it the temple authorities might make other arrangements to bring a horse or to have it led. Mr. Desikan the learned Advocate on behalf of the respondents argues that this provision is only meant as a rule of suspension in case the office-holder

1. (1899) 9 M.L.J. 355.

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Somayya, J.

does not do the duty properly, but how it strikes us is that this provision has an important bearing on the question whether there is an office at all. The evidence taken as a whole leads to the conclusion that to start with there was no compellable duty at all but that if the plaintiff chose he might bring a horse and lead it. The mere circumstance that in the past a member of the plaintiff's family was allowed to do it is not a guide or a test for deciding whether what is claimed by the plaintiff is an office. The decisions relied on by the learned counsel for the respondents are all in cases where the right to perform worship in a temple or other religious institution was the subject of dispute. If the trustees or other persons in charge of a religious institution deny the right of worshipping to a member of the public who has a right to perform worship therein, then that member has got a right to have it declared that he is entitled to perform worship. These decisions are of no help in considering the question whether what is claimed in a particular case is an office or not. One test which is necessary to constitute an office is a corresponding compellable duty. That being absent in this case, we are of opinion that what is claimed is not an office but merely an honour.

The result is that this Letters Patent Appeal must be allowed, the decrees of the lower Courts set aside and the suit dismissed with costs throughout. It follows that the memorandum of objections must be dismissed but we do not award costs.

B.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Krishna Mudaliar .. *Appellant** (*1st Respondent*)

v.

Marimuthu Mudaliar and others .. *Respondents* (*Appellants Nos. 2 to 4 and Respondent No. 2 in do.*).

Krishna Mudaliar v. Marimuthu Mudaliar.

Hindu Law—Common female ancestor—Prostitute woman—Sons of—Existence of atmabandhus *of propositus—Succession to estate—Order of preference—Descendants of the female ancestor, whether agnates—Provision in the texts.*

* L. P. A. No. 41 of 1937. 17th April, 1939.

Krishna Mudaliar *v.* Marimuthu Mudaliar.

On the question whether the son of one of two brothers born to an unmarried prostitute can claim to be the nearest presumptive reversioner of the other's great grandson in preference to the latter's paternal aunt's sons, who are *atmabandhus* according to the Mitakshara,

Held, that a person cannot be regarded as Sagotra Sapinda unless he can trace his descent in an unbroken male line from a common male ancestor, which the present claimant cannot do.

Viswanatha Mudali v. *Doraiswami Mudali*, (1925) 49 M.L.J. 684: I.L.R. 48 Mad. 944 and *Mayna Bai* v. *Uttaram*, (1864) 2 M.H.C.R. 196: 8 M.I.A 400, distinguished.

Lal Harihar Pratap Bakksh Singh v. *Thakur Bajrang Bahadur Singh*, (1937) 2 M.L.J. 711 at 713 (P.C.), followed.

All that he can establish is relationship through a female but there are nearer relations than the claimant. To prefer him to the nearer relations would be to ignore justice, equity and good conscience.

Per *Patanjali Sastri, J.*—It would seem somewhat illogical that, while the illegitimate son of a Sudra by a permanently kept concubine is denied Sapinda relationship to the legitimate descendants of the putative father, two illegitimate sons of a prostitute or their descendants should be recognised as having such relationship between them.

The text of Yagnavalkya declaring that in the absence of Gotrajas the next class of persons who would take the heritage should be *bandhus* of the propositus (Yagna 11, 136) is a specific provision, which cannot be outweighed by analogical reasoning.

Observations in Mayne's Hindu Law (10th Edn.) p. 691 about the decision under appeal reported in *Ratna Mudaliar* v. *Krishna Mudaliar*, (1937) 1 M.L.J. 390, criticised and not followed.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Varadachariar dated 24th November, 1936, in S. A. No. 1332 of 1932, preferred to the High Court against the decree of the District Court of Salem in A. S. No. 7 of 1924 preferred against the decree of the Court of the District Munsif (Additional) of Salem in O. S. No. 373 of 1922 (O. S. No. 852 of 1919 on the file of the Court of the District Munsif (Principal) of Salem.

S. S. Ramachandra Aiyar for Appellant.

S. Ranganadha Aiyar for Respondents.

The Court delivered the following

Leach, C. J.

JUDGMENTS. *The Chief Justice.*—The appellant filed a suit in the Court of the Additional District Munsif of Salem for a declaration that an alienation made on the 4th February, 1918, by the fourth respondent, the mother of one Shanmugam, in favour of the father of the first, second and third respondents was not binding on the reversion. Shanmugam died in 1916 and the appellant claimed to be the nearest reversioner. The common

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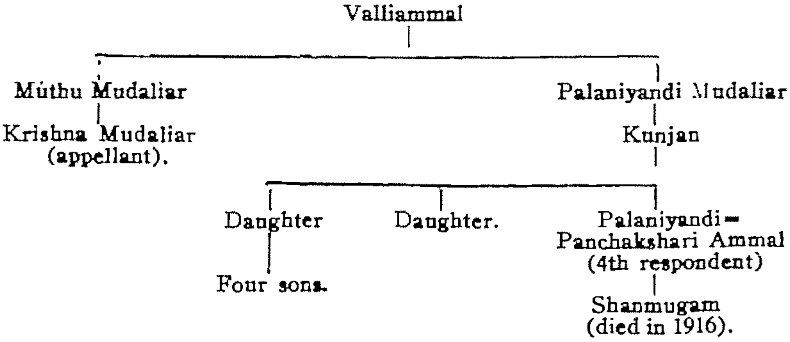
ancestor was a Sudra woman, named Valliammal, who was a prostitute. She had two sons, Muthu Mudaliar and Palaniyandi Mudaliar, but it is not known whether they were born of the same father. There is no evidence at all with regard to their paternity. The connection between the appellant and Shanmugam will be gathered from the following geneological tree:—



It has been accepted for the purposes of this appeal that all the descendants of Muthu and Palaniyandi are legitimate. The appeal turns on the answer to the question whether Muthu, the father of the appellant, is to be regarded under the Hindu Law as an agnate of Palaniyandi, the great grandfather of Shanmugam. If he is to be so regarded, it is accepted that he will be the nearest reversioner. The alienee respondents deny that in law there was agnatic relationship between Muthu and Palaniyandi and say that the nearest reversioners are the four sons of the elder daughter of Kunjan, the son of Palaniyandi, they being the direct descendants of Palaniyandi. The District Munsif dismissed the suit. He rejected the appellant's claim to be the nearest reversioner, but as pointed out in the judgment now under appeal it is not clear whether he thought that the appellant was not an heir at all or whether he thought that the appellant must in any event be postponed to Kunjan's daughter's sons. He also held that there was no consideration for the alienation. On appeal to the District Judge of Salem it was held that the appellant was the nearest reversioner. The District Judge placed reliance on the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*[1]. He interpreted that decision as meaning that the legitimate descendants of Muthu and Palaniyandi

1. (1925) 49 M.L.J. 684: I.L.R. 48 Mad. 944.

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—
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could claim the same rights as if the two brothers had been born of a lawful marriage. On this interpretation of the law and being of the opinion that no necessity had been proved for the alienation the District Judge decreed the suit.

The alienee respondents appealed to this Court. The appeal was heard by Varadachariar, J., who allowed it and restored the decree of the trial Court. The learned Judge did not accept the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*[1], as laying down the proposition that the sons of a prostitute are to be deemed to be in agnatic relationship, but merely declared that there was a heritable relationship between the two. He pointed out that to constitute sagotra sapindaship, there must be descent in an unbroken male line from a common male ancestor. In the case of the sons of a prostitute, where the father is unknown, it was impossible to trace the descent from a common male ancestor. Varadachariar, J., regarded Muthu and Palaniyandi as being cognates and consequently the four sons of the elder daughter of Kunjan were nearer in kin to Shanmugam than the appellant.

In *Viswanatha Mudali* v. *Doraiswami Mudali*[1], it was held that the legitimate descendants of two sons of a Hindu dancing woman were under the Hindu Law entitled to succeed to each other. I agree with Varadachariar, J., that when the judgment is read in the light of the record it is clear, in spite of the general terms used, that all the Court decided was that there was heritable blood between the two sons. It is true that in their written statement the defendants in the case pleaded that there was a nearer reversioner, but this plea was not persisted in, and the Court had merely to decide whether one son could under Hindu Law succeed to the property of the other. The finding that there was heritable blood was sufficient to decide the case. There also the paternity was unknown.

The decision in *Viswanatha Mudali* v. *Doraiswami Mudali*[1], was based on the judgment of this Court in *Mayna Bai* v. *Uttaram*[2], following a remand by the Privy Council. In *Mayna Bai's case*[2], the Court had to decide what rules of inheritance should be applied to the illegitimate sons of an Englishman by two Hindu women. One of the women was a Brahmin

1. (1925) 49 M.L.J. 684: I.L.R. 48 Mad. 944.
2. (1864) 2 M.H.C.R. 196: 8 M.I.A. 400.

who had married but had separated from her husband. By her he had two sons and by the other woman he had three sons. The five sons were brought up as Hindus and lived together as a joint family. By his will the father devised his estate to them in equal shares. A suit was instituted by one of the sons of the Brahmin woman against his step-brothers for partition of the estate and for recovery of the share of his full brother who had died. It was necessary in the first instance to decide whether the brothers were to be deemed to be Hindus, and when the case was under trial the following question was submitted to the Pandit of the Court of Sudder Adawlut:—

"You are requested to state whether, upon the death of one of two illegitimate sons of a Hindu woman, the estate of the deceased by law devolves upon the surviving brother?"

The answer given was:—

"If the illegitimate sons referred to in the question were undivided, the estate of one of them would, after his death, devolve upon his surviving brother. If divided, it would go to him only on failure of the deceased's widow, daughter, or her son, or of the deceased's mother."

The Privy Council considered that question had not been properly framed as it did not embrace all the important facts proved or admitted in the suit which might affect the conclusion. The result of the appeal before the Privy Council was that the brothers were deemed to be Hindus, but the Board left the question of their rights to be solved by the determination of the class of Hindus to which they belonged and the rules of inheritance which existed in that class.

When the case came before this Court on remand it was held that the sons were to be regarded as Sudras, or as a class still lower, and that in the absence of preferable heirs they inherited the property of their mother and of one another. The Court recognised relationship merely through the mother as the following passage from page 201 of the judgment shows:—

"Certainly there are many passages of the text-writers which recognise the relationship of the son, irregularly begotten, to his mother's family. Yagnavalkya quoted in the Vivada Chintamani (page 823): 'A damsel's child is one born of an unmarried woman; he is considered as the son of his maternal grandsire'. This passage clearly recognises the mother and her son, irregularly begotten, as cognate; and the Mitakshara, quoting Manu (Chap. I, S. 11, cl. 7), points out that, if the girl is married, the child, although not begotten by the husband, becomes his son. The authorities already referred to, as to the son of concealed origin, also bear upon this point, and seem to show clearly that the Hindu law, although for obvious reasons not recognising as the husband's son one got by a man of unequal class,

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nevertheless gives no ground whatever for supposing that the circumstances of birth from illicit connection severs the union between the mother and her son, so as not to admit of heritable blood between them."

This opinion is emphasised in the following passage to be found at page 203 of the report:—

"Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Taukaram and his brother (the sons of the Brahmin mistress) are decided to be Hindus. They are the Hindu sons of a woman who was either a woman of a class lower than the fourth of Manu's classes, and in this case the sons are cognate to her and to one another, as the children of a class not twice born out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father, because he is not a Hindu at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."

The decision was that the sons of a Hindu prostitute by a non-Hindu father are cognate to the mother and to one another and therefore possess heritable blood. In the case of *Viswanatha Mudali* v. *Doraiswami Mudali*[1], the father was unknown and the decision did not go beyond the question whether there was heritable blood.

In the present case, the Court is not concerned with the question whether the illegitimate sons of a Sudra father are to be regarded as agnates, and the decision must be confined to the case where a Hindu prostitute has sons but their paternity is not known. Valliammal was not a permanent concubine, but a prostitute, and there can be no presumption in such circumstances that the same man was the father of her two sons. As a person cannot be regarded as a sagotra sapinda unless he can trace his descent in an unbroken male line from a common male ancestor it is impossible to regard the appellant as a sagotra sapinda of Shanmugam. As the result of the decisions in *Mayna Bai* v. *Uttaram*[2] and *Viswanatha Mudali* v. *Doraiswami Mudali*[1], the appellant can claim to be a cognate of Shanmugam, but this does not help him. Not being an agnate he would only be able to maintain the suit if he were the nearest male relation of Shanmugam possessing heritable blood. He is clearly not in that position. The grandsons of Kunjan stand between him and Shanmugam.

It has been contended on behalf of the appellant that it would be in accordance with justice, equity and good conscience

1. (1925) 49 M.L.J. 684: I.L.R. 48 Mad. 944.
2. (1864) 2 M H.C.R. 196: 8 M. I. A. 400.

to regard him as an agnate. This argument completely ignores essential factors. There is here the fundamental principle that a person cannot be regarded as a sagotra sapinda unless he can trace his descent in an unbroken male line from a common male ancestor, which the appellant cannot do. All that he can establish is relationship through a female and there are nearer relations than the appellant. To prefer him to the nearer relations would be to ignore justice, equity and good conscience.

The appellant has asked us to hold that he should in any event be allowed to maintain the suit for the benefit of the reversion. He could only be allowed to do so on the footing that there was collusion between Kunjan's grandsons and the alienor or that the grandsons had precluded themselves from interfering. (*Rani Anund Koer* v. *The Court of Wards*[1].) This was not the appellant's case and he cannot be allowed at this stage to alter the character of the suit.

It follows that I consider that the case was rightly decided by Varadachariar, J., and that the appeal should be dismissed with costs in favour of the contesting respondents.

Patanjali Sastri, J.

Patanjali Sastri, J.—This appeal raises a somewhat novel and interesting question of Hindu law, namely, whether the son of one of two brothers born to an unmarried prostitute can claim to be the nearest presumptive reversioner of the other's great grandson in preference to the latter's paternal aun't sons who are *atmabandhus* according to Mitakshara. The appellant's learned Advocate contends that sapinda relationship and a consequent right to collateral succession between the sons of a Hindu prostitute and their descendants having been recognised by the Courts on the analogy of descent from a common male ancestor, the appellant must be regarded as a gotraja of the propositus and therefore a nearer presumptive reversioner than his paternal aunt's son.

In applying the general rule of succession that the nearest sapinda takes the heritage to, cases not covered by any texts, the Courts have no doubt extended the concept of sapindaship to relations outside marriage and legitimate descent relying upon the definition of a sapinda in the Mitakshara as one connected by particles of the same body. (See *Mayna Bai* v.

1. (1880) L.R. 8 I.A. 14: I.L.R. 6 Cal. 764 (P.C.).

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Uttarami[1], *Narayan Pundlik* v. *Laxman Daji*[2], *Viswanatha Mudali* v. *Doraswami Mudali*[3] and *Dattatraya Tatya* v. *Matha Bala*[4].) But there are also other cases which have now established that even among Sudras illegitimate sons or their descendants have no right of collateral succession to the legitimate sons or descendants of the putative father, as no sapinda relationship as contemplated by the Hindu law texts can exist in such cases. (See *Krishnayyan* v. *Muttuswami*[5], *Ranoji* v. *Kandoji*[6], *Parvathi* v. *Thirumalai*[7], *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam*[8], *Dharma Lakshman* v. *Sakharam Ramji Rao*[9] and *Zipru* v. *Bomiya*[10].) It would seem somewhat illogical that while the illegitimate son of a Sudra by a permanently kept concubine is denied sapinda relationship to the legitimate descendants of the putative father, two illegitimate sons of a prostitute or their descendants should be recognised as having such relationship between them. The texts of Hindu law laying down the rules as to inheritance undoubtedly refer only to relationships based upon marriage and legitimate descent and the recognition of the right of inheritance of the illegitimate son of a Sudra to his putative father is based upon special texts relating to that class of sons and do not necessarily imply the existence of sapinda relationship between them. Indeed, even within the sphere of marriage and legitimate descent the Mitakshara has limited sapinda relationship to specified degrees from the common ancestor, prohibiting its indefinite extension on mere etymological grounds which its definition of a sapinda might all too readily suggest. (See *Ramchandra Martanda Waikar* v. *Vinayak Venkatesh Kothekar*[11].) It is however unnecessary in this case to examine how far these two lines of cases are reconcilable, for assuming that sapinda relationship can be postulated outside marriage, the question remains whether the appellant is also a gotraja within the meaning of the well-known text of Yagnavalkya providing for succession to a sonless Hindu, for, it is conceded that unless the appellant can bring

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1. (1864) 2 M.H C.R. 196 : 8 M.I.A. 400.
2. (1927) I.L.R. 51 Bom. 784.
3. (1925) 49 M.L.J. 684 : I.L.R. 48 Mad. 944.
4. (1933) I.L.R. 58 Bom. 119.
5. (1883) I.L.R. 7 Mad. 407.
6. (1885) I.L.R. 8 Mad 557.
7. (1887) I.L.R. 10 Mad. 334.
8. (1898) I.L.R. 21 All. 99.
9. (1919) I.L.R. 44 Bom. 185.
10. (1921) I.L.R. 46 Bom. 424.
11. (1914) 27 M.L.J. 333 : L.R. 41 I.A. 290 : I.L.R. 42 Cal. 384 (P.C).

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himself within that category he cannot claim precedence over *bandhus* who are mentioned as the next category in the text.

Their Lordships of the Privy Council had to consider the import of 'gotraja sapinda' in *Jadunath Kuar* v. *Bisheshar Bakhsh Singh*[1], where after referring to an exposition of the term in *Bhyah Ram Singh* v. *Bhyah Ugur Singh*[2], they observed as follows:

"From this it is clear that in order to qualify as a male agnate, or gotraja sapinda of the propositus the plaintiff must satisfy two conditions, namely, (*a*) that he is of the same gotra, or, as it may be expressed, of a common patriarchal stock and (*b*) that he is a sapinda of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males."

Again, in their judgment in the same case at a later stage reported in *Lal Harihar Pratap Bakhsh Singh* v. *Thakur Bajrang Bahadur Singh*[3], their Lordships observed:

"Blood relations or sapindas may be related either through males or through females. *Prima facie* sapindas who are related through an unbroken line of male descent are gotraja sapindas, for by virtue of such unbroken relationship they must be of the same gotra. It will thus be seen that the two conditions which as stated in the previous judgment of the Board in *Jadunath Kuar* v. *Bisheshar Bakhsh Singh*[1], must be satisfied by a person claiming to be a gotraja sapinda of the propositus, are not really independent but inter-related, for the first condition will ordinarily be included in the second."

It is thus quite clear that unless the appellant can show that himself and Shanmugam the last male owner are descendants of a common male ancestor, he cannot claim to succeed in preference to Shanmugam's paternal aunt's sons who as his *atmabandhus* will exclude any other class of *bandhus*.

The appellant's learned Advocate placed reliance upon the decision in *Mayna Bai* v. *Uttaram*[4] in support of his contention. In that case it was held by this Court after a remand by the Privy Council that one of two sons born to a married woman living in adultery with an Englishman was entitled to succeed to the separate property of the other son on the ground that there was heritable blood between them. This decision however does not assist the appellant, for assuming that it is in consonance with the text and principles of Hindu law, it did not hold that there was gotraja sapindaship between the brothers in that

1. (1932) 63 M.L.J. 287 at 297 and 298: L.R. 59 I.A. 173 at 189 and 190 (P.C.).
2. (1870) 13 M.I.A. 373.
3. (1937) 2 M.L.J. 711 at 713 (P.C.).
4. (1864) 2 M.H.C.R. 196: 8 M.I.A. 400.

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case. The learned Judges observed at page 203:

"They are the Hindu sons of a woman who was either a woman of a class lower than the fourth of Manu's classes, and in this case the sons are cognates to her and to one another as to the children of a class not twice born out of wedlock and entitled to inherit to their mother, and only not capable of inheriting to their father, because he is not a Hindu at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."

This clearly shows the decision was based upon the existence of only cognate relationship between the two sons of the prostitute. The appellant's learned Advocate further relied upon the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*[1]. But this decision too does not in my opinion lend any support to his contention. It merely extended the principle of *Mayna Bai's case*[2] to the legitimate descendants also of the illegitimate sons of a prostitute. In support of this extension the learned Judges invoked the principle of representation as laid down in *Ramalinga Muppan* v. *Pavadai Goundan*[3] and reasoned thus at page 957:

"If it is once granted that Muthusami's son represents him and Muniappa's represents him, then it is difficult to understand how their sons could not represent Muthusami and Muniappa, respectively. If that is so then there is heritable blood between them and one line can succeed to the other line according to the principle of collateral succession."

It will thus be seen that the only question decided there was whether the plaintiffs were heirs at all under the Hindu law to the last male owner. No doubt, as pointed out in the judgment under appeal, it appears on a reference to the printed records of that case that the defendants, besides denying that the plaintiffs were heirs at all to the last male owner, pleaded also the existence of a nearer *bandhu* who would be entitled to succeed in the absence of gotraja sapindas. But the suit was dismissed by the trial Court apparently on the preliminary ground that the plaintiffs were no heirs at all under the Hindu law. On appeal, however, the appellate Court took the view that the plaintiffs were in the line of heirs and remanded the case to the trial Court for disposal on the other points raised. There was an appeal to this Court against this order of remand and this was the subject-matter of the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*[1]. It is thus clear that the question

1. (1925) 49 M.L.J. 684: I.L.R. 48 Mad. 944.
2. (1864) 2 M.H.C.R. 196: 8 M.I.A. 400.
3. (1901) 11 M.L.J. 399: I.L.R. 25 Mad. 519.

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whether the plaintiffs could succeed as gotraja sapindas of the propositus in preference to persons who were his *bandhus* did not arise at that stage of the case and was not considered by this Court.

The appellant's learned Advocate finally placed strong reliance upon the observations in Mayne's Hindu Law (10th Edition), page 691, where the decision under appeal which is reported in *Ratna Mudaliar* v. *Krishna Mudaliar*[1], is noticed and criticised as follows:—

"The ground of decision was that he (plaintiff) could not be regarded as a sagotra sapinda of the last male owner as to be preferred to an *atmabandhu*. But, when once it is admitted that two illegitimate brothers have heritable blood as between them and are entitled to inherit as brothers, their legitimate descendants will be governed by the ordinary rules of succession either on the grounds of analogy or on principles of justice and equity. The two illegitimate brothers cannot be said to be cognates of one another. They are therefore to be regarded as if they are agnate sapindas for the purpose of Hindu Law as between themselves, their legitimate male descendants being, of course, their gotraja sapindas."

This opinion is, no doubt, entitled to great weight as proceeding from so eminent a lawyer, but, with all due respect, I find it difficult to follow the reasoning. Almost the earliest case which decided that two illegitimate sons of a prostitute have heritable blood as between them and are entitled to inherit as brothers, that is, *Mayna Bai's case*[2], was expressly based, as pointed out above, upon the cognate relationship existing between them. Neither this nor any later decision based upon it, is therefore authority for the proposition that two illegitimate brothers cannot be said to be cognate of one another and that they are therefore to be regarded as if they are agnate sapindas as between themselves. As for the suggestion that grounds of analogy or the principles of justice and equity may be invoked to support the proposition, I can see no warrant for the application of the analogy of gotraja sapindaship to a case of this kind. Courts have no doubt applied analogies in deducing rules of succession in some cases, but their application can, in my opinion, be justified only where no provision is made either in the Smrithis, or their recognised commentaries. It is a familiar rule of interpretation in Mimamsa that when a particular object is named as an eligible substitute for another which is not available, you cannot, on grounds of analogy, use

1. (1937) 1 M.L.J. 390.

2. (1864) 2 M.H.C.R. 196: 8 M.I.A. 400.

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other objects which might even better fulfil the purpose in view, for the use of the named substitute is deemed to be specifically enjoined. Here, the text of Yagnavalkya declares that in the absence of gotrajas the next class of persons to take the heritage shall be *bandhus* of the propositus. After enumerating the several classes of heirs, it prescribes:

> "Of these, on failure of the preceding the next following shall take the estate of one who dies sonless. This is the rule for all classes." (Yagn. II, 136.)

The specific provisions of this text cannot, in my opinion, be outweighed by analogical reasoning. In the present case, there are in existence the paternal aunt's sons of the last male owner who as *atmabandhus* would take the estate according to the text, there being admittedly no gotrajas in the strict sense of the term. No use of analogy can therefore be permitted so as to affect this result. Nor am I able to see how it is in consonance with the principles of justice and equity to displace an *atmabandhu* from his prescribed rank in the scheme of inheritance, in favour of one like the appellant who, except by a fanciful extension of the term, cannot be described as a gotraja sapinda of the propositus.

I agree with my Lord that this appeal fails and should be dismissed with costs.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

The Mylapore Hindu Permanent Fund, Ltd. .. *Appellant** (*Defendant*)

v.

P. S. Pushpammal .. *Respondent* (*Plaintiff*).

M. H. P. Fund, Ltd. v. Pushpammal.

Transfer of Property Act (IV of 1882), Ss. 55 (3) and 59—Mortgage with power of private sale—Sale of mortgaged property—Duty of mortgagee to surrender mortgage deed to purchaser.

Where a mortgagee having the power of private sale under the mortgage deed sells the mortgaged property in exercise of that power he is bound to surrender his deed of mortgage to the purchaser of the property as the mortgage deed is a document of title relating to the property sold.

Appeal against the decree of the Court of the City Civil Judge, Madras, in O. S. No. 771 of 1936.

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* C. C. C. A. No. 10 of 1937. 9th December, 1938.

A. Rajabhadur Mudaliar for Appellant.

C. R. Rajagopalachariar for Respondent.

The Court delivered the following

M. H. P. Fund, Ltd. *v.* Push-pammal.

JUDGMENT.—The decision of the learned Judge of the City Civil Court is correct. The appellant sold the property to the respondent and S. 55 (3) of the Transfer of Property Act is clear and unambiguous. The mortgage deed, it is contended, is not a document of title, but no authority is cited in support of this proposition. Since the appellant sold the property to the respondent in the exercise of the power of sale conferred upon him by the terms of the deed of mortgage, the deed is clearly a document of title. The appellant must therefore surrender the deed to the respondent, however inconvenient it may be.

The appeal is dismissed with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Seeni Madar Sahib .. *Petitioner** (*Petitioner*)

v.

Abdur Rahman Sahib and another .. *Respondents* (*Respondents*).

Seeni Madar Sahib *v.* Abdur Rahman Sahib.

Writ of certiorari—*Election for two seats—Unsuccessful candidate in one of them petitioning to set aside elections—Election Commissioner giving option to petitioner to drop charges against both the successful candidates, but permitting one—No warrant for such a procedure in the rules—Election Rules under the Madras Local Boards Act (XIV of 1920).*

Where an unsuccessful candidate filed a petition to set aside elections for two seats, one for the reserved and the other for the general constituency, on the allegations of false impersonation, because the persons impersonated were the same in his election as well as the other seat for which he did not contest, and the Election Commissioner gave the petitioner the option of treating the petition as an election petition in respect of one of the seats,

Held, that the order of the Election Commissioner should be quashed. There was no warrant in the election rules for the petitioner being ordered to drop his charges against one of the successful candidates. The Commissioner could have treated the petition as a petition in each case and could have required the petitioner to make further provision with regard to costs.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ to the Election Commissioner (District Munsif) of

* C. M. P. No. 5334 of 1938 28th April, 1939.

Seeni Aladar Sahib v. Abdur Rahman Sahib.

Tiruvallur calling for the records in O. P. No. 40 of 1938 (Election Petition No. 3 of 1938) on his file and to quash the proceedings therein.

V. Ramaswami Aiyar and *M. Natesan* for Petitioner.

V. T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Respondents.

The order of the Court was made by

Leach, C.J.

The Chief Justice.—The petitioner in this case was a candidate at the election held on the 28th June, 1938, of members to the Tiruvallur Panchayat Board. For the sixth ward of the Board two candidates were to be elected. One of the seats was reserved for the Muhammadan community; the other was a general seat. There were two candidates for each seat and the petitioner was one of the candidates for the reserved seat. He was unsuccessful and he filed a petition in which he asked that both elections should be set aside. The successful candidates are the respondents to this petition. Before the Election Commissioner a preliminary objection was taken to the validity of the petition. It was said that in as much as the petitioner was asking that the election in respect of the reserved seat and the election in respect of the general seat be set aside he should have filed two petitions. The Election Commissioner accepted this contention and gave the petitioner the option of treating the petition as an election petition in respect of one of the two seats. The petitioner then filed an application to this Court for a writ of *certiorari* with a view to the order of the Election Commissioner being quashed. A writ *nisi* was issued, and the Court is now called upon to decide whether the rule shall be made absolute.

In holding that it was necessary for the petitioner to file a petition in respect of each election the Election Commissioner had regard to the fact that the Election Rules framed under the Madras Local Boards Act, 1920, are drafted in the singular and that a deposit of Rs. 25 has to be made in respect of the costs of the respondent. It is true that there is no express provision enabling an unsuccessful candidate or a voter to challenge the election of two candidates in one petition, but it does not necessarily follow from this that the Election Commissioner was justified in refusing to treat the petition which was filed as a petition in each case. The petition averred that there had been

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impersonation and that the persons impersonated were the same in both the cases. Each voter was given two ballot papers. There were four ballot boxes and a voter had the right to put the ballot papers in whichever box he selected, but he was not allowed to put two ballot papers in one box. It is obvious that in this case it would have been convenient to have tried the two matters together. Under the English rules this petition would have been accepted but it would have been treated as a petition in each case. *See* Ss. 22 and 23 of the Parliamentary Elections Act, 1868, and S. 91 (3) of the Municipal Corporations Act, 1882. We consider that there was no justification for the action which the Election Commissioner took. He could have treated the petition as a petition in each case and could have required the petitioner to make further provision with regard to costs. His decision meant that the petitioner was called upon to choose whether he would drop his charges against one of the two successful candidates, and for this there is no warrant in the rules.

We consider that the rule should be made absolute and the order of the Election Commissioner quashed. The record will be returned to the Election Commissioner to proceed with the hearing of the petition according to law. The petitioner is entitled to his costs.

In order to prevent such questions arising in future it may be desirable to effect an amendment in the rules.

K. C. *Writ issued. Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Srimath Kachi Chinna Nallappa Kalakka Thola Udayar Avergal, Zamindar of Udayarpalayam .. *Petitioner* (Counter-Petitioner)*

v.

Sudai Udayan and others .. *Respondents Petitioners).*

Zamindar of Udayarpalayam v. Sudai Udayan.

Madras Estates Land Act (I of 1908 as amended), S. 40 (1)—Scope—Rent paid in cash—Right of ryot to apply for commutation—Meaning of words "whether in cash or in kind".

* C. R. P. No. 1193 of 1937. 28th March, 1939.

Zamindar of Udayarpalayam *v.* Sudai Udayan.

S. 40 (1) of the Madras Estates Land Act, as amended, clearly says that a ryot who pays rent at rates varying with the crop shall have the right of applying for an order commuting the rent payable whether he pays the rent in cash or in kind. The words "whether in cash or in kind" in the section should not be read as meaning sometimes in cash and sometimes in kind, and the section cannot be held to be inapplicable to a case where rents were paid at varying rates in cash.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Collector of Trichinopoly dated 24th June, 1937, and made in M. P. No. 2 of 1936 preferred against the order of the Court of the Revenue Divisional Officer, Ariyalur, dated 14th November, 1936 and made in M. P. No. 1 of 1936.

B. Sitarama Rao and *A. Srirangachariar* for Petitioner.

K. Bashyam and *T. R. Srinivasan* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The petitioner is the proprietor of the Udayarpalayam Zamindari. The respondents are the ryots of the village of Kaduvatankurichi which forms part of the Zamindari. They applied under S. 40 of the Madras Estates Land Act, 1908, to the Deputy Collector, Ariyalur, for an order commuting the rent payable to the petitioner to a definite money rent. The respondents have for many years paid rent in cash but the amount has varied according to the nature of the crops raised. The petitioner contended that the application did not lie as S. 40 only had in view cases where rents were paid partly in kind. The Deputy Collector held that the application did not come within the section and accordingly dismissed it. An appeal followed to the Collector, who disagreed with the Deputy Collector and reversed his decision. The petitioner has now applied to this Court to reinstate the order of the Deputy Collector under the powers of revision conferred upon it by S. 115 of the Code of Civil Procedure.

S. 40 (1) of the Madras Estates Land Act reads as follows:—

> " Where for any land in his holding a ryot pays rent in kind or on the estimated value of a portion of the crop, or at rates varying with the crop, whether in cash or in kind, or partly in one of these ways and partly in another, or partly in one or more of these ways and partly in cash, either the ryot or the land-holder may apply to the Collector to have the rent on the holding commuted to a definite money rent."

There are here five different categories, namely, (1) where a ryot pays rent in kind; (2) where he pays rent on the estimated

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value of a portion of the crop; (3) where he pays rent at rates varying with the crop, whether in cash or in kind; (4) where he pays rent partly in one of these ways and partly in another; and (5) where he pays partly in one or more of these ways and partly in cash. If the case falls within any of these categories the ryot may apply to the Collector for an order commuting the rent to a definite money rent.

In reversing the order of the Deputy Collector and in allowing the respondents' petition the Collector was of the opinion that the case fell within the third category. It is said that he was wrong because the words "whether in cash or in kind", should be read as meaning sometimes in cash and sometimes in kind. To do so would clearly be reading into the section words which are not there and words which would alter the effect of the section. The section clearly says that a ryot who pays rent at rates varying with the crop shall have the right of applying for an order whether he pays the rent in cash or in kind. Instead of the amount varying from year to year or from crop to crop the rent should be fixed at a definite sum per annum.

On behalf of the petitioner Mr. Sitarama Rao has drawn our attention to the section as it stood before its amendment in 1934. Before the amendment the section was construed in the way he would have it construed now, but the amended section is differently worded and we can only construe it in accordance with the words used. It may not have been the intention of the Legislature to permit ryots in the position of the respondents to apply under this section. The marginal note reads "Commutation by suit of rent payable in kind". The marginal note lends some support to Mr. Sitarama Rao's argument, but the argument cannot be accepted. The intention of the Legislature can, so far as the Court is concerned, be gathered only from the words used in the section when the words are free from ambiguity. They are free from ambiguity in this case and we consider that the Collector read them correctly.

The petition consequently fails and will be dismissed with costs. We fix the Advocate's fee at Rs. 100.

B.V.V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Ponnammai Nadathi .. *Appellant** (*Defendant*)

v.

The Tinnevelly Swami Nelliappar and Sri Kanthimathi Ambal Devasthanam, through its trustee, Mr. K. Subramania Pillai .. *Respondent* (*Plaintiff*).

Ponnammai Nadathi v. Tinnevelly Swami Nelliappar, etc., Devasthanam.

Madras Estates Land Act (*IX of 1908*), *S. 3* (*11*)—*Rent—Government levying water cess—Landlord paying the cess—Irregular irrigation—Claim for recovery by landlord from ryot of water cess paid to Government—Revenue Court—Jurisdiction.*

It is well settled that when a Zamindar or landlord lawfully collects on behalf of the Government a payment for water supplied or taken for cultivation of land in the holding of a ryot within the estate, the charge in respect of that water forms part of the rent and a suit for recovery of that charge is one cognizable only by a Revenue Court.

Battina Appanna v. *Raja Yarlagadda*, (1917) 33 M.L.J. 355, followed.

Where, however, in the special circumstances of a case the charge in question was wrongly collected from the plaintiff, but there was no doubt that the real origin of the payment was the use and enjoyment of water and there was no doubt that the money was lawfully payable to the plaintiff, though the collection from the plaintiff (landlord) by the Government was irregular,

Held, that because the plaintiff *bona fide* paid a sum of money which was lawfully payable by the defendant (ryot) for the use of water and which was lawfully recoverable by the plaintiff from the defendant, the sum recoverable should be deemed recoverable lawfully on account of the use of water supplied to defendant's land and it formed part of the rent and hence the Revenue Court had jurisdiction to adjudicate upon the claim.

Appeal against the decree of the District Court of Tinnevelly in A. S. No. 453 of 1934 preferred against the decree of the Court of the Sub-Collector of Tuticorin in S. S. No. 175 of 1933.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Appellant.

K. V. Sesha Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the jurisdiction of a Revenue Court to deal with a claim by a landholder to recover under the Madras Estates Land Act a sum of money paid to the Government on account of water cess payable by the ryot to the Government. The appellant is the defendant who is a ryot. The suit was one of a large batch, in which various contentions were raised with which we are not concerned. For

* S. A. No. 837 of 1937. 28th April, 1939.

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the purpose of the present appeal the essential facts are that the defendant had rendered himself liable to water cess for irregular irrigation of his land with water taken from a Government source. Under S. 1-A of the Madras Irrigation Cess Act, the Government on 22nd April, 1914, issued a notification the effect of which is that irrigation cess due in respect of regular irrigation shall be recovered from the landlord, whereas irrigation cess due in respect of irregular irrigation shall be recovered from the ryot to whose holding water is taken irregularly. It is established that in spite of this notification the local revenue authorities continued to follow the old practice whereby all sums due on account of irrigation of lands within an estate with the help of Government water, whether the irrigation was regular or irregular, were recovered by the Tahsildar from the landholder and the landholder was left to recover from the ryot. Consequently the sums due from the present defendant though due in respect of irregular irrigation were recovered from the plaintiff and the plaintiff claimed these amounts as part of his rent, without any special pleading regarding the circumstances in which he had discharged his (ryot's) obligation.

It is argued for the appellant that though the money payable to the Government by the defendant for irregular irrigation was originally payable on account of use and enjoyment of water supplied or taken to the cultivation of his land, the money which the defendant has to pay to the plaintiff is not a payment for the use of water, but a payment in compensation for unlawful recovery from the plaintiff of a sum of money due to the Government from the defendant; that is to say, it is purely a claim falling under Ss. 69 and 70 of the Contract Act which can only be based on a proper pleading, showing the circumstances in which the payment was made and the reason for which the plaintiff is entitled to recover from the defendant. The contention is that this being an ordinary civil claim under Ss. 69 and 70 of the Contract Act is not a matter over which a Revenue Court can exercise jurisdiction.

It must be conceded that this plea to the jurisdiction was not taken in the written statement as it should have been. But the appellant explains that the plaintiff did not set forth the circumstances in which this claim for irrigation cess was made and that as soon as the position was made clear the contention was put forward that the Revenue Court had no jurisdiction

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and a ground of appeal was taken in the lower appellate Court. In these circumstances, I think it is open to the appellant to urge this contention in second appeal.

Now the only question is whether the plaintiff's claim in respect of *thirva jasti* and *fasli jasti* which is in substance a claim to the reimbursement of the amounts collected from the plaintiff for irregular irrigation of the defendant's land, can be said to be a claim for rent within the definition in S. 3 (11) of the Madras Estates Land Act. The definition runs as follows:—

"'Rent' means whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of the land in his estate for the purpose of agriculture, and includes whatever is payable on account of the use and enjoyment of waters supplied or taken for cultivation of land, where the charge for such water has not been consolidated with the rent payable for the land."

I think it can be taken as settled by authority that in the ordinary cases where no rule is framed under the Madras Irrigation Cess Act an obligation is cast upon the landholder to pay irrigation cess with a power to recover from the ryot. Such a recovery is a collection of rent within the definition just recited. The Full Bench decision in *Doraiswami Gurukkal* v. *Subramania Gurukkal*[1], proceeds on the assumption that such a charge does come within the definition of rent. It is true that the question was not in issue, for it had been conceded in that case that the claim was one for rent. It is also true that Wallace, J., doubts whether a claim of this nature for water cess recovered from a landholder by Government can be treated as rent. But the only reason given for the doubt is the fact that the landholder is a mere collection agent for the Government and the learned Judge finds it difficult to see how what does not really go into the landholder's pocket is rent. With the greatest respect it seems to me that this observation overlooks the fact that the definition of rent expressly includes local tax, cess, etc., which are collected by the landholder, not for his own benefit, but under an obligation cast upon him by law. There is moreover an express decision in *Battina Appanna* v. *Raja Yarlagadda*[2] to the effect that S. 3 (11) of the Madras Estates Land Act makes it clear that a payment for water supplied or taken from the Zamindaries rent and on the facts of that case there is no doubt

1. (1927) 54 M.L.J. 361: I.L.R. 51 Mad. 266 (F.B.).
2. (1917) 33 M.L.J. 355.

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that the payment in question was one for water supplied by Government in respect of which the Zamindar was a mere collection agent. I take it therefore as well settled that when a Zamindar lawfully collects on behalf of the Government a payment for water supplied or taken for cultivation of land in the holding of a ryot within his estate, the charge in respect of that water forms part of the rent and a suit for recovery of that charge is one cognisable only by a Revenue Court.

There is, however, the special circumstance in this case that the charge in question was wrongly collected from the plaintiff. It is clear that under the notification referred to above the Tahsildar should have recovered the cess due for irregular irrigation directly from the ryot and that, presumably in ignorance of this rule, the money was erroneously collected from the landholder in pursuance of a practice which was, at the time of the collection, irregular. Can it be said that this circumstance changes the character of the payment which the defendant is to make so as to render it no longer a payment for the use and enjoyment of water supplied or taken for cultivation of his land, but a mere compensation payable under Ss. 69 and 70 of the Contract Act to the plaintiff for in return for a payment made in good faith by the plaintiff under compulsion and on behalf of the defendant? I confess that the matter is not free from doubt. But on the whole I am of the opinion that the money which the plaintiff seeks to recover from the defendant must be deemed to be money lawfully payable on account of the use and enjoyment of water supplied or taken. There is no doubt that the real origin of this payment is the use and enjoyment of water. There is also no doubt that the money is lawfully payable to the plaintiff, for, though the collection from the plaintiff by the Government was irregular, it is clear that the plaintiff paid honestly under pressure a sum which was lawfully payable by the defendant and that the plaintiff has with reference to the terms of the Contract Act a lawful right to recover from the defendant. Seeing therefore that the plaintiff has *bona fide* paid a sum of money which was lawfully payable by the defendant for the use of water and which is lawfully recoverable by the plaintiff from the defendant, it seems to me that the sum recoverable must be deemed to be recoverable lawfully on account of the use and enjoyment of water supplied to the defendant's land. I therefore hold that it forms part of the

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rent and that the Revenue Court has jurisdiction to adjudicate upon the claim. The appeal is therefore dismissed with costs.

Leave to appeal granted.

K. C. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

The Trustees of Tribune Press, Lahore .. *Appellants**

v.

The Commissioner of Income-tax, Punjab, Lahore .. *Respondent.*

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Trustees of Tribune Press, Lahore v. Commissioner of Income-tax, Punjab, Lahore.

Indian Income-tax Act (XI of 1922), S. 4 (3) (i)—Newspaper left to trustees by will on trust to maintain its liberal policy—Surplus income to be used in improving newspaper—Carrying on newspaper in accordance with the trust—Whether an object of general public utility entitled to exemption from income-tax.

Where an assessment to income-tax was made on the income of a newspaper vested by will in trustees on trust to maintain it in an efficient condition, keeping up its liberal policy and devoting surplus income to improving it and placing it on a permanent footing,

Held (reversing the decision of the High Court) that, as questions of politics and legislation were discussed only in common with many other matters in the newspaper, and as it was not made out that a political purpose was the dominant purpose of the trust, and as, further, the object of the paper might be described as the object of supplying the public with an organ of educated opinion, the carrying on of the newspaper in accordance with the trust declared in the will was an object of general public utility and as such exempt from income-tax under S. 4 (3) (i) of the Act of 1922.

In re *Scowcroft*, (1898) 2 Ch. 638, applied.

Bonar Law Memorial Trust v. *Commissioners of Inland Revenue*, (1933) 17 Tax Cases 508, distinguished.

Dictum of Sir Raymond West in *Fatmabibi* v. *Advocate-General*, (1881) I.L.R. 6 Bom. 42 at 50, approved.

There is no real distinction, from the point of view of "general public utility" between a school founded by a testator but charging fees to its pupils, and a paper founded by a testator and sold to its readers. While the purpose of providing the poor or the community in general with some useful thing without price or at a low price may in itself be a purpose of general public utility, yet if another object be independently in itself of general public utility the circumstance that the testator's bounty was only in respect of the initial capital assets, or had only to meet a working loss temporarily will not necessarily alter the character of the object of the trust.

* P. C. Appeal No. 117 of 1936. 13th June, 1939.

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Appeal under S. 66-A (2) of the Indian Income-tax Act, 1922, from a decision of a Full Bench[1] of the High Court, Lahore, dated 4th June, 1935 (Young, C. J. and Addision, J.; Tek Chand, J., dissenting) on a reference from a Division Bench (Jai Lal and Skemp, JJ.), to whom a question had been referred by the Commissioner of Income-tax, Punjab, under S. 66 (2) of the Act.

A testator, Sardar Dayal Singh, died in 1898, having by his will declared as a trust that his "property in the stock and goodwill of the Tribune Press and Newspaper in Anarkali, Lahore, shall vest permanently in a committee of trustees," and that it should be "the duty of the . . . . trustees to maintain the said press and newspaper in an efficient condition, keeping up the liberal policy of the said newspaper and devoting the surplus income of the said press and newspaper . . . . . . in improving the said newspaper, and placing it on a footing of permanency."

An assessment to income-tax having been raised on the undertaking for the year 1932-33 by the Income-tax Officer, Lahore, the trustees presented a claim to the Assistant Commissioner for exemption from tax. The Assistant Commissioner having rejected that claim, the Commissioner referred to the High Court the question whether the income in question was exempt from tax under S. 4 (3) (*i*) of the Act. A Division Bench were divided in opinion, Jai Lal, J., holding that the appellants' income was exempt from tax, and Skemp, J., holding that it was not. The matter having been referred to a Full Bench of the High Court, that Court decided in favour of the Crown, and the trustees now appealed to His Majesty.

A. M. Latter, K.C. and *H. W. Williams* for Appellants.—It is submitted that the carrying on of the newspaper is an object of general public utility within the meaning of S. 4 (3) (*i*) of the Act of 1922. A consideration of the way in which the newspaper has been carried on in the past makes it clear that it has not been used for the propagation of a fixed policy such as might bring the case within the decision in *Bowman* v. *Secular Society, Ltd.*[2] or *Bonar Law Memorial Trust* v. *Commissioners of Inland Revenue*[3]. There is no question here of any dominant political purpose or of the propagation of some definite legislative measure as in *Commissioners of Inland Revenue* v. *Temperance Council*[4]. In so far as the newspaper deals with politics, it does so only incidentally in the course of supplying its public with enlightened information on all subjects of general interest.

1. (1935) I.L.R. 16 Lah. 829 (F.B.).
2. (1917) A.C. 406.
3. (1933) 17 Tax Cases 508.
4. (1926) 10 Tax Cases 748.

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J. M. Tucker, K. C. and *E. L. Norton* for Respondent.—The test of general public utility is hardly sufficient by itself under the Act of 1922 as a test of the question whether the object of a trust entitled its income to exemption from tax. But even if it were, that is a question of fact for the Commissioner, and not one of law for the Court. In any case, however, it is submitted, the declared object of the trust, as was pointed out in the Courts below, is the perpetual propagation of the political views of the founder, which cannot be considered to be a charitable purpose. Furthermore, the newspaper was and still is and will be run on ordinary commercial lines. It is submitted that, as was held below, it is not sufficient to distinguish it from other commercial newspapers that the profits were directed to be devoted to the improvement of the paper and not distributed to individuals.

13th June, 1939. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The Trustees of the Tribune Press, Lahore, appeal from the decision given on the 4th June, 1935, by the majority of the Judges composing a Full Bench of the High Court at Lahore upon a reference made to that Court under S. 66 (2) of the Indian Income-tax Act, 1922.

On the 31st January, 1933, the Income-tax Officer, Lahore, for the year of assessment 1932-3 assessed the appellants to tax upon an income of Rs. 61,629, calculated upon the figures for the previous year. No question now arises as to the amount of the assessment or the computation of the tax. The sole question is whether the income of the appellants is not exempt from tax under the first clause of sub-S. 3 of S. 4 of the Act.

" (3) This Act shall not apply to the following classes of income:—

(*i*) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application thereto.

In this sub-section "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility."

Sardar Dayal Singh, a Sikh inhabitant of the Punjab, died in 1898 having by his will, dated the 15th June, 1895, created three separate trusts, to be administered by three independent "committees of trustees". Two of the trusts were for the establishment and maintenance of (1) an Arts College, (2) a public library. The third trust was declared by the 20th and 21st paragraphs of the will in the following terms:—

" XX. That my property in the stock and goodwill of the Tribune

Press and Newspaper in Anarkali, Lahore, shall vest permanently in a Committee of Trustees consisting of the following members, namely:—

1. Babu Jogendra Chandra Bose, M.A., B.L., Pleader, Chief Court, Lahore.

2. Mr. Charles Golak Nath, B.A., LL.B., Barrister-at-Law.

3. Mr. Harkishen Lal, B.A., Barrister-at-Law, Lahore.

XXI. That it shall be the duty of the said Committee of Trustees to maintain the said press and newspaper in an efficient condition, keeping up the liberal policy of the said newspaper and devoting the surplus income of the said press and newspaper after defraying all current expenses in improving the said newspaper, and placing it on a footing of permanency."

By a deed of compromise dated the 1st December, 1906, whereby certain litigation as to the validity of the will was brought to an end, it was agreed between the parties thereto that "in case the Tribune newspaper should cease to exist or be impossible to exist" the property belonging to the Tribune Press should become the property of the Arts College trust.

Since the death of Sardar Dayal Singh in 1898, the trust in respect of the Tribune Press has been carried out, and the newspaper of that name has continued to be published. The profits of the press and newspaper have been assessed to Income-tax since 1918. The claim to exemption was first made by the appellants in respect of the year 1932-3—that is, in the proceedings out of which this appeal arises. The claim was made for the first time before the Assistant Commissioner, and, on his rejecting the appellants' contention, they applied to the Commissioner praying that on this point (and on another point which is not now in controversy) he would either accept their contentions or make a reference to the High Court. On the 20th January, 1934, the Commissioner referred to the High Court two questions framed in the following terms:—

"(1) Is the income of the Tribune Trust liable to be assessed in the hands of the Trustees under the provisions of the Income-tax Act?

(2) If so, is it not exempt under S. 4 (3) (*i*) of the Act?"

Upon the second question, which alone need now be referred to, the Commissioner having set out clauses 20 and 21 of the will gave as his opinion:—

"It will be very difficult to say whether the running of a newspaper is an object of general public utility, but the mere fact that income is used for the improvement of the paper is not enough to take it out of the category of a business concern."

The learned Judges of the Division Bench before whom the reference was first heard were of different opinions, Jai Lal, J., holding that the appellants' income was exempt from

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tax and Skemp, J., holding that it was not. The question was referred to a Full Bench, with the result that Young, C.J. and Addison, J., held that the income in question was not exempt, Tek Chand, J., dissenting. From this decision (4th June, 1935) the present appeal to His Majesty was brought, and at the first hearing—on the 22nd and 23rd July, 1937,—it was considered by the Board to be desirable that the powers conferred by sub-S. 4 of S. 66 of the Act should be employed to obtain further information. Accordingly by an Order in Council dated the 29th July, 1937, it was directed in accordance with the advice tendered by the Board:—

" (2) that the case ought to be remitted to the High Court of Judicature at Lahore with a direction that the said High Court shall refer the case back to the said Commissioner under S. 66 (4) of the Indian Income-tax Act, 1922, first for the addition of such facts during the lifetime of the Testator Sardar Dayal Singh as may bear upon the proper interpretation of the expression 'keeping up the liberal policy of the said newspaper' in cl. 21 of the Will of the said Testator dated the 15th day of June, 1895 and secondly for the addition of such facts as to a compromise dated the 1st day of December, 1906, as may show whether the said compromise is binding on all parties interested in the estate of the said Testator."

There is now before their Lordships a supplementary statement made by the present Commissioner, Mr. K. C. Basak, who has carefully assembled considerable material explanatory of the direction given by the testator in the phrase "keeping up the liberal policy of the said newspaper", and showing, as their Lordships think very fairly, the nature and purpose of the trust. The first issue of the paper was dated the 2nd February, 1881, and contained an article entitled "Ourselves" which was a statement of the paper's aims and objects. Two years later (3rd February, 1883), a further article of the same character was published headed "Our Second Anniversary". Extracts from issues of the paper between 1881 and 1898 have been selected by the Commissioner and by the appellants to throw light on the character and policy of the paper in the lifetime of its founder.

The sole use which their Lordships are concerned to make of these materials is to arrive at a true construction of the trust, the testator having expressed his intentions by reference to a newspaper which had been published in his lifetime and to a policy the character and purpose of which must necessarily be collected from its previous issues. It is not necessary or relevant to inquire as to the manner in which the trust has been or

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is being carried out since the date of the testator's death. The question is the true nature and character of the trust.

No question here arises such as was dealt with in *Brighton College* v. *Marriott*[1], where it was held that the English Act as it then stood provided no exemption for profits of a trade carried on by a charity even if the carrying on of the trade was the sole and only purpose of the charity. In the letter of reference there is no suggestion that the income under assessment is not derived from property held under the trust declared in the 20th and 21st paragraphs of the will.

Their Lordships are not prepared to hold that the property referred to in these paragraphs of the will is held for the purpose of "education" in the sense of that word as it appears in S. 4 of the Act. *Prima facie*, therefore, the only question for decision is whether that property is held under trust wholly for the advancement of an object of general public utility. This was the view taken in the High Court by Tek Chand, J., who contrasted the wide terms of the exempting clause in the Indian Income-tax Act with the observations of Lord Lindley in the case of In re *Macduff*[2], where after referring to a well-known passage in Lord Macnaghten's speech in *Pemsel's case*[3], Lord Lindley held that in English law there might be some purposes of general utility which might be charitable and some which might not, the true test being the spirit or intention of the statute of Elizabeth (43 Eliz. c. 4). Learned counsel for the respondent in the present case, while not apparently conceding that under the Indian statute the sole test to be applied to the object of a trust was that of general public utility, was willing that this should be assumed in the present case. He suggested that the question whether an object was of general public utility was a question of fact to be found and stated by the Commissioner, and not a question of law for the Court. Their Lordships, while unwilling to pronounce upon any matter which has not been argued before them, consider that the Courts in India might be misled if the Board appeared to cast doubt upon the view that the admissibility of a claim to exemption from Income-tax must be determined by the language of the special provision made by the Act in that behalf. They are also of opinion that the question whether a particular object is of general public

1. (1926) A.C. 192. 2. (1896) 2 Ch. 451 at 467.
3. (1891) A.C. 531 at 583.

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utility, like the question whether a particular trust is charitable, is a question of law, though doubtless it is for the Commissioner to find and state any facts bearing thereon. [Cf. *Commissioners of Inland Revenue* v. *Temperance Council, etc.*[1]] In the present case the Commissioner properly stated it as a question of law under S. 66 and answered it as such—indeed he put the point as being "whether the Trust can be deemed to be a charitable trust?" The importance of applying correct principles in such a matter is manifest by reason of the rule against perpetuity laid down as to wills in S. 114 of the Indian Succession Act, 1925, and as to transfers *inter vivos* by S. 14 of the Transfer of Property Act, 1882. As to the latter, by S. 18 exception is made for transfer of property "for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind." By a long course of judicial decisions following English authority an exe ption for charitable trusts has been implied or read into S. 114 of the Succession Act, and by S. 118 restrictions are imposed upon bequests for "religious or charitable uses." And S. 2 of the Charitable Endowments Act, 1890, contains the same definition of charitable purpose as is given by the Income-tax Act, but with the addition of words excluding religious purposes.

It was considered by Jai Lal and Tek Chand, JJ., that on the question whether a particular object or purpose was of general public utility the true test is not what the Court considers to be beneficial to the public but what the testator considered to be so. In so holding they were following what was said by Chitty, J., in In re *Foveaux: Cross* v. *London Anti-Vivisection Society*[2]. That case was on this point dissented from by Russell, J., in In re *Hummeltenberg*[3] where it was held that, though the personal or private opinion of the judge is immaterial, nevertheless for a charitable gift to be valid it must be shown (1) that the gift will or may be operative for the public benefit and (2) that the trust is one the administration of which the Court itself could if necessary undertake and control:—

"If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be

1. (1926) 10 Tax Cases 748 at 772.
2. (1895) 2 Ch. 501.
3. (1923) 1 Ch. 237 at 242.

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established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects."

Their Lordships are in agreement with this view and see nothing in the Indian Income-tax Act to discharge the Court of its responsibility in coming to a finding as to the character of the object of a trust—a matter which bears directly upon its validity. It is to be observed moreover that under the Income-tax Act the test of general public utility is not only applicable to trusts in the English sense but is to be applied to property held under trust "or other legal obligation"—a phrase which would include Moslem wakfs and Hindu endowments. The true approach to such questions in cases which arise in countries to which English ideas—let alone English technicalities—may be inapplicable was considered by the Board in *Yeap Cheah Neo* v. *Ong Ching Neo*[1], and it was well said by Sir Raymond West in an Indian case *Fatmabibi* v. *Advocate-General*[2]:—

"But useful and beneficial in what sense? The Courts have to pronounce whether any particular object of a bounty falls within the definition; but they must in general apply the standard of customary law and common opinion amongst the community to which the parties interested belong."

In the High Court stress was laid by the learned Chief Justice and by Addison, J., on the fact that the Tribune newspaper charges its readers and advertisers at ordinary commercial rates for the advantages which it affords. As against this the evidence or findings do not disclose that any profit was made by the newspaper or press before 1918, and it is at least certain that neither was founded for private profit whether to the testator or any other person. By the terms of the trust it is not to be carried on for profit to any individual. It cannot in their Lordships' opinion be regarded as an element necessarily present in any purpose of general public utility that it should provide something for nothing or for less than it costs or for less than the ordinary price. An eleemosynary element is not essential even in the strict English view of charitable uses (*Commissioners* v. *University College of North Wales*[3]). There seems to be no solid distinction to be taken under the phrase "general public utility" between a school founded by a testator but charging fees to its pupils and a paper founded by a testator and sold to its readers. The purpose of providing the poor or the community in general with some useful thing without price or at a low

1. (1875) L.R. 6 P.C. 381. 2. (1881) I.L.R. 6 Bom. 42 at 50.
3. (1909) 5 Tax Cases 408 at 414.

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price may doubtless be in itself a purpose of general public utility. But if another object be independently in itself of general public utility the circumstance that the testator's bounty was only in respect of the initial capital assets, or had only to meet a working loss temporarily and not permanently, will not, necessarily at least, alter the character of the object.

The main objection now taken to the appellants' claim for exemption is on the ground that the Tribune newspaper, as its founder intended it to be carried on, would contain matter in the nature of political propaganda and would be devoted to the advocacy of particular legislative measures considered by its founder to be measures of reform. It is not suggested that the views or measures to be advocated were in any way unlawful, but even so the political character, it is said, prevents the trust from being held to be for an object of general public utility. Lord Parker said in *Bowman* v. *Secular Society, Ltd.*[1] :—

"A trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that the gift to secure the change is a charitable gift"

And in In re *Tetley*[2], where the gift was for "patriotic" and charitable objects Russell, J., said :—

"But must every application of the fund for a patriotic purpose be beneficial to the community and therefore charitable? It seems to me that it is impossible to hold that. What is or is not patriotic is in many cases mere matter of opinion. Subsidising a newspaper for the promotion of particular political or fiscal opinions would be a patriotic purpose in the eyes of those who considered that the triumph of those opinions would be beneficial to the community. It would not be an application of funds for a charitable purpose."

Again in *Commissioners of Inland Revenue* v. *Temperance Council*[3], Rowlatt, J., finding that the first purpose of the assessees was legislative temperance reform though the work was to be of a strictly non-party character, observed :—

"Any purpose of influencing legislation is a political purpose in this connection. Under these circumstances this is mainly a trust to secure a certain line of legislation, and if that is so I do not understand it to be disputed that that would not be a charitable trust. I think the authorities are clear upon it and I am not going to say anything more about it."

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1. (1917) A.C. 406 at 442.
2. (1923) 1 Ch. 258 at 262.
3. (1926) 10 Tax Cases 748 at 752.

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On the other hand it is to be observed that in this case Rowlatt, J., rejected, but only upon the facts, the argument that the purpose of the Council was temperance and that legislation came in in a subsidiary way. And in In re *Scowcroft*[1], the devise of a building known as the Conservative Club and Village Reading Room in a certain parish to be maintained "for the furtherance of Conservative principles and religious and mental improvement, etc." was held to be a gift for religious and mental improvement. Stirling, J., said:—

"It is therefore a gift in one form or another for religious and mental improvement, no doubt in combination with the advancement of Conservative principles; but that limitation it appears to me is not sufficient to prevent it from being a perfectly good charitable gift as undoubtedly it would be if it were a gift for the furtherance of religious and mental improvement alone."

Hood, In re[2] was a case where a testator had bequeathed his residuary estate for the purpose of spreading Christian principles and aiding all active steps to minimise and extinguish the drink traffic. On the view that the former was the dominant purpose and that the latter was subsidiary thereto, the gift was upheld even on the hypothesis that the latter purpose would not have been charitable in itself.

In *Bonar Law Memorial Trust* v. *Commissioners of Inland Revenue*[3], Finlay, J., had to deal with a college founded in connection with the Conservative party and after reviewing the cases above-cited held that the question was whether the dominant purpose was a good charitable purpose or not:—

"The fact that the education was entrusted to the Conservative party would not I think affect the validity of the Trust if in truth it was a trust for education; but on the other hand, if the true view is that the Trust was a trust for the promotion of Conservative principles . . . and that the education, the lectures and so forth were subsidiary to that which was the main and dominating purpose then the fact that the lectures and so forth would be educative would not be sufficient to make the Trust a trust for charitable purposes only."

Holding that the college was in effect an educational centre for the Conservative party and that this was in accordance with the trust deed, the learned judge decided that the claim for exemption from tax could not be sustained.

These English decisions are in point in so far only as they illustrate the manner in which political objects, in the wide sense which includes projects for legislation in the interests of

1. (1898) 2 Ch. 638. 2. (1931) 1 Ch. 240.
3. (1933) 17 Tax Cases 508.

P.C.

Trustees f Tribune Press, Lahore v. Commissioner of come-tax, Punjab, Lahore.

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particular causes, affect the question whether the Court can regard a trust as being one of general public utility. In the original letter of reference it was not suggested by the Commissioner that the newspaper was intended by its founder to be a mere vehicle of political propaganda, and in the case of Sardar Dayal Singh it seems unreasonable to doubt that his object was to benefit the people of Upper India by providing them with an English newspaper—the dissemination of news and the ventilation of opinion upon all matters of public interest. While not perhaps impossible, it is difficult for a newspaper to avoid having or acquiring a particular political complexion unless indeed it avoids all reference to the activities of Governments or legislatures, or treats of them in an eclectic or inconsistent manner. The circumstances of Upper India in the last decade of the nineteenth century would doubtless make any paper published for Indian readers sympathetic to various movements for social and political reform. But their Lordships, having before them material which shows the character of the newspaper as it was in fact conducted in the testator's lifetime, have arrived at the conclusion that questions of politics and legislation were discussed only as many other matters were in this paper discussed and that it is not made out that a political purpose was the dominant purpose of the trust.

They think that the object of the paper may fairly be described as "the object of supplying the Province with an organ of educated public opinion," and that it should *prima facie* be held to be an object of general public utility. Having regard to the particular circumstances of the time, the directions of the testator and the evidence as to the contents of the paper before 1898 their Lordships think that the present case is nearer on its facts to In re *Scowcroft*[1] than it is to the case of the *Bonar Law Memorial Trust*[2] or to the case put by Russell, J., in In re *Tetley*[3] of a newspaper subsidised for the promotion of particular political or fiscal opinions. They do not think that in these circumstances the case can be regarded as outside the ambit of the exemption clause of the Indian Act.

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1. (1898) 2 Ch. 638.
2. (1933) 17 Tax Cases 508.
3. (1923) 1 Ch. 258 at 262.

P.C.

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It is not necessary to consider what the position would be if the trust declared by the will were for any reason to fail in the future.

For the reasons given their Lordships are of opinion that this appeal should be allowed and that the second of the two questions referred to the Court by the Commissioner's letter of reference dated 26th January, 1934, should be answered in the affirmative. They will humbly advise His Majesty accordingly. The respondent will pay the appellants' costs of the reference in the High Court and of this appeal.

Solicitors for Appellants: *Nehra & Co.*

Solicitors for Respondent: *The Solicitor, India Office.*

R. C. C.
K. S.

——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Subbiah Tevar .. *Prisoner* (Accused—Appellant).*

Subbiah Tevar, *In re.*

Criminal Procedure Code (V of 1898), Ss. 1 (2) and 162—Statements admissible under S. 27, Evidence Act—Incriminating statement leading to discovery of articles—Admissibility against accused—Maxim generalia specialibus non derogant.

S. 162, Criminal Procedure Code, does not shut out statements which are admissible under S. 27 of the Evidence Act. And the law in this respect is in no way modified by the decision of the Privy Council in *Pakala Narayanaswami* v. *The King-Emperor,* (1939) 1 M.L.J. 756: L.R. 66 I.A. 66: I.L.R. 18 Pat. 234 (P.C.). Consequently an incriminating statement made by the accused to the Village Munsif which is followed up by the discovery of articles alleged to be connected with the crime at the place mentioned by the accused, is admissible in evidence.

The rule laid down in S. 1 (2) of the Criminal Procedure Code, "Nothing herein contained shall affect any special law now in force" is an application of the maxim *"generalia specialibus non derogant"*. The rule contained in S. 27 of the Evidence Act is a 'special law' which is not derogated from by the general rule enacted in S. 162, Criminal Procedure Code.

Thimmappa v. *Thimmappa,* (1928) 55 M.L.J. 351: I.L.R. 51 Mad. 967 (F.B.) and *Syamo Maha Patro,* In re, (1932) 62 M.L.J. 742: I.L.R. 55 Mad. 903 (F.B.), relied on.

Trial referred by the Court of Session of the Tinnevelly Division for confirmation of the sentence of death passed upon the said Prisoner in Case No. 115 of the Calendar for 1938 on 10th February, 1939.

R. Sadasivam Pillai for Appellant.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

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* R. T No. 33 of 1939. 19th April, 1939.
Criminal Appeal No. 151 of 1939.

Subbiah Tevar, *In re.*

Stodart, J.

The judgment of the Court was delivered by

Stodart, J.—The accused Subbiah Tevar has been convicted and sentenced to death for the murder of Sundarammal. He has filed two petitions by way of appeal. In his statement made under S. 342 to the Sessions Judge he declared that the Sub-Inspector of Police P. W. 9 concocted the case against him because he refused to give him fodder for his bulls. In one of his appeal petitions he states that the case has been concocted against him by enemies because he was the principal witness in a murder case five years ago. In the referred trial the question for our decision is whether the sentence of death should not be confirmed.

2. There is no doubt that Sundarammal a woman of 60 was murdered in her field on the morning of Saturday, the 30th July. She was seen in the early morning when she set out for her field, by her daughter P. W. 5 who lives in the opposite house and by P. W. 6 her next door neighbour, and she was seen again by P. W. 7 in her field about 8 A.M. At midday her son P. W. 4 when he went to the field to take her her midday meal found her lying dead near the well. Her face and the front of her head had been battered in. There was blood on the ground there. It was clear that she had been murdered there. A blood-stained stone lay near the body.

3. The motive for the murder was clear. The right ear-lobe was torn and lacerated. The left ear-lobe was completely cut off. Gold mudichus—a kind of ear ornament—which her daughter P. W. 5 had lent to the deceased the previous day to wear when she went to a neighbouring village on a visit of condolence were missing. P. W. 5 and P. W. 6 say they saw these mudichus in the ears of the deceased on the morning of the crime.

4. P. W. 9 the Sub-Inspector reached the village at 7 P.M. He held the inquest early next morning. The blood-stained stones and earth from the place where the body was lying and the blood-stained stone with which the murder might have been committed were sent by him with other things to be examined by the Chemical Examiner and Imperial Serologist and were found to be stained with human blood.

5. There was no clue to the murderer. The scene of crime is 1¼ miles from the village: the cholam crop in the field was high: the unfortunate woman had evidently been taken

unawares and killed without the knowledge of anyone who might have been in the surrounding fields.

6. The accused is a member of a registered Criminal Tribe who was bound to report to the authorities when he intended to leave the village. He was absent and he had not made any report. For this reason and because he suspected that the accused might have had something to do with the murder, the Sub-Inspector left instructions in the village that the whereabouts of the accused should be reported to him. On the morning of the 26th August, P. W. 10 a relation of the deceased found the accused sleeping in his field and went off to the police station four miles away to tell the Sub-Inspector. The latter happened to be at Kurukkalpatti on the main road not far away and received this information at 12-30 P. M. He went to the village at once and to the place where the accused was, and arrested him. The accused then made a statement which is the principal evidence against him. He made it in the presence of the Village Munsif P. W. 11, P. W. 12 and P. W. 10. He said according to P. W. 11 and P. W. 12:

> "I tore the earlobes of Sundarammal and took her mudichus. She raised an alarm . . . . I have kept the mudichus in my house. I shall produce them."

P. W. 10's recollection of this statement however is simply that the accused said:

> "I have kept the concerned property in my house in a hole made for a rafter in one corner, and I shall produce it."

P. W. 11 and P. W. 12 also say that the accused stated that he had killed Sundarammal with a black stone so that she might not disclose the robbery. But that part of the statement is not admissible in evidence since it did not, within the meaning of S. 27 of the Indian Evidence Act, lead to the discovery of any fact. P. W. 11 the Village Munsif deposes that when the accused was making this statement he took it down in writing and the record of it is Ex. J. In Ex. J, the admissible portions are:

> "On a Saturday, 26 days ago, in the morning my concubine Muthammal went out towards the south to gather cowdung. I followed her. Sundarammal was sitting at a place to the west of the well and to the north of the Kamalai pit. I suddenly cut the two mudichus from both her ears. (Then comes the inadmissible portion.) I left her at the same place, came to my village tied the two mudichus in a dirty white cloth with a green border and kept it in a hole in the southern wall in the south-eastern corner of the house in which I live. I shall take it and deliver it up. I should be protected."

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Though the persons who heard the accused making this statement do not remember the whole of it, there is no reason to disbelieve the Village Munsif when he says that Ex. J is a correct record of what the accused said.

7. Following on this the Sub-Inspector and the accused and the Village Munsif and P.W. 12 and P.W. 10 and P.W. 13 a neighbour of the accused went at once to the accused's house. In their presence the accused took the jewels from their hiding place and handed them over to the Sub-Inspector.

8. That is all the evidence against the accused. It is plain, consistent and straightforward and has been believed by the learned Sessions Judge and learned Counsel who appears for the appellant has not attempted to show that there are any grounds on which it should be rejected. His appeal rests on a point of law. He contends that statements made to the police by an accused person after his arrest, though they may come within the meaning of S. 27 of the Evidence Act, are inadmissible under S. 162 of the Criminal Procedure Code. S. 162 is:

"No statement made by any person to a police officer in the course of an investigation shall . . . . be used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when such statement was made."

This section is clearly wide enough to include statements made to a police officer which would be admissible under S. 27 as constituting information in consequence of which some fact has been discovered. But it has been held by this High Court and by other High Courts in a long series of decisions that S. 162 does not shut out statements which are admissible under S. 27 of the Evidence Act. That must now be regarded as settled law. Learned Counsel contends however that this settled rule has been abrogated by a recent decision of the Judicial Committee of the Privy Council, *Pakala Narayanaswami* v. *The King-Emperor*[1]. We have examined that decision very carefully and we do not think that it disturbs the course of decisions of this and other Courts. In that case one of the questions at issue was the admissibility of statements made before arrest to a police officer by a person ultimately accused. The Privy Council held that such statements were shut out under S. 162 of the Criminal Procedure Code.

1. (1939) 1 M.L.J. 756: L.R. 66 I.A. 66: I.L.R. 18 Pat. 234 (P.C.).

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Incidentally the Privy Council when considering the scope of S. 162 discussed a view which had been taken by some of the High Courts in India that S. 162 referred to statements made in the course of a police investigation by witnesses only and not by accused persons. And the Privy Council differing from that view—which I *might* observe has not been the view of this High Court—proceeded to make some observations relating to the reasons on which that view had been based. The principal reason was that if S. 162 of the Criminal Procedure Code applied to statements by accused persons it would amount to a repeal of S. 27 of the Indian Evidence Act. On this point the Judicial Committee observed:

"The words of S. 162 are plainly wide enough to exclude any confession made to a police officer in the course of investigation whether discovery is made or not. They may therefore *pro tanto* repeal the provisions of the section which would otherwise apply. If they do not, presumably, it would be on the ground that S. 27 of the Evidence Act is a special law within the meaning of S. 1 (2) of the Code of Criminal Procedure, and that S. 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic."

9. The question therefore whether S. 162 of the Criminal Procedure Code has repealed S. 27 of the Indian Evidence Act so far as statements made to a police officer are concerned has not been here decided by the Privy Council and we are not therefore debarred by this decision from following the rule laid down in previous decisions of this Court. We may observe that it has been recently held specifically by learned Judges of this Court that though S. 162 of the Criminal Procedure Code applies to statements made by accused persons, nevertheless S. 27 of the Indian Evidence Act is a 'special law' which is not derogated from by the general rule enacted in S. 162. *See* the dictum of Ramesam, J., as he then was in *Thimmappa* v. *Thimmappa*[1] and of Reilly and Sundaram Chetty, JJ., in *Syamo Maha Patro,* In re[2]. The rule laid down in S. 1 (2) of the Criminal Procedure Code "Nothing herein contained shall affect any special law now in force" is an application of the maxim "*generalia specialibus non derogant*".

10. The statements made by the accused in this case on the 26th August being admissible in evidence we agree with the learned Sessions Judge that the charge against him is proved.

1. (1928) 55 M.L.J. 351: I.L.R. 51 Mad. 967 (F.B.).
2. (1932) 62 M.L.J. 742: I.L.R. 55 Mad. 903 (F.B.).

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He was absent from the village immediately after the crime. He was under a special obligation to intimate his absence to the police and did not do so. He stated that, at the place where the murder was committed, and at a time which is shortly after the deceased was last seen alive, he came upon her suddenly and cut her ear-lobes and took her mudichus and hid them in his house. That statement is corroborated by the condition of the ears as seen on the body of the deceased and by the accused's production of the mudichus from the place in his house where they were hidden. The man who cut the ears of the deceased that Saturday morning when the deceased was sitting near the well in her field—and the accused has admitted that he was that man —was in all human probability the man who murdered her. No motive has been proved against anyone other than the accused to murder this old woman. The only reason for her death was the need to silence her. That reason existed only for the accused. We reject his appeal and confirm his conviction for murder.

As for the sentence the extreme penalty is the only punishment appropriate for such a brutal crime. We confirm the sentence of death passed by the learned Sessions Judge.

B.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Kodukula Kameswaramma .. *Appellant** (*Plaintiff*)

v.

Kodukula Thammanna and others .. *Respondents* (*Defendants*).

Kameswaramma *v.* Thammanna

Award—Suit for maintenance—Rate of maintenance referred to arbitration—Award providing fixed rate without possibility of variation—Parties acting on award—Binding nature—Agreement for maintenance contained in award—Variation not permissible.

Where a Hindu widow claimed maintenance from out of certain joint family properties and subsequently the parties referred the question of the amount to be paid to her by way of maintenance to arbitration, but the arbitrators in giving their award went beyond the terms of the reference and provided therein that she should not be entitled to an increase in the rate fixed even if circumstances changed and the widow acted on the award by drawing the maintenance amount at the rate fixed therein,

*L. P. A. No. 64 of 1937. 13th March, 1939.

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Held, that the award having been accepted and acted upon by the parties, the widow could not at a later stage challenge its validity on the ground that it went beyond the terms of reference.

Brij Mohan Lal v. *Shiam Singh*, (1901) I.L.R. 24 All. 164, relied on.

Held, further, that the award was enforceable between the parties as an agreement by which the widow was to be paid a certain sum by way of maintenance during her lifetime without any right in either party to claim a variation, and that it was as such binding upon the widow.

Mohanleswara Rao v. *Durgamba*, (1923) 46 M.L.J. 189: I.L.R. 47 Mad. 308, relied on.

Decision of Venkataramana Rao, J., affirmed.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Venkataramana Rao dated 23rd March, 1937, in S.A. No. 626 of 1933 preferred to the High Court against the decree of the District Court of Vizagapatam in A. S. No. 253 of 1931 preferred against the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 11 of 1930.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

Y. Suryanarayana for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant is the widow of one Subbarayudu, who died in August, 1913. Subbarayudu was joint with his brothers, respondents 1 to 4. After the death of her husband the appellant went to live with her maternal grandfather and continued to live with him until his death in 1923. Shortly after her husband's death the appellant claimed the widow's right of maintenance out of the joint family property. The question of the amount to be paid to her was referred to arbitration. She was a major at the time and signed the reference, which is dated 25th April, 1914. The arbitrators gave their award on the 18th October, 1914, under which the appellant was to receive from her brothers-in-law by way of maintenance a sum of Rs. 42 per annum during her lifetime. The award also provided that the appellant should not be entitled to an increase in the rate even if circumstances changed. The rate was to be Rs. 42, no more and no less. Notwithstanding the award the appellant, after her grandfather's death, claimed to be entitled to maintenance at the rate of Rs. 20 per mensem, to an annual payment of Rs. 25 for clothing and to a sum of Rs. 200 for residence and cooking utensils. She based her claim on two grounds:—(1). At the time of the award and until his

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Leach, C.J.

death her maternal grandfather was helping to support her; and (2) the income from the joint family property had increased. The members of the family refused to accede to the appellant's demand. The consequence was, she filed in the Court of the District Munsif of Vizagapatam the suit out of which this appeal arises. The respondents pleaded the award and their plea was accepted. The appellant then appealed to the District Judge of Vizagapatam. The District Judge agreed with the decision of the District Munsif and dismissed the appeal. She then filed a second appeal which was heard by Venkataramana Rao, J., who considered that the decision of the lower Courts were right, but granted a certificate under cl. 15 of the Letters Patent.

Venkataramana Rao, J., accepted the contention of the appellant that the award went beyond the terms of reference in that the question referred was merely the amount of maintenance to be paid without regard to the question whether the appellant would be entitled to claim an increased amount if circumstances changed, but he was of the opinion that the case fell within the decision in *Brij Mohan Lal* v. *Shiam Singh*[1]. There the Allahabad High Court held that where an award has been accepted by the parties and one of them has received benefits under it he is not entitled at a later stage to challenge its validity. In the present case it is certainly not open to the appellant to raise any question as to the validity of the award. She knew of the provisions in the award and for fourteen years she accepted without question the amount given to her by it. That she knew of the terms of the award and accepted it as being valid is shown by Ex. III which is a receipt given by her in respect of the payment of the first annual payment of Rs. 42. The receipt reads as follows:—

"As my husband Subbarayudu, your undivided brother is dead, and as you are bound to protect me, the mediators who were chosen by you and me, have settled that a sum of Rs. 42 per annum should be given as maintenance by you to me. I consented to the said settlement. You have therefore paid me in cash this day a sum of Rs. 42 (Rupees forty-two) being the amount of maintenance for one year, from the 15th Margasira Sudda of this year to the 15th Margasira Sudda of the ensuing Rakshasa year. Hence the same has been received."

In the face of the express statement that she had consented to the award it is not possible for the appellant to contend that

1. (1901) I.L.R. 24 All. 164.

she did not accept it or that she did not know the terms of it. The District Judge has found as a fact that she did accept the award and this finding is conclusive on the question. Kameswaramma v. Thammanna

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It was held in *Mohanleswara Rao* v. *Durgambai*,[1] that a contract by a Hindu widow with her husband's coparceners to receive a fixed sum per annum for maintenance and not claim any increase in future even in case of change of circumstances was a valid agreement. If it were open to the appellant at this late stage to question the award—I hold that it is not—she accepted the arrangement embodied in it and this constituted an agreement between her and her husband's coparceners under which she was to be paid this sum for life without any right in either party to claim a variation, whatever change there might be in circumstances. From whatever point of view the case is considered the decision must be against the appellant. The appeal consequently fails and will be dismissed with costs.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kunhibi *alias* Beebi Umma .. *Appellant** (*1st Defendant*)

v.

Kalliani Amma and others ... *Respondents* (*Plaintiffs and 2nd Defendant*).

Kunhibi v. Kalliani Amma.

Muhammadan Law—Minor—Mortgage executed by de facto *guardian—Personal covenant by such guardian both on her behalf and on behalf of her ward—Enforceability against the minor—Powers of* de facto *guardian—Specific Relief Act (I of 1877), S. 41—Applicability.*

The *de facto* guardian of a Muhammadan minor, to clear off a decree on a mortgage executed by her on behalf of the minor raised money by a new mortgage with personal covenants both on her behalf and on behalf of the minor. In a suit on the mortgage,

Held, a mortgagee cannot get a decree on the strength of a mortgage executed by the mother of a Muhammadan minor as *de facto* guardian. A *de facto* guardian cannot bind the minor with a personal debt unless it can be brought under the category of "acts arising from the wants of the infant."

Imambandi v. *Mutsaddi*, (1918) 35 M.L.J. 422: L.R. 45 I A. 73: I.L.R. 45 Cal. 878 (P.C.), followed.

In the case of a Muhammadan minor, the law does not contemplate the management of the minor's immovable property by any one other than the legal guardian. On the facts, the borrowing on the suit mortgage was not an act done to meet a sudden emergency when there was no time to adopt a

1. (1923) 46 M.L.J. 189: I.L.R. 47 Mad. 308.

* S. A. No. 4 of 1936. 31st March, 1939.

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legal procedure for binding the minor. S. 68 of the Indian Contract Act does not apply to the facts of the case. A minor whose property has been made subject to a void mortgage by an unauthorised person is entitled to ignore that mortgage and the mortgagee is entitled to claim no benefit thereunder in law as against the minor and there is no obligation upon the minor either under S. 41, Specific Relief Act, or on general equitable grounds.

Appeal against the decree of the Court of Subordinate Judge of South Malabar at Calicut in A. S. No. 27 of 1934 preferred against the decree of the Court of the District Munsif of Calicut in O. S. No. 116 of 1932.

Ch. Raghava Rao and *M. Chinnappan Nair* for Appellant.

B. Sitarama Rao and *K. Appu Menon* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit to recover money alleged to be due on a mortgage executed by second defendant, the mother of the first defendant who was then a minor. Defendants 1 and 2 are Muhammadans and second defendant purported to execute the mortgage as the guardian of the first defendant. The mortgage contains a personal covenant by the second defendant, both on behalf of herself and on behalf of the minor. The property bound by the mortgage belonged originally to second defendant's husband, who in 1917 shortly before his death transferred it to the second defendant as guardian of the minor, directing her to discharge the mortgage then subsisting and waiving in favour of the minor the receipt of the balance of consideration. In substance this assignment (Ex. D) is a gift to the daughter, the mother being empowered to accept the gift on behalf of the minor daughter.

The then mortgagee and the jenmi both got decrees against the minor and to pay off these decree debts the mother (second defendant) mortgaged the suit property and another item to one Koru Panikkar purporting to act on behalf of the minor first defendant. Koru Panikkar eventually got a decree for the balance due on his mortgage and advertised the suit property for sale. It was to avert this sale that the second defendant executed the suit mortgage-deed and out of Rs. 800 which was the consideration, a sum of Rs. 746-14-7 was paid to Koru Panikkar in satisfaction of his decree.

The lower appellate Court has found that the plaintiffs cannot get a mortgage decree on the strength of a mortgage executed by the mother of a Muhammadan minor, as *de facto*

guardian. This finding is undoubtedly correct in view of the decision of the Privy Council in the leading case of *Imambandi* v. *Mutsaddi*[1]. The learned Subordinate Judge held, however, that the plaintiff was entitled to a decree on the personal covenants, not only of the second defendant herself, but also of the second defendant as guardian of her minor daughter first defendant. The first defendant appeals.

The learned Subordinate Judge relies on the decision of Beasley, C. J., in *K. Venkatarayudu* v. *A. Khasim Saheb*[2] where the learned Chief Justice held that the mother of a Muhammadan minor could bind the minor by executing a promissory note in renewal of one executed by the deceased father of the minor, for the reason that this was the proper way of meeting the emergency arising when a suit was threatened on the original bond. The correctness of this decision is doubted by Sir Dinshaw Mulla in his "Muhammadan Law", 11th Edition, page 268. The learned Chief Justice does not quote any authority in support of his decision and though he refers to the fact that the Privy Council in *Mata Din* v. *Ahmed Ali*[3] left open the question of a *de facto* guardian's power of sale for necessity, his attention does not appear to have been drawn to *Imambandi's case*[1], which subsequently decided that no such power could be validly exercised over the immovable property of a Muhammadan minor.

Now the judgment of the Privy Council in *Imambandi's case*[1] contains a very elaborate consideration of the authorities on the powers of a Muhammadan guardian or person acting as such. Their Lordships point out that an unauthorised person who happens to have charge of a Muhammadan minor can bind the minor only by acts falling within the second of the three categories enumerated in the Hedaya, namely:

> "Acts arising from the wants of an infant, such as buying or selling for him on occasions of need, or hiring a nurse for him or the like."

Though the question of the *de facto* guardian's powers of borrowing was not actually before their Lordships for decision the whole question of the powers of guardians was considered and it must, I think, be taken as settled that the *de facto* guardian cannot bind the minor with a personal debt unless it can be

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1. (1918) 35 M.L.J. 422: L.R. 45 I.A. 73: I.L.R. 45 Cal. 878 (P.C.).
2. (1935) M.W.N. 643.
3. (1912) 23 M.L.J. 6: L.R. 39 I.A. 49: I.L.R. 34 All. 213 (P.C.).

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brought under the category of 'acts arising from the wants of the infant'.

Can it be said that the act of the second defendant in borrowing Rs. 746-14-7 from the plaintiffs to save her minor daughter's property from the Court sale was an "act arising from the wants of the infant." My attention has been drawn to the case of *Mahmud Ali* v. *Chinki Shah*[1], where it was held that money advanced by a creditor to save a minor's property from imminent sale for arrears of revenue comes within the scope of "necessaries" in S. 68 of the Contract Act, the term not being restricted to the elementary requirements of the minor such as food and clothing. It seems to me that whether a borrowing to save property from sale or to prevent a suit from being filed is a borrowing for "necessaries" must always be largely a question of fact. But in the case of a Muhammadan minor, it must be remembered that the law does not contemplate the management of the minor's immovable property by any one other than the legal guardian. The mother or other relative looking after the child has a legal right to supply that child's personal wants and presumably for that purpose could pledge the child's personal credit. But when it is a question of a debt affecting immovable property, to permit the unauthorised person to bind the minor with obligations arising from a duty to save that property from danger, is in fact to impose on that unauthorised person a duty which the law does not recognise. It may be that in a sudden emergency, when there is no time to employ a more regular procedure, the mother might be justified in incurring a temporary debt binding the minor to avert a grave and unanticipated danger to his property. But I doubt whether any such obligation could be deemed one "arising from the wants of the infant" when there is time to adopt the proper procedure of calling in the aid of the legal guardian, if any, or of obtaining an order of the Court for the appointment of a legal guardian. In my opinion and on the facts of the present case, it is not established that the act of the second defendant in borrowing Rs. 746-14-7 from the plaintiffs to discharge the mortgage decree was an act done to meet a sudden emergency or that there was no time to adopt a legal procedure for binding the minor. In the absence of such circumstances, I am of opinion that a

1. (1929) I.L.R. 52 All. 381.

borrowing on the personal credit of the minor cannot be deemed to be an "act arising from the wants of the infant" and that such a borrowing cannot bind the minor's estate. I may add that the decree which threatened the minor's property was itself based on a mortgage executed by the second defendant as guardian of her minor daughter—a mortgage presumably subject to the same infirmities as that which forms the basis of the present suit. This is an additional reason for doubting whether the borrowing was really essential to the welfare of the minor.

Various contentions have been advanced on behalf of the respondent by way of showing that the minor's property can be held liable for this debt even apart from the power of the mother as *de facto* guardian to incur the debt. Firstly, it is argued that the mother was originally appointed as guardian by the father and charged with a duty of freeing this property from its encumbrance and that she is therefore a legal guardian. The case of *Shaik Nawab Jan* v. *Safiur Rahman*[1], is cited as authority for the proposition that a Muhammadan father can delegate his functions as guardian. Assuming that this decision is correct it goes no further than to hold that a gift by a Muhammadan father to his minor child is not invalidated because the father authorises another relative to accept the gift on behalf of the minor. So much being granted, it would follow that the gift to the first defendant was validly accepted by the second defendant by reason of the authority conferred upon her for that purpose by the father. But this does not amount to the constitution of the mother as legal guardian for all purposes or after the father's death. If her authority is a delegated authority it will lapse on the death of the delegator whose legal powers pass on death to another.

Next it is argued that S. 68 of the Contract Act applies. This contention was not raised in either of the Courts below, as it should have been, depending as it does largely on matters of fact. But I think that it follows from the considerations set forth above that the materials available on the record do not justify a finding that this borrowing was necessary, though it was probably intended to be for the benefit of the minor.

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1. (1917) 25 C.L.J. 286.

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It is further contended that S. 41 of the Specific Relief Act applies and that the first defendant must surrender the benefit, if the contract is to be treated as void. With reference to this contention, it must be observed that this is not a case of a minor seeking as plaintiff to cancel a void contract. In the present case the plaintiffs are seeking to enforce a void contract or at least to use this void contract as a lever to extract from the minor defendant a refund of the benefit which she has received. The case of *Sinia Pillai* v. *Munisami Aiyar*[1] has been quoted as authority for the proposition that a defendant can be made to restore the benefit which he has received when resisting a suit on a contract not made with the sanction of the Court as required by S. 29 of the Guardian and Wards Act. But that was a case of a contract found to be beneficial and the decision expressly proceeds on the basis that the contract was not void but only voidable and the order to restore the benefit proceeded not on S. 41 of the Specific Relief Act but on general grounds of equity. My attention has been drawn to an *obiter dictum* of Krishnaswami Aiyangar, J., in *Hanumantha Rao* v. *Sitharamayya*[2], wherein the learned Judge tentatively raises the question whether S. 41, Specific Relief Act, would not equally apply when it is the defendant who seeks to cancel the instrument. It seems to me unnecessary to go into the question for the purpose of the present case where the defendant does not have to ask for the cancellation of the mortgage, but can merely plead that it is a void transaction which he is entitled to ignore. A minor whose property has been made subject to a void mortgage by an unauthorised person is entitled to ignore that mortgage and the mortgagee is entitled to claim no benefit thereunder in law, as against the minor. To hold that the minor as defendant to a suit on a void mortgage is bound to pray for its cancellation and to restore the benefit received, would be to give to the mortgagee a right to enforce his void contract by compelling the minor to pray for cancellation: that is to say, the person who has entered into a void contract with some person not authorised to bind the minor would be given a weapon whereby he could force the minor to honour the contract in part. This seems to me to be contrary to the maxim: "He

1. (1899) 9 M.L.J. 64: I.L.R. 22 Mad. 289.
2. (1939) 2 M.L.J. 195: I.L.R. 1939 Mad. 203.

who seeks equity must come with clean hands". I hold that there is no obligation upon the first defendant either under S. 41, Specific Relief Act, or on general equitable grounds.

In the result, therefore, I allow the appeal with costs here and in the lower appellate Court and restore the decree of the trial court.

Leave granted.

K. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Krishnamachari .. *Appellant** (*Petitioner*)

v.

Chengalraya Naidu .. *Respondent* (*Respondent*).

Limitation Act (IX of 1908), Art. 182 (5)—Preliminary decree for sale in usufructuary mortgage suit—Decree for costs—Execution for costs—Objection to execution—Costs executed and paid—Order for costs reversed on appeal—Application to amend decree ordered—Revision against—Dismissal of—Application for restitution of costs collected—Starting point of limitation—If date of order on appeal against costs or also order in revision against amendment—Wrong return of application for restitution—If application to be deemed pending—Application returned to party and not in Court—If makes any difference.

By mistake a preliminary decree for sale instead of redemption of a usufructuary mortgage was passed and costs were ordered to be paid by all the five defendants to the plaintiff. When the decree-holder applied for execution for costs, the fifth defendant objected on the ground that the decree was preliminary and therefore inexecutable. The executing Court overruled the objection but on appeal by the fifth defendant the order was reversed on 9th July, 1926. In the meantime the costs were recovered from the fifth defendant. He therefore applied for restitution and it was ordered. But the decree-holder applied on 11th November, 1925, for amendment of the decree into one for redemption and for a temporary injunction restraining the fifth defendant from realising the costs ordered to be restored to him. An *ex parte* interim injunction was granted. Two days later, on 13th November, 1925, the fifth defendant in ignorance of the interim injunction, applied for restitution but the petition was returned on 18th November, 1925, on the ground that the order granting interim stay was still in force. The execution petition was not represented. On 8th March, 1928, the amendment of the decree was ordered and the interim injunction was also made absolute. A revision to the High Court against the order allowing amendment was dismissed on 23rd April, 1931. On 28th April, 1934, the fifth defendant filed a fresh petition for restitution.

Held, the petition of 1934 as a fresh execution petition was barred as made more than three years from 1924 when the High Court finally held the decree was inexecutable and his cause of action for restitution thereupon

* A.A.A.O. No. 171 of 1936. 2nd December, 1938.

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arose. The pendency of a revision against the order allowing amendment of the decree cannot save limitation under Art. 182 (5), as it was in respect of a collateral matter and not with respect to the application for restitution.

ut the petition of 1934 must be regarded as one in the nature of a reminder of as one for continuance of the petition of 1925, as no legal final order was passed on that application as required by Art. 182 (5). The order returning the application to the defendant was clearly wrong. The fact that the application of 1925 was not physically in Court but was returned does not take the case out of the rule that when an order dismissing a prior execution petition is illegal or the prior execution petition was not properly disposed of, the execution petition must be deemed to be pending.

Held, further, that the equitable doctrine of English Courts cannot be allowed to prevail when the legal rights of a party to a proceeding come up before the Court for determination.

Appeal against the order of the District Court of North Arcot at Vellore in A. S. No. 203 of 1935 preferred against the order of the Court of the District Munsif of Arni dated 9th July, 1935 and made in E. P. No. 1008 of 1934 in O. S. No. 140 of 1920 on the file of the Court of the District Munsif of Ranipet.

N. Suryanarayana for Appellant.

K. Narasimha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The main question raised by the appellant in this appeal is whether an application for restitution made on the 13th November, 1925, in consequence of an order passed on appeal on the 9th July, 1924, and returned by the Court on the ground that an order of an interim injunction restraining the applicant from recovering the amount deposited by him for costs was still in force is still undecided and should therefore be ordered to be proceeded with. Two more applications for restitution were presented by the appellant in 1928 and in 1934. They will have to be incidentally considered but as the facts which are going to be stated will show, the decision of this appeal solely depends on the effect of the order passed on the application presented on the 13th November, 1925.

A preliminary decree for sale instead of redemption of a usufructuary mortgage was passed by a mistake on the 8th November, 1922 and costs were ordered to be paid by all the defendants, who were five in number, to the plaintiff. The plaintiff (decree-holder) applied for the recovery of costs on the 11th October, 1923, but the fifth defendant who is the appellant in the present appeal objected on the ground that the decree was

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preliminary in character and was therefore inexecutable. This objection was overruled by the execution Court. The fifth defendant preferred an appeal against this order in which he was successful and the order of the executing Court was reversed on the 9th July, 1924. In the meantime costs which had been awarded to the plaintiff had been recovered by him from the fifth defendant who applied for restitution after his appeal had been accepted (C. M. P. No. 1257 of 1924). An order for restitution was passed by the executing Court on the 22nd January, 1925. This was appealed against but it was confirmed by the appellate Court. The plaintiff then applied on the 11th November, 1925, for an amendment of the preliminary decree and prayed that the decree for sale, which had been erroneously passed by the Court, be converted into a decree for redemption (C.M.P. No. 357 of 1925). On the same date he applied for a temporary injunction restraining the fifth defendant from realising the costs paid by him, from the plaintiff (C M.P. No. 390 of 1925). An *ex parte* order was passed by the execution Court and an interim stay was ordered. The fifth defendant, apparently without any knowledge of this order, presented another application on the 13th November, 1925, asking for restitution but instead of keeping it on the file or adjourning it to a future date, a curious procedure was observed by the executing Court. The petition for restitution was returned on the 18th November, 1925, to the fifth defendant on the ground that the order granting interim stay had been passed and was in force. It is on the effect of this order that the decision of this appeal depends. The application for amendment made by the plaintiff was eventually allowed on the 8th March, 1926, and the interim stay was confirmed by another order on the same date. The fifth defendant made an application for revision against the order granting the plaintiff leave to amend but this was dismissed by the High Court on the 28th April, 1931. Before this revision was decided, the fifth defendant had filed another petition for restitution and had attached the application dated the 13th November, 1925, along with this application. This was again returned to him for compliance with certain requirements and was not re-presented. On the 28th April, 1934, a fresh petition for restitution was filed by the fifth defendant and I have to decide first whether this is within time.

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Having been presented after about six years of the application made in 1928 it is apparently barred, but it has been contended that the limitation for this application started on the date on which the appellant's revision was ordered by the High Court to be dismissed. Applications for restitution have been treated in this Presidency as applications for execution and would therefore be governed by Art. 182 of the Indian Limitation Act. (See *Somasundaram* v. *Chokkalingam*[1].) The same view has prevailed in Rangoon and Patna. (*Muthukaruppan Chettiar* v. *Annamalai*[2] and *Pathak Bhaunath Singh* v. *Thakur Kedar Nath Singh*[3].) It is true that the word 'appeal' occurring in Art. 182 of the Limitation Act has been held to include revisions, *Nagendra Nath Dey* v. *Suresh Chandra Dey*[4] and if the order, in pursuance of which the application for restitution was made had been the subject of a revision in the High Court, limitation would have started from the date on which the final order was passed by this Court. This is however not the case. The first decree was held to be inexecutable by the appellate Court in July, 1924. This order was not appealed against and became final. The cause of action for making an application for refund thus accrued to the appellant on the date when the appeal was accepted in 1924. This was independent of the application made or order passed by the Court for amendment of the decree. If the order passed on appeal in July, 1924, were final and could not be affected by the subsequent amendment, the pendency of a revision petition by the plaintiff against the order allowing the decree to be amended could not possibly help him. The revision was in respect of a collateral matter with which we are not at present concerned. The contention that the starting point of the period of limitation should be the date of the order passed by this Court in 1931 on revision has therefore no force.

The question then is, if the applications made by the defendant-appellant in 1925 or 1928 are of any help to him. The application made in 1928 could not be of much use as the present application was made six years later. Moreover in view of the fact that it was returned for complying with certain

1. (1916) I.L.R. 40 Mad. 780.
2. (1933) I.L.R. 11 Rang. 275.
3. (1934) I.L.R. 13 Pat. 411 (F.B.).
4. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).

requirements and was not re-presented within a reasonable time even if none was fixed by the Court, it can't be held to be of any avail to the appellant now.

This brings me to the main question whether the application of the 13th November, 1925, should still be deemed to be pending as no final orders required by Art. 182 (5) of the Indian Limitation Act were passed on that application. This would depend on the effect of the order passed by the Court returning the application to the defendant-appellant in consequence of the interim stay being then in force. This was clearly a wrong order and it is therefore contended that the application should still be deemed to be undisposed of and thus held to be pending. The learned Counsel for the appellant has relied on a number of cases which lay down that in order to entitle a petitioner to treat an application as in continuation or one for revival of a previous application it should be found that the order dismissing the first application was wrong or that the first application was not properly disposed of. (See *Pattannayya* v. *Pattayya*[1], *Appavoo Nainar* v. *Lakshmana Reddi*[2], *Ayisa Umma* v. *P.K. Abdulla*[3], *Krishnakaminee Debee* v. *Gireeshchandra Mandal*[4] and *Madhusudhan Kowor* v. *Girindra Narayan Singha*[5].) The principle on which these cases were decided is beyond controversy; but they have been attempted to be distinguished by the learned Counsel for the respondent on the ground that the orders passed on the applications were not only illegal but the applications were physically in Court. He contends that when the applications had been returned to the appellant either improperly in 1925 or when the application returned for compliance with certain requirements in 1928 was not re-presented by him within a reasonable time it must be considered to be *non est* in the eye of the law and cannot be taken advantage of by the appellant after the lapse of about 9 years. The contention is undoubtedly plausible but is there any warrant in law for me to give effect to it when I find that the Court was not justified in returning the application to appellant on the ground that an interim order for stay had been passed by it two days before? The application should have been retained in Court and any legal order that the executing

1. (1925) 50 M.L.J. 215.
2. (1933) 65 M.L.J. 305.
3. (1923) 76 I.C. 126.
4. (1935) I.L.R. 63 Cal. 57.
5. (1925) 87 I.C. 561.

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Court might have considered to be proper and which it was competent to give should have been passed thereon. As it is, no final order was passed on this application as required by Art. 182 (5) of the Indian Limitation Act. In the absence of any legal or proper order I am constrained to come to the conclusion that the application although not physically in Court must be yet treated to be pending and undisposed of. There is no duty cast on a decree-holder to make an application to revive an execution petition and the application of 1934 must be in the absence of any such duty, taken to be a kind of reminder to the Court to take up his application for execution or restitution which has not been disposed of and to decide it according to law. I am fortified in this conclusion by a decision given by my learned brother, Madhavan Nair, J., and reported in *Muhammad Abu Bakkar Maracair* v. *Ramakrishna Chettiar*[1].

In the end it has been contended on behalf of the respondent that even if the application for restitution made in 1925 is considered to be pending up till now, the appellant should, nonetheless, be held to have been guilty of laches and delay and should therefore be held disentitled to make the application almost 10 years after the order was passed which entitles him to get restitution. Reliance has been placed in this connection on two cases reported in *Sundaramma* v. *Abdul Khadar*[2] and *Jagadisan Pillai* v. *Narayanan Chettiar*[3]. It is hardly necessary for me to examine these cases in any detail as I find that this question was not being considered in either of them. The observations in the first case were made in summing up the effect of a decision by their Lordships of the Privy Council in *Kamar-ud-din Ahmad* v. *Jawahir Lal*[4], in which it had been held that the first petition for execution was not finally disposed of and that the subsequent application was both in substance and in form made with the object of reviving and carrying through a pending execution which was suspended by no act or default of the decree-holder. The facts in the second case were entirely different. No petition for execution was pending or undisposed of in that case and it was found that the decree-holder could have applied for execution at any time after

1. (1932) 64 M.L.J. 401.
2. (1932) 64 M.L.J. 664: I.L.R. 56 Mad. 490 (F.B.).
3. (1935) 71 M.L.J. 180.
4. (1905) 15 M.L.J. 258: L.R. 32 I.A. 102: I.L.R. 27 All. 334 (P.C.).

March, 1924, and the delay from March, 1924, to August, 1932, was:

"On account of his own negligence or laches and not to any defect in the decree or to any circumstances connected with the decree which prevented him from putting in an application for execution."

I find, on the other hand, that in the present case, the petition for execution filed by the appellant has not been finally disposed of so far and the interruption was not occasioned by any default or laches of the appellant. The interim stay was obtained by the respondent and it was in consequence of this stay that the application for restitution was illegally returned to the appellant.

Moreover, the objection as to laches or delay, based as it is on the equitable doctrine of English Courts cannot be allowed to prevail when the legal rights of a party to a proceeding come up before the Court for determination. It might have been different if the appellant were asking for an equitable relief. He is asking for a legal relief in this case and the only question is whether this is barred by the statute of limitation. There is thus no room in such cases for the application of any equitable defence such as suggested by the learned Counsel for the respondent.

In the circumstances the application made by the appellant in 1925 must be held not to have been disposed of and the application made in 1934 may be regarded either in the nature of a reminder or as one for continuance thereof.

The result is that this appeal must be accepted and the case sent back to the executing Court for disposal of the application made by the *appellant* in 1925.

In the peculiar circumstances of the case, however, I shall leave the parties to bear their own costs throughout.

S.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Lakshmana Pillai and others. *Petitioners** (*Rejected applicants*)

v.

Govindam Pillai and others.. *Respondents* (*Newly appointed trustees*).

Lakshmana Pillai v. Govindam Pillai.

Civil Procedure Code (V of 1908), S. 92—Scheme—Court carrying out provisions of—Judge presiding not persona designata*—Orders passed appointing trustees—Review and cancellation without sufficient grounds, not proper.*

* C. R. P. No. 1451 of 1938. 21st July, 1939.

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The Judge or a Court carrying out the provisions of a scheme framed for the management of a temple as a result of a scheme suit, acted as a Court and not as a *persona designata.*

The Judge had power to appoint trustees to vacancies created in the office of trustees but no power to cancel the orders in the circumstances of a case, where certain other applicants sought review and cancellation of the orders already passed, on the ground of their having been misled by information of an entry in the B diary as to the adjournment of the hearing to some other date.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Trichinopoly dated 5th October, 1938 and made in O. S. No. 32 of 1913.

S. T. Srinivasagopalachari for Petitioners.

K. Bhashyam and *T. R. Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT.—This is an application to revise the order passed by the learned Subordinate Judge of Trichinopoly on 5th October, 1938, in O. S. No. 32 of 1913. The suit was a scheme suit in which a scheme was framed for the Sri Kailasanathaswami temple at Tirumanur. Under the scheme the Subordinate Judge of Trichinopoly is entrusted with the duty of appointing trustees to fill vacancies as they arise. The order of the lower Court shows that three vacancies arose in the office of trustee and the learned Subordinate Judge was moved to fill up the vacancies. The matter was posted for hearing to the 28th July, 1938, and on that date the learned Subordinate Judge passed an order appointing the present petitioners as trustees. The order, however, was not issued from the office. On the 1st August, 1938, an application was made by one Manikkam Pillai who had been a candidate for the office of trustee to the Subordinate Judge praying that the order of the 28th July appointing the three trustees should be set aside, that the matter should be reopened and the petition disposed of after hearing all the applicants. It was alleged in the affidavit filed in support of that application that on the morning of the 28th July Manikkam Pillai and some other applicants came to the Sub-Court, found that a Sessions case was going on and were informed (by whom it was not stated) that the petition would not be taken up that day. They were informed, he said, that the petition had been adjourned and posted to some day in August and therefore Manikkam Pillai and some other applicants left the Court at about 2 P.M. The Subordinate Judge, they

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learnt, had taken up the matter later in the afternoon about 3-30 P.M. and had appointed the three present petitioners as trustees. On this application the learned Subordinate Judge gave notice to the present petitioners and on the 8th September, the learned Subordinate Judge decided to review his order of the 28th July and to inquire afresh into the matter of filling up the vacancies in the office of trustees. He therefore called for fresh applications and on the 5th October he passed the order against which this revision petition has been brought. In that order the learned Subordinate Judge purports to cancel the appointments of the three petitioners for reasons stated by him and to appoint the three respondents. The petitioners' case is that the learned Subordinate Judge had no jurisdiction to review or cancel the order which he passed on the 28th July appointing them as trustees. They therefore desire that the order of the learned Subordinate Judge should be set aside.

Learned Counsel for the respondents maintains that the order of the learned Subordinate Judge was proper. He contends on the one hand that, if the learned Subordinate Judge was acting as a Court, he had inherent power to set aside the order which had been passed on the 28th July at a time when his clients were under a mistake or misapprehension. On the other hand, if the Subordinate Judge was acting only as a *persona designata* and not as a Court, learned Counsel for the respondents contends that his order is not liable to be revised. In support of his contention learned Counsel refers to the case reported in *Moharmani Kuer* v. *Bhankumar Chandi*[1] and another case reported in *Sivarao* v. *Gangamma*[2]. These cases, I think, are not parallel. The first is a case in which, owing to the omission of the Court's establishment, no notice was sent to one party and the latter case is one in which, owing to the act of the Judge himself, one party was not fully heard. In the present case it cannot, I think, be fairly alleged that there was any act of the Court by which the respondents or any other of the applicants for the office of trustee were misled. They do not say who informed them that the matter had been adjourned and would not be taken up on the 28th July. It has been stated that their Counsel looked into some rough B diary and saw therein an entry that this matter had been adjourned to the 23rd August, 1938. It is not proved who made such an entry

1. A.I.R. 1936 Pat. 176. 2. (1934) 68 M.L.J. 66 : I.L.R. 58 Mad. 84.

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or under what authority. If that was done by a clerk in the office on his own responsibility, that is not, in my opinion, sufficient to bring the case within the principle applied in the two cases quoted. With regard to the contention that the Subordinate Judge was acting as a *persona designata*, learned Counsel for the petitioners points out that in *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar*[1], it was clearly held by a Bench of this Court that a Judge or a Court carrying out the provisions of a scheme decree acts as a Court and not as a *persona designata*.

The contention of the petitioners must, I think, be upheld. The learned Subordinate Judge had power to pass the orders of appointment which he passed on 28th July, 1938, but he had not, I think, power to cancel those orders in the circumstances of this case. As I have already stated, the respondents and the other applicants who went away on the 28th July were not misled or put into any disadvantageous position by reason of any act done by the learned Subordinate Judge or by anything which could be considered to be the act of the Court. When the learned Subordinate Judge appointed these three petitioners as trustees he conferred upon them, as the learned Counsel for the petitioners contends, the status of trustees and once they had got that status, they could only be removed by proceedings properly taken in the Court. It is not in my opinion possible to extend the inherent powers of the Court to cover such a case as this. Learned Counsel for the respondents contends that, since these petitioners themselves made applications to the learned Subordinate Judge for appointment after he called for such applications on the 8th September, 1938, they clearly acquiesced in his proceedings and ought not to be heard to object to them now. This, however, overlooks the principle that mere acquiescence does not confer jurisdiction which is otherwise lacking. This petition is accordingly allowed and the order of the learned Subordinate Judge dated 5th October, 1938, is set aside. The appointments made by the learned Subordinate Judge on the 28th July, 1938, will therefore take effect. The petitioners will recover their costs of this petition from the respondents.

I am informed that the appointment of treasurer has been filled but there is no dispute with regard to that.

K. C. ——— *Petition allowed.*

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1. (1923) I.L.R. 47 Mad. 139.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.

PRESENT:—LORD ROMER, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

Bhupendra Mohan Roy and others .. *Appellants**

v.

Srimati Purna Sashi Debi and others .. *Respondents.*

P.C.

Bhupendra Mohan Roy *v.* Srimati Purna Sashi Debi.

Wills—Powers under—Necessity for strict observance—Authority to adopt to be exercised within 10 years by the widow—Adoption more than 11½ years after testator's death—Validity—Gift over of surplus income to charity—Validity.

A testator died having provided by his will that if he had no son by his widow, or if such a son died, she might adopt 5 sons successively (one on the death of another) the adopted son to be the owner of the estate. The adoption was to be, within ten years of the testator's death, of a son from among the sons of the testator's three brothers or of his step-brother. If it should prove impossible to adopt any such son, then, after ten years, and within the next two years, she might adopt a son from among the sons of other agnatic relations of the testator. The will then made provision for, *inter alia*, the maintenance of the testator's mother and widow, and for the payment of the surplus income of the estate for the establishment and maintenance of a certain charity, in the event either that the testator should have no son, or that such a son should die sonless, or that no son should be taken in adoption, or that such an adopted son should die sonless. More than 11½ years after the testator's death, the widow purported to adopt one of his nephews, and he died without issue a short time afterwards. It would have been quite possible for the widow to adopt a nephew of the testator within the ten years prescribed by the will. On a claim by the widow to be entitled to the estate as heiress of the adopted son who, according to the will, had been the "owner of the estate",

Held, (1) that it was established law in such a case that the authority to adopt given by a husband to his widow must be strictly followed; that, on the true construction of the will, the power given to the widow was to adopt within ten years after the testator's death; and that the purported adoption was accordingly invalid, it being immaterial that the will did not expressly state that an adoption of one of the testator's nephews after that period should be void, since the determining factor was, not what the will declared should be void but what was the power of adoption conferred by it, and since that power was expressly limited and must, as laid down by the authorities, and in accordance with the general principles applicable to powers, be strictly observed.

Mutsaddi Lal v. *Kundan Lal*, (1906) 16 M.L.J. 174: L.R. 33 I.A. 55: I.L.R. 28 All. 377 (P.C.) and *Sitabai* v. *Bapu Anna Patil*, (1920) 39 M. L. J. 106: L. R. 47 I. A. 202: I.L R. 47 Cal. 1012 (P.C.), followed

(2) That, in the event which had happened of no adoption being made, the gift over in favour of the charity was valid and took effect ten years after

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* P.C. Appeal No. 67 of 1937. 7th July, 1939.
Bengal Appeal No. 21 of 1935.

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the testator's death, the gift over in the event of there being no adoption being severable from the gift over in the event of an adopted son's dying sonless.

Quaere, whether, if there had been a valid adoption, the gift over in the event of the adopted son's dying sonless would have failed for remoteness.

(3) That, inasmuch as the right to receive the surplus income of the estate, after fulfilment of the requirements of the will, vested in the widow, and as the gift to the charity was contingent and could not carry that income until it had become absolute, the widow was entitled to the surplus income which had accrued during the ten years before the gift to the charity became absolute, and was entitled to an account accordingly.

Appeal from a judgment of the High Court, Fort William in Bengal, dated 20th May, 1935 (Mitter and Rau, JJ.) reversing a judgment and decree, dated 17th June, 1932, of the First Additional Subordinate Judge, Dacca.

The facts are fully stated, and the relevant provisions of the will set out *in extenso*, in the judgment of the Board.

J. M. Pringle for Appellants.

J. M. Parikh for Respondents.

7th July, 1939. Their Lordships' judgment was delivered by

Lord Romer.

LORD ROMER.—This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal dated the 20th May, 1935, reversing the judgment and decree of the First Additional Subordinate Judge of Dacca dated the 17th June, 1932, whereby he had dismissed with costs a suit brought by the first respondent Srimati Purna Sashi Debi (hereinafter called the respondent) against the appellants and others.

The respondent is the widow of one Bhabendra Mohan Roy (hereinafter called the testator) who died on the 11th January, 1915, having made his will on the day preceding his death. He left a daughter surviving him but no son. He also left him surviving his three brothers (who are the appellants) and a step-brother, one Rajendra Mohan Roy.

Inasmuch as the questions to be determined upon this appeal are concerned with the proper construction and effect of the will, the material portions of it must be set out in full. They are as follows:—

"2. If no son be born to me of my loins or if such a son dies after birth, my wife Srimati Purnasashi Debi will be permitted, for the purpose of performing the Sradh, funeral rites and for offering water and funeral cakes to my ancestors, to take five sons successively (one on the death of the other) and that adopted son will be the owner of the estate, and will be, on attaining majority, entitled to take the estate from the hands of the Executors; and I

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grant her permission to take son in adoption as aforesaid. Before I gave her oral permission to take son in adoption in that manner.

"3 Within ten years after my death my aforesaid wife, in accordance with the provision mentioned in paragraph 2, will take a son in adoption from amongst the sons of my three full brothers or from amongst those of my step-brother Srijut Rajendra Mohan Roy. If it be impossible to take in adoption a son from amongst the sons of any one of them, then, after the expiry of ten years and within the next two years, she will take, at her own choice, a son in adoption from amongst the sons of my other agnatic relatives. In the absence of that or if that is not possible, she will take a son in adoption from one of my own Gotra or from a different Gotra. She will take the first son in adoption within twelve years as aforesaid. If the said son dies sonless, she will be entitled to take a second son in adoption even after the said period of twelve years. My aforesaid wife will be entitled to adopt five sons in succession, one on the death of the other, in the aforesaid manner.

"4. My full brothers, mentioned in paragraph 1, are my well-wishers and faithful objects of my love; and I have been living with them in Ejmali and in the same mess. My two elder brothers have been properly looking after and managing the estate even during my lifetime. Accordingly, I appoint my full brothers Srijut Bhupendra Mohan Roy, Srijut Prithwindra Mohan Roy and Sriman Hiranya Mohan Roy, Executors to the estate, after my death till my son or my adopted son or, if they die during their minority, till their sons attain majority. They will together, or in the event of the death, inability or absence of the one the others will manage and look after the estate. For the welfare or for the necessity of the estate they will be able to settle permanently, or in Putni or in Ijara the whole or any portion of my immovable property. They shall not be able to do any act detrimental to the estate, or to transfer or encumber the same. The Executors will perform the religious rites and duties of my ancestors and other festivities, according to their consideration and the custom of my family, the expenses of which will be borne by the estate left by me. They will maintain my mother, wife, daughter and others mentioned in paragraph 5, and pay their monthly allowance from the estate left by me. The Executors and their representatives will be bound to act according to the provisions of the Will of my deceased father Sudhendu Mohan Roy. Nobody will be able at any time to demand or take any accounts of income and expenditure from the Executors.

"5 My mother Srijukta Harakamini Debi, of whom I was born, will be entitled to maintenance out of my estate according to share, in accordance with my father's Will, and a sum not exceeding Rs. 2,000 should be spent out of my estate for her Sradh ceremony. My wife, Srimati Purnasashi Debi, will be under the care of my Executors and under the care of my son or adopted son when he would attain majority. She will be entitled to maintenance and all expenses for religious rites, pilgrimage, etc., out of the estate according to the circumstances of the estate and directions of the Executors. If my aforesaid wife be not on good terms with them, she will be entitled to a monthly maintenance allowance at the rate of Rs. 20 during her life and to a sum of Rs. 1,000 at a time out of my estate for the expenses of her pilgrimage, and she will further be entitled to live in a proper house in my residential homestead. My only daughter Srimati Binapani Debi is at present minor and unmarried. All the expenses of her marriage will have to be paid out of my estate in accordance with the custom of my family, and my estate will bear the cost of her maintenance till her marriage. If she lives at her

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husband's house after her marriage, she will receive Rs. 5 per month during her life out of my estate, and if she lives at my own house she will be entitled to maintenance out of my estate. If she be not on good terms with my heirs or successors in interest and if she wants to live in my own village, then my heirs and successors-in-interest should be bound to give her separate lands and houses according to the circumstances of the estate, and she will be entitled to a monthly allowance of Rs. 20 during her lifetime on account of her maintenance out of my estate; and she will be entitled to get proper sum of money out of my estate on the said accounts. If any other daughter is born to me, then she also will be entitled to maintenance, monthly allowance, marriage expenses, homestead and houses, etc, just like the aforesaid Srimati Binapani.

"6. My three brothers executors, will together or two of them or one of them will take the probate of this Will and will administer and manage the estate left by me till my son or grandson attain majority, being vested with all the responsibilities and power as mentioned in this Will and by paying off all the debts.

"7. If there be no son born of my loin, or if such a son die sonless after birth, or if perchance, no son be taken in adoption, or if the son taken in adoption die sonless, then the Executors or any of them or, in the event of their disagreement the Collector of Dacca will establish at my own native village Rawail, the place of my residence, a school or a charitable dispensary named after me and will spend the whole amount of surplus of my estate for its maintenance. To the above effect, being in full possession of my senses and in tranquil state of mind, I execute to-day this Will, being in Calcutta at 19, Hara Chandra Mallick Lane. *Finis.* Dated 26th Pous, 1321 B.S."

As already stated, the testator died on the 11th January, 1915. Ten years then passed without the respondent's taking any steps to adopt any one of the sons of the testator's brothers or step-brother. This was in no way due to any difficulty in finding such a son. It seems to have been a deliberate omission on her part. The learned Subordinate Judge has examined the evidence about this in some detail and has summed it up in these words:—

"So there is not only no evidence that the plaintiff even made any genuine endeavour to take any of her husband's brothers' sons in adoption within 10 years and failed, but there is evidence in the contrary direction that defendants 1 and 2 (*i.e.*, two of the appellants) offered their sons for adoption to the plaintiff but she did not adopt."

On the 13th August, 1926, however, the respondent purported to adopt an infant son of one of the appellants. That the adoption took place in fact is not now in dispute. The only question about it is whether it was a valid adoption seeing that it was not made within 10 years of the testator's death. On the 24th November, 1926, the adopted son died sonless.

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It was in these circumstances that the respondent instituted the present suit on the 20th January, 1928, claiming that the appellants as executors of her husband's will should put her in possession of the properties to which she was entitled at his death. She also claimed to have an account taken of the income of such properties. Her contention was that the adopted son had become by virtue of the express words in cl. 2 of the will "the owner of the estate," and that upon his death she became entitled to the estate as his heiress. As to cl. 7 of the will which contains a gift over in favour of charitable purposes in the event (amongst others) of the son taken in adoption dying sonless, she contended that the gift over was void on the ground that it was repugnant to the absolute gift to the adopted son contained in cl. 2. This was, of course, on the assumption that the adoption was valid. If that assumption proved to be ill-founded, she claimed to be entitled to the properties as heiress of her husband, alleging that the gift over in the event of no son's being taken in adoption was void on the grounds of remoteness and uncertainty.

The suit came on for hearing before the Additional Subordinate Judge at Dacca on the 17th June, 1932. He held that the adoption was invalid as not having been made within the 10 years limited by the will. He thought, in view of certain authorities, to which their Lordships will refer later, that the power to adopt given to the respondent was one that had to be strictly followed. He held further that the gift over in cl. 7, in the event which had happened of no son's having been taken in adoption, was valid in every respect. The result, as already stated, was that the respondent's suit was dismissed with costs.

The respondent then appealed to the High Court. The appeal was successful. It was held that the adoption was valid. Mitter, J., in whose judgment Rau, J., concurred, agreed with the Subordinate Judge that under the Bengal School of Hindu Law an authority to adopt given by a husband to his widow must be strictly followed. "No one", he said, "would quarrel with this proposition of law". But he thought that according to the true construction of the testator's will the authority given to the widow to adopt a son of one of his four brothers could be exercised at any time within 12 years from the testator's death. He said:—

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"In our opinion on a reasonable construction of the will, even on a literal construction of it, the proper way to read it is to hold that there was no prohibition with reference to the taking in adoption of the nephews of her husband beyond the period of 10 years and within 12 years of the testator's death and by the adoption of the nephew within 12 years the wishes of the testator were complied with."

And a little later he said:—

"We have to see on the authorities whether there is an intention within the four corners of the will as expressing that the nephews are to be excluded beyond the period of 10 years. As we have already said that seems to us to be an unreasonable construction to put upon the will."

The adoption having been in their opinion validly made and the adopted son having died sonless, it necessarily followed that the respondent had power at any time thereafter to take four more sons in adoption successively. In order, therefore, to determine whether the gift over contained in cl. 7 of the will had taken effect by reason that the son taken in adoption had died sonless, it might be necessary to wait until the death of the respondent. What, then, was to happen in the meantime to the testator's estate which had vested in the son whose adoption had been held to be good? This question was answered by the High Court in the respondent's favour. They held that the estate had vested in her as heiress of the adopted son, and that she was entitled forthwith to be put into possession of it and to administer it. They considered that any other conclusion would be inconsistent with the Hindu law that the succession to an estate can never remain in abeyance.

It is, in their Lordships' opinion, established law that in such a case as the present the authority to adopt given by a husband to his widow must be strictly followed. In the case of *Mutsaddi Lal* v. *Kundan Lal*1, the law upon the subject was stated by the Privy Council to be as follows:—

"All the schools of Hindu law recognise the right of the widow to adopt a son to her husband 'with the assent of her lord'. It is equally well established that this assent may be given either orally or in writing; that, when given, it must be strictly pursued; that she cannot be compelled to act upon it unless and until she chooses to do so; and that in the absence of express direction to the contrary, there is no limit to the time within which she may exercise the power conferred upon her."

Much to the same effect was said by Lord Buckmaster when delivering the judgment of the Privy Council in *Sitabai* v. *Bapu Anna Patil*2:—

1. (1906) 16 M.L.J 174: L.R. 33 I.A. 55: I.L.R. 28 All. 377 (P.C.).
2. (1920) 39 M.L.J. 106: L.R. 47 I.A. 202: I.L.R. 47 Cal. 1012 (P.C.).

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"According to the Bombay School of Law the duty of a Hindu widow to obey her husband's command compels her to act upon any mandatory direction that he may give by will as to the way in which her power of adoption should be exercised."

Their Lordships so far are in complete agreement with the High Court. But, with all respect to that Court, they are unable to agree that in making the adoption of her husband's nephew more than 11 years after his death the respondent was acting in strict conformity with the authority given to her by the will. It is true that the will does not in terms state that an adoption of one of the sons of her husband's brothers or step-brother after the expiration of 10 years from his death should be void. That, however, is not the point. The question is not what the will says shall be void, but what is the power of adopting such a son that is given to the respondent. In their Lordships' opinion the answer to this question is plain. It is the power set forth in the first paragraph of cl. 3 of the will, namely: a power to adopt within 10 years after the testator's death. Their Lordships are unable to find anything in the will either preceding or succeeding this paragraph that can be regarded as in any way enlarging this power.

The power is expressly limited, and in accordance with the authorities and in accordance with the general principles applicable to powers the express limitation must be strictly observed.

For these reasons their Lordships agree with the decision of the Subordinate Judge that the adoption was invalid.

They also agree with him that the gift over contained in cl. 7 of the will in the case of no son's being taken in adoption was valid in the events which happened, and took effect upon the expiration of 10 years from the death of the testator. Their Lordships express no opinion upon the question whether, if there had been a valid adoption, the gift over in the event of "the son taken in adoption" dying sonless would or would not have failed for remoteness. For the gift over in the event of no son's being taken in adoption is clearly severable from the gift over in the other event just mentioned, and necessarily would take effect, if it took effect at all, at the latest upon the expiration of the period of 12 years from the death of the testator or the earlier death of his widow. In the events that happened it took effect upon the expiration of 10 years from the testator's

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death inasmuch as it was not impossible for the respondent within that time to take in adoption one of the sons of his brothers or step-brother.

It was, however, contended on behalf of the respondent that, even so, the gift over was invalid on the ground that, between the death of the testator and the expiration of the 10 years, the succession to the estate would be in abeyance, and that this was contrary to Hindu law. Their Lordships do not desire in any way to question this principle of the Hindu Law of succession. But it has no conceivable application to the present case. Upon the death of the testator any interest in his estate not effectually disposed of by his will would vest at once in the respondent as his heiress. There could not therefore be any abeyance of the succession. If the surplus income from his estate after making the provisions detailed in cls. 4 and 5 of the will had not been effectually disposed of, the right to receive such surplus income vested in the respondent. In truth it was not so disposed of, for the gift over of the residuary estate of the testator in favour of the charitable purposes mentioned in cl. 7 of the will was a contingent gift and would not therefore carry the income accruing before the gift vested. In these circumstances the respondent is entitled to have an account taken of that income and to be paid what shall be found due upon taking that account, and her suit ought not to have been dismissed altogether. It ought, however, to be stated in justice to the learned Subordinate Judge that this aspect of the matter does not appear to have been called to his attention.

In their Lordships' opinion the right course to take in all the circumstances is to discharge the decree of the Subordinate Judge and also the decree of the High Court except in so far as it directs payment of the court-fees out of the estate; to direct that an account be taken of the surplus income of the testator's estate accruing during the 10 years immediately succeeding the death of the testator; and to direct payment by the appellants to the respondent of what shall be found due on taking such account. Their Lordships will humbly advise His Majesty accordingly.

Their Lordships think that this is a proper case for directing that the costs of the appellants and the respondent both in the

Courts below and of this appeal should be raised and paid by the appellants out of the estate of the testator.

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Solicitors for Appellants: *A. J. Hunter & Co.*

Solicitors for Respondents: *Stanley, Johnson and Allen.*

R. C. C.

K. S. *Decrees of both Courts in India discharged.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Veerana Kone .. *Appellant* (Accused No. 1—Prisoner).*

Veerana Kone, *In re.*

Indian Penal Code (XLV of 1860), S. 364—Conviction under—Evidence, nature of—Admissibility of accused's statement to Police Officer—How much of it admissible under S. 27, Evidence Act (I of 1872).

Where the appellant had been convicted for offence under Ss. 364, 201 and 202, Indian Penal Code, and the evidence could only prove that the appellant had abducted the deceased in order that he might be murdered but there was no evidence of the commission of the offence under S. 364 except the statement made by the appellant to the Sub-Inspector of Police,

Held, that the whole of the statement was not admissible under S. 27 of the Evidence Act. The sole evidence relevant under S. 364 was that of the deceased's mother who stated that the appellant had accompanied the deceased before the alleged murder. It was highly possible that the accused did kidnap the deceased, but there was no legal evidence of it and hence the conviction under S. 364 should be set aside.

Appeal against the order of the Court of Session of the Madura Division in Case No. 149 of the Calendar for 1937.

Appellant not represented.

A. S. Sivakaminathan for *The Public Prosecutor* for the Crown.

The Court delivered the following

JUDGMENT.—The appellant has been convicted by the learned Sessions Judge of Madura for offences under Ss. 364, Indian Penal Code; 201 and 202, Indian Penal Code. He was tried along with two others for the murder of one Mayalagan on or about the 5th of May, 1937. Mayalagan left his home on the morning of that day with the intention of going to Vellaikundram. His mother P. W. 4 says that the appellant came at the time that her son was starting and accompanied him. Mayalagan did not come back home and after some days his mother went to Vellaikundram and made enquiries about him and when it

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* Crl. Appeal No. 80 of 1938. 14th April, 1938.

Veerana Kone, *In re.*

was found that he had not been to Vellaikundram she questioned the first accused, the present appellant. He told her that her son had gone to Madura. Search in Madura proved fruitless and when P. W. 4 again questioned the appellant he said that he had gone to Melakottai. She could not find him there and when she questioned the appellant a third time he said that Mayalagan had gone to Ayyankottai. These varying statements of the appellant made P. W. 4 suspect him and on the 29th of May, she made a complaint to the Village Munsif that her son was missing and that this appellant who had gone with him had given discrepant accounts of the places to which he had gone. The appellant was arrested on the 31st of May, and when questioned by the Sub-Inspector of Police, P. W. 11, he made a long confession in the course of which he described where the dead body of Mayalagan had been concealed. He took the Sub-Inspector and other witnesses to the place near Alagarkoil where there were borehole latrines and there he showed two borehole latrines in one of which a headless trunk and in the other a human head were found. It was impossible to identify the corpse since putrefaction had set in in every part, but along with it were found articles of clothing which were identified by the mother and sister of Mayalagan. It was also proved that Mayalagan had had his left tibia fractured in March, 1936, and that the left tibia of the corpse had been broken. It was therefore clear without the possibility of reasonable doubt that the corpse was that of Mayalagan.

Against the second and third accused, there was no evidence except the statement made by this appellant who alleged that he at their instance had persuaded the deceased to go towards the hills in order that they might kill him. He alleged that the murder had been committed by the second and third accused. The learned Sessions Judge acquitted the second and third accused but convicted the first accused of abducting Mayalagan in order that he might be murdered and sentenced him to ten years' rigorous imprisonment for that offence. He convicted him also under S. 201 for assisting in concealing the body of Malayagan and sentenced him to seven years' rigorous imprisonment. He convicted him also under S. 202 for intentionally omitting to give information of an offence of which he was legally bound to give information and sentenced him to six months' rigorous imprisonment.

The conviction under S. 364, Indian Penal Code, cannot be supported. There is no evidence of the commission of this offence except the statement Ex. K made by the appellant to the Sub-Inspector of Police. I cannot agree with the learned Sessions Judge that the whole of this statement was admissible under S. 27 of the Evidence Act. The preamble in which the appellant alleges that the second and third accused instigated him to take the deceased to the hills in order that he might be murdered cannot be said to have any relation to the discovery of the corpse in the borehole latrines. The sole evidence relevant under S. 364 is that of P. W. 4 who merely says that the appellant accompanied her son when he was going to Vellaikundram. I therefore set aside the conviction under S. 364, Indian Penal Code, and the sentence of ten years' rigorous imprisonment. It is quite possible—indeed highly probable—that the accused did kidnap the deceased, but there is no legal evidence of it and therefore this appeal must be allowed in regard to that offence. The convictions under Ss. 201 and 202, Indian Penal Code, are correct. The sentences are not excessive; they are confirmed. Veerana Kone, *In re*.

K. C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

A. P. M. Syed Ibrahim Sahib
and brother .. *Appellants** (*Appellants*)

v.

V. S. Gurulinga Aiyar .. *Respondent* (*Respondent*).

Syed Ibrahim Sahib *v.* Gurulinga Aiyar.

Indian Partnership Act (IX of 1932), Ss. 69 and 74—Suit by unregistered firm—Right accrued before the Act—Suit if maintainable—S. 74 subordinate to S. 69 (2).

S. 69 (2) of the Indian Partnership Act, 1932, should be read as being subordinate to S. 74 and therefore a suit filed by a firm to enforce rights which had accrued before the commencement of the Act could be maintained in spite of the non-registration of the firm. Before the Act came into force there was no register and a firm therefore had the right to file a suit without any formalities other than those required by the Civil Procedure Code and the Stamp Act and that right is saved by S. 74.

The majority view in *Girdharilal Son & Co.* v. *Kappini Gowder*, (1938) 2 M.L.J. 44, approved and followed.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Stodart dated 1st March,

* L.P. No. 74 of 1937. 16th March, 1939.

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1937 and passed in S. A. No. 138 of 1936 preferred to the High Court against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 97 of 1935 (O. S. No. 716 of 1933, District Munsif's Court, Vellore).

S. Ramachandra Aiyar for Appellants.

K. Bhashyam and *V. C. Veeraraghavan* for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question which arises in this appeal is whether S. 74 of the Indian Partnership Act, 1932, which saves rights and remedies which existed before the Act came into force, should be read as being subordinate to S. 69 (2), which requires a firm to be registered before instituting a suit to enforce rights, or whether S. 74 should prevail. The facts are simple. The appellant firm filed a suit in the Court of the District Munsif of Vellore claiming from the respondent a sum of Rs. 846-13-2 with interest. The respondent was in the employ of the appellant firm and was given charge of a branch office. It was said that he had withdrawn his account to the extent of the amount claimed. The defence was that the respondent was entitled to a share in the profits of the firm and that if the profits were taken into account there was no indebtedness. The firm had not been registered under the provisions of S. 58 of the Partnership Act when the suit was filed, but during its pendency registration was effected. When the respondent discovered that the appellant firm had not been registered before the institution of the suit he applied for leave to amend his written statement and include a plea that the suit could not be maintained by reason of the non-compliance with the Act. The amendment was allowed and an additional issue was framed. The District Munsif found that the respondent was indebted to the appellant firm in the amount claimed, but refused to grant a decree on the ground that the firm had not been registered before the plaint was filed. The suit was accordingly dismissed. The appellant firm appealed to the Subordinate Judge of Vellore, who concurred in the decision of the District Munsif. The appellant firm then appealed to this Court. The appeal was heard by Stodart, J., who also accepted the contention of the respondent that the suit was bad on account of the failure to register the firm before the suit was launched. The learned Judge, however, granted a certificate under cl. 15 of the Letters

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Leach, C.J.

Patent and the question now comes before this Court for decision.

S. 69 (2) of the Partnership Act states that no suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against a third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. S. 74, however, states that nothing in the Act or any repeal effected thereby shall affect or be deemed to affect *inter alia*:

"(*a*) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or (*b*) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act."

The question now under discussion arose in the case of *Girdharilal Son & Co.* v. *Kappini Gowder*[1], which came in the first instance before Pandrang Row and Venkataramana Row, JJ. Pandrang Row, J., having in mind the fundamental principle that existing rights are not to be taken away except by an express enactment or by an enactment which clearly expresses this intention, held that S. 69 (2) does not prevail over S. 74 and that a suit filed by a firm to enforce rights which had accrued before the commencement of the Act could be maintained in spite of the non-registration of the firm. On the other hand Venkataramana Rao, J., considered that S. 69 (2) must prevail and was apparently of the opinion that S. 74 was merely inserted in order to save a suit which was pending at the time the Act came into force. As the result of the disagreement the case was re-argued before Varadachariar, J., who agreed with Pandrang Row, J.

The opinion of Pandrang Row, J. and Varadachariar, J., is supported by the decision of Sulaiman, C. J., in *Danmal Parshotamdas* v. *Baburam Chhotelal*[2], the decision of the Bombay High Court in *Revappa Nandappa Hattarki* v. *Babu Sidappa Erandole*[3] and the decision of the Rangoon High Court in In re *Sooniram Ramniranjandass* v. *Junjilal*[4]. In his judgment in *Revappa Nandappa Hattarki* v. *Babu Sidappa Erandole*[3], Beaumont, C. J., referred to *Girdharilal Son & Co.* v. *Kappini Gowder*[1] and concurred in the judgment of Sulaiman,

1. (1938) 2 M.L.J. 44.
2. (1935) I.L.R. 58 All. 495.
3. (1938) 40 Bom.L.R. 1275.
4. (1938) Rang. L.R. 371 (F.B.).

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Leach, C.J.

C. J., in the Allahabad case. In the last mentioned case Bennet, J., was not in agreement with Sulaiman, C. J. He preferred the decision of the Calcutta High Court in *Surendranath De* v. *Manohar De*[1], where it was held that S. 69 (2) would apply to suits for enforcement of claims which accrued before the commencement of the Act, if such suits were started after S. 69 (2) had come into operation. The Calcutta High Court laid great stress on the provision in the Act that S. 69 (2) should not come into operation until twelve months after the rest of the Act had come into force. The Calcutta decision has been followed by the Patna High Court in *Shazad Khan* v. *Darbar Babu Kuchhi*[2] and by the Lahore High Court in *Krishan Lal-Ram Lal* v. *Abdul Ghafur Khan*[3], but the judgments in those cases do not carry the matter any further. The majority decision of this Court in *Girdharilal Son & Co.* v. *Kappini Gowder*[4] is binding on us and the matter could be left there, but as it has been suggested that we should refer the question to a Full Bench I will set out our reasons for agreeing with it.

There is no ambiguity in the wording of S. 74. It says definitely that nothing in the Act shall affect or be deemed to affect any right, title, interest, obligation or liability acquired or accrued before the commencement of the Act and that the Act shall not affect any legal proceeding in respect of any such right, title, interest, obligation or liability or any thing done or suffered before the commencement of the Act. Therefore the rights and remedies which accrued before the commencement of the Act are left entirely untouched. Before the Act came into force there was no register and a firm therefore had the right to file a suit without any formalities other than those required by the Code of Civil Procedure and the Stamp Act. In the Calcutta case *Surendranath De* v. *Manohar De*[1], it was suggested that the words "before the commencement of this Act" should be read in conjunction with the words "any legal proceeding or remedy", but in our opinion to do this would be doing violence to the wording of the section. The section is a saving section and if effect is to be given to the words used S. 69 (2) cannot apply in a case like the one before us.

1. (1934) I.L.R. 62 Cal. 213.
2. (1936) I.L.R. 15 Pat. 810.
3. (1935) I.L.R. 17 Lah. 275.
4. (1938) 2 M.L. 44.

Having indicated our opinion on the question of law the learned Advocate for the respondent suggested that we should send the case back to the Subordinate Judge for his finding on the issue as to the amount due to the appellant firm. This suggestion cannot be accepted. The District Munsif's findings of fact were not challenged before the Subordinate Judge. The appeal was confined to the question of law, and the respondent must therefore be deemed to have accepted the findings of the District Munsif. The Subordinate Judge has stated in his judgment that the respondent did not seem to have any real case on the merits and had not attacked the findings of the District Munsif. It is now too late to do so. The District Munsif has found that the appellant firm was entitled to a sum of Rs. 846-13-2 with interest at 9 per cent. per annum from the 7th March, 1934. Therefore there will be a decree in favour of the appellant firm for this amount with interest at the agreed rate from the date just mentioned to the date of the judgment of the District Munsif, namely, 27th March, 1935, with further interest at the Court rate on the decretal amount from that date until payment or realisation. The appellant firm will also be entitled to costs throughout on the principal amount.

S. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Ramakrishna, minor by his guardian *ad litem* Arkul Narayana Bhatta .. *Appellant** (*2nd Respondent*)

v.

Panchamal Narasimha Kamath (dead) and others .. *Respondents* (*Petitioners 1 and 2 and 1st Respondent*).

Transfer of Property Act (IV of 1882 as amended), S. 55 (4) (b)—Vendor's lien—Money reserved with vendee for discharging debt—Absence of novation with creditor—Subsistence of statutory lien—Enforcement of lien against purchaser with notice.

The statutory lien created by S. 55 (4) (*b*) of the Transfer of Property Act must operate to the extent to which there is any portion of the purchase money lying unpaid in the hands of the vendee or his transferee with notice. If there is a novation or a direct undertaking between the vendee and the creditor for the payment to the latter of the money retained in the vendee's

*A. A. O. No. 133 of 1935. 20th July, 1939.

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hands, then that money may cease to be a part of the unpaid purchase price and may become a debt payable only to the creditor in respect of which there can be no occasion for a lien in favour of the vendor. But when there is no privity between the vendee and the creditor who is to be paid off, the money in the hands of the vendee, whatever be the purpose for which it is retained, remains in fact money at the disposition of the vendor who can presumably countermand the instructions given to the vendee as to the disposal of that fund. It is therefore the vendor's money in respect of which he is entitled to the statutory lien and he can enforce that right as against a purchaser of the property with notice.

Appeal against the order of the District Court of South Kanara dated 7th February, 1935 and made in A. S. No. 219 of 1934 preferred against the order of the Court of the District Munsif of Mangalore dated 1st day of August, 1934 and made in R. E. P. No. 371 of 1934 in O. S. No. 6 of 1932.

E. Vittal Rao for Appellant.

K. Sanjiva Kamath and *K. P. Sarvothama Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is against an order making absolute an attachment of a vendor's lien in execution of a mortgage decree. The appellant is the transferee from the original vendee. There were three items sold two of which were covered by a mortgage. The vendee retained with himself a sum of money sufficient to discharge the mortgage and the interest thereon. He did not discharge the mortgage but sold the three properties to the present appellant, the transfer also reciting the fact that money had been retained for the discharge of the mortgage. The appellant also did not discharge the mortgage. Consequently the mortgagee has sued thereon and in execution of his mortgage decree the two items actually covered by the mortgage have been sold. The mortgagee is now seeking to recover the balance due under the mortgage decree by attachment and sale of the original mortgagor's lien as vendor over the third item which was no part of the mortgaged property.

It is contended that when a vendee retains in his hands part of the purchase price for payment to a mortgagee of a portion of the property sold, the vendor's lien does not exist. The only authority quoted in support of this proposition is an Oudh case which relies on the decision in *Abdulla Beary* v.

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Mammah Beary[1], which itself has been overruled by the Full Bench in *Sivasubramania Aiyar* v. *Subramania Aiyar*[2]. It seems to me a self-evident proposition that the statutory lien created under S. 55 (4) (*b*) of the Transfer of Property Act must operate to the extent to which there is any portion of the purchase money lying unpaid in the hands of the vendee or his transferee with notice. If there is a novation or a direct undertaking between the vendee and the creditor for the payment to the latter of the money retained in the vendee's hands, then that money may cease to be a part of the unpaid purchase price and may become a debt payable only to the creditor in respect of which there can obviously be no occasion for a lien in favour of the vendor. But when there is no privity between the vendee and the creditor who is to be paid off, the money in the hands of the vendee, whatever be the purpose for which it is retained, remains in fact money at the disposition of the vendor who can presumably countermand the instructions given to the vendee as to the disposal of that fund. It is therefore the vendor's money in respect of which he is entitled to the statutory lien.

There can be no doubt that in the present case the appellant purchased the property with full notice of the liability undertaken by the original vendee. He cannot therefore resist the attachment of the vendor's right.

The appeal is therefore dismissed with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Swaminatha Odayar .. *Appellant-Petitioner* (Petitioner—2nd Defendant)*

v.

Srinivasa Aiyar and others .. *Respondents in do. (Respondents—Decree-holder).*

Swaminatha Odayar *v.* Srinivasa Aiyar.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3, 19 and 20—Nature of application under S. 20—Powers of Court under—Stay of execution proceedings—Competency to stay—Appealability of order—Absence of applicant's name in the assessment register—Whether applicant entitled to benefits of the Act.

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1. (1910) I.L.R. 33 Mad. 446.
2. (1916) 31 M.L.J. 530: I.L.R. 39 Mad. 997 (F.B.).

* A. A. O. No. 6 of 1939 and C. R. P. No. 5 of 1939. 19th July, 1939.

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A reading of S. 20 of the Act IV of 1938 by itself indicates clearly that the only question which arises under that section is a question between the executing Court and the applicant and not a question between the parties to the decree.

A Court to which an application under S. 20 is made is perfectly competent to stay execution proceedings without notice to the decree-holder, if it is satisfied *prima facie* that the applicant is a person entitled to the benefits of the Act. This is indicated by the proviso to S. 20, which is that, if the judgment-debtor does not make an application under S. 19 within sixty days or if his application is made and rejected, the Court proceeds with the execution of the decree.

An order passed therefore refusing stay of execution is not an appealable order under S. 47 of the Civil Procedure Code.

Where it was shown beyond possibility of dispute that the applicant under the Act had not within the two years immediately preceding 1st October, 1937, been assessed to property or house-tax under the Madras District Municipalities Act on a property of the annual rental value of not less than Rs. 600 but it was shown on the other hand that he was only assessed to property-tax on property of annual rental value much less than Rs. 600, and never had been assessed to property-tax on any property within the jurisdiction of the Court entertaining his present application.

Held, that the proviso to S. 3 of the Act does not exclude those, who, though liable to property-tax, have for some reason or other escaped assessment.

A person cannot be 'assessed' unless the assessment is made in his name.

Appeal against the order of the Court of the Subordinate Judge of Tiruvarur dated the 6th day of October, 1938, and made in E. A. No. 188 of 1938 in O. S. No. 30 of 1924 on the file of the Court of the Subordinate Judge of Tanjore and petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tiruvarur dated the 6th day of October, 1938, and made in E.A. No. 188 of 1938 in O. S. No. 30 of 1924 on the file of the Court of the Subordinate Judge of Tanjore.

V. N. Venkatavaradachariar for Appellant.

M. S. Venkatarama Aiyar for Respondents.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—This appeal and this revision petition are both preferred from the order of the learned Subordinate Judge of Tiruvarur passed on E. A. No. 188 of 1938 in O. S. No. 30 of 1924 on the file of the Tanjore Sub-Court. The application was made to the learned Subordinate Judge by the appellant, who was the second defendant in the suit, under S. 20 of Madras Act IV of 1938, for stay of execution of the decree. S. 20 of Madras Act IV of 1938 says that:

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"Every Court executing a decree passed against a person entitled to the benefits of this Act shall, on application, stay the proceedings until the Court which passed the decree has passed orders on an application made or to be made under S. 19."

S. 19 provides for an application by a judgment-debtor who is an agriculturist to the Court which passed the decree for scaling down the decree. The learned Subordinate Judge has held an inquiry in order to ascertain whether the second defendant who made the application under S. 20 was "a person entitled to the benefits of this Act" and after taking evidence on the point he has decided this question unfavourably to the second defendant. He therefore dismissed the application to stay the proceedings. The second defendant has appealed from this decision and has also put in a revision petition.

With regard to the appeal, we are clearly of opinion that no appeal lies in this case. The question which is raised in an application under S. 20 of Madras Act IV of 1938, according to Mr. Venkatachari who appears for the appellant, must be considered to be a question under S. 47 of the Civil Procedure Code, since it relates to stay of execution, and there are many decisions that questions regarding stay of execution are questions regarding execution. We find ourselves unable to accept this view. The question raised under S. 20 is, we think, not a question between the parties to the decree at all. As we have already indicated, S. 19 of Madras Act IV of 1938 provides for the application of the judgment-debtor for the scaling down of the decree and S. 20 we consider to be a provision merely ancillary to S. 19. It was intended, we think, to make it possible for the judgment-debtor against whom execution was proceeding in a Court different from that which passed the decree to get the execution proceedings stayed until the Court which passed the decree could decide upon his application under S. 19. We see no reason to differ from our learned brother Wadsworth, J., who held in his decision of C.R.P. No. 1520 of 1938 that the Court to which an application is made under S. 20 must decide whether the person making the application is a person entitled to the benefits of the Act or not. But we think that the inquiry contemplated by S. 20 is an inquiry of a summary kind and that all that is necessary is that the applicant should show the Court that *prima facie* he is entitled to the benefits of the Act. A reading of S. 20 by itself seems to us to indicate clearly that the only question which

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arises under that section is a question between the executing Court and the applicant and not a question between the parties to the decree. In our view a Court to which an application is made under S. 20 is perfectly competent to stay the execution proceedings without notice to the decree-holder, if it is satisfied *prima facie* that the applicant is a person entitled to the benefits of the Act. This is indicated by the existence of the proviso to S. 20 which is that, if the judgment-debtor does not make an application under S. 19 within sixty days or if his application is made and rejected, the Court proceeds with the execution of the decree. We cannot therefore agree that the order passed in this case is an appealable order under S. 47 of the Civil Procedure Code and A.A.O. No. 6 of 1939 must accordingly be dismissed with costs.

In considering the Civil Revision Petition we think that the order of the learned Subordinate Judge cannot be upheld. It is not possible to say that he had no jurisdiction to decide whether the applicant was entitled to the benefits of the Act, for, as we have already said, we think that S. 20 does give him such jurisdiction. But his decision we think in this case must be set aside because he has given a perverse meaning to the words of S. 3, proviso C. It was shown beyond the possibility of dispute that the petitioner had *not* within the two years immediately preceding 1st October, 1937, been assessed to property or house tax under the Madras District Municipalities Act on property of the annual rental value of not less than Rs. 600. It was shown that he was assessed to property tax on property of the annual value of Rs. 405 in Mannargudi Municipality, and it was also shown that he was in reality the *owner* of property in Tiruvarur Municipality of the annual value of Rs.240. But he was never *assessed* to property tax on the property in Tiruvarur. The assessment on that property stands, as it has stood apparently for the last 40 years, in the name of another person Balasubramanya Udayar, who apparently died long ago. Learned Counsel for the respondent contends—and we think with good reason—that the policy of the Act was to prevent persons owning property of the annual rental value of Rs. 600 and more from claiming the benefits of Madras Act IV of 1938. But the proviso to S. 3, as we have already said, excludes from the benefits of the Act only persons who have been *assessed* to

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Burn, J.

property tax. It does not exclude those who, though liable to property tax, have for some reason or other escaped assessment. The learned Subordinate Judge says:

"In my opinion, the words 'assessed to' means only 'taxed in respect of' and not that the person's name should actually be found in the assessment register."

This, as we have said, is clearly perverse. A person cannot be "assessed" unless the assessment is made in his name.

In this case the petitioner was *prima facie* a person entitled to the benefits of the Act and we therefore set aside the order of the learned Subordinate Judge and direct that the execution proceedings be stayed under S. 20 of Act IV of 1938. It will be for the petitioner to make an application under S. 19 and if no application is made within sixty days or if the application is made and dismissed, the executing Court will proceed (under the proviso to S. 20) with the execution. The petitioner will recover from the respondents (decree-holders) the costs of this revision petition.

K. C. —— *A. A. O. 6 of 1939 dismissed.*

C. R. P. allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Vedula Lakshminarasimhamurti styled as Nittala Lakshminarasimhamurti and others .. *Appellants** (*Respondents*)

v.

Meduri Venkata Jogisomayajulu and others .. *Respondents* (*Petitioners*).

Lakshminarasimhamurti v. Venkata Jogisomayajulu.

Costs—Debt avyavaharika—*Legal representatives of judgment-debtor whether liable for costs in defending suit.*

If a debt has been decided finally in appeal as an *avyavaharika debt*, that is, tainted with immorality and illegality and in execution the decree-holders contend that the legal representatives of the judgment-debtor should also be held liable for costs,

Held, that the costs incurred in prosecuting a defence of this kind must be said to be a debt tainted with illegality or immorality for which the legal representatives cannot be held liable.

Appeals against the orders of the Court of the Subordinate Judge of Rajahmundry dated 10th February, 1937 and made in E. A. No. 626 of 1935 in O. S. No. 68 of 1919.

K. Kameswara Rao for *P. Somasundaram* for Appellants.

V. Suryanarayana for Respondents.

* A. A. O. Nos. 416 of 1937 and 24 of 1938.

19th April, 1939.

Lakshmi-narasimha-murti v. Venkata Jogi-omayajulu.

Burn, J.

The judgment of the Court was delivered by

Burn, J.—These are cross-appeals from the order of the learned Subordinate Judge of Rajahmundry passed on E. A. No. 626 of 1935 in O. S. No. 68 of 1919. The decree-holders in this execution petition sought to recover from the judgment-debtors four sums of money; costs in O. S. No. 68 of 1919 ordered by the decree of the Court to be paid by the guardian of the first defendant to plaintiffs 2 to 4 amounting to Rs. 666-8-0, interest on the same sum from 16th October, 1923, to 15th September, 1935, at 6 per cent. per annum amounting to Rs. 476-8-9, the costs decreed in A.S. No. 134 of 1924 on the file of this High Court amounting to Rs. 465-1-6 and costs in C. M. P. No. 2774 of 1927 on the file of this High Court amounting to Rs. 402-13-0. The learned Subordinate Judge held that the legal representatives of the first judgment-debtor Vedula Ramakrishnamma should be added in the execution petition and that execution should proceed against any self-acquired properties of the first judgment-debtor in their hands for the recovery of the first two items, namely, Rs. 666-8-0 and interest Rs. 476-8-9. He directed that with regard to the remaining two sums all the joint family property of the respondents should be held liable. The judgment-debtors have appealed with regard to the last two items. Their contention is that the costs of the appeal (A. S. No. 134 of 1924) should have been dealt with in the same way as the costs of the suit and interest upon it and that in so far as the costs in the C. M. P. are concerned, only the estate of the first appellant should be made liable. In C. M. A. No. 24 of 1938 the transferee-decree-holders have appealed contending that the legal representatives of the first judgment-debtor should also be held liable for the costs of the suit and the interest-items 1 and 11 referred to above.

Dealing with appeal No. 24 of 1938 first, we think the contention raised on behalf of these appellants is quite untenable. It was shown that Vedula Ramakrishnamma in defending O. S. No. 68 of 1919 on behalf of his minor daughter Nittala Yellamma set up a false will. It was for that reason that the Court ordered him personally to pay the costs of the plaintiffs although he himself was not a party to the suit. We think that it is quite clear that this debt is properly described as *avyavaharika*. As the learned Subordinate Judge has said,

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Burn, J.

although he might have felt responsible for defending the suit on behalf of his minor daughter, he was certainly under no obligation to fabricate a will in order to do so and all the costs that he incurred in prosecuting a defence of this kind must be said to be a debt tainted with illegality or immorality for which his sons cannot be held liable.

With regard to the costs of the appeal we agree with the learned Counsel for the appellants in C. M. A. No. 416 of 1937 that they must be dealt with in the same way as the costs of the suit. It was urged on behalf of the respondents (decree-holders) that whatever might be said about the costs of the suit, the costs incurred by Vedula Ramakrishnamma in prosecuting the appeal could not be said to be a debt tainted with illegality or immorality. We find, however, on referring to the grounds of appeal (the appeal was preferred jointly by Vedula Ramakrishnamma as the second defendant and his daughter as the first defendant) that the allegations made are that the lower Court was wrong in its decision that the will was a fabrication. It is quite clear therefore that in prosecuting the appeal Vedula Ramakrishnamma was acting in the same illegal and immoral way as he had done in conducting the defence on behalf of his minor daughter. There was no separate ground taken in A. S. No. 134 of 1924 that the order of the trial Court directing the guardian to pay the costs was in itself illegal.

* * * * *

K. C. ——— *C. M. A. 24 of 1938 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Sinnachami Chettiar .. *Appellant** (*Plaintiff*)

v.

Ramasami Chettiar (deceased) and others .. *Respondents* (*Defendants and his L. Rs.*).

Sinnachami Chettiar *v.* Ramasami Chettiar.

Negotiable Instruments Act (XXXVI of 1881), S. 46—Delivery of promissory note—Mode contemplated by Act—Delivery to person advancing money—Payee alleged to be benamidar—Delivery if complete.

The delivery contemplated by S. 46 of the Negotiable Instruments Act, no doubt, must be a delivery by the maker or by some one authorised on his behalf. It need not necessarily be to the person whose name is given in the note as payee. So long as there is delivery by the maker with the intention of completing the transaction to the person actually advancing money under

* A. A. O. No. 202 of 1936. 12th August, 1938.

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the promissory note, the note is valid and complete. And a claim by the payee or his indorsee cannot be questioned by the maker of the promissory note on the ground that the payee was only a benamidar.

Subbanarayana Vathiyar v. *Ramaswami Aiyar,* (1906) 16 M.L.J. 508: I.L.R. 30 Mad. 88 (F. B.), referred to.

Appeal against the order of the Court of the Subordinate Judge of Dindigul dated 11th March, 1936 and made in Appeal No. 35 of 1935 preferred against the decree of the District Munsif of Periakulam in O. S. No. 70 of 1934.

K. Rajah Aiyar for Appellant.

B. Sitarama Rao for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal from the order of the Subordinate Judge of Dindigul dated 11th March, 1936, setting aside the decree of the District Munsif of Periakulam dated 28th February, 1935, in O. S. No. 70 of 1934 and remanding the suit for fresh disposal after deciding certain issues framed by the Subordinate Judge.

The suit was by an indorsee of a promissory note executed by the defendant in favour of one Subbayyan Chettiar, the endorser. The issues framed by the District Munsif were:

"(1) Is the full discharge pleaded true?

(2) Is the plaintiff not a *bona fide* holder in due course?

(3) Is the defendant entitled to raise the plea of discharge as contended in his written statement?"

In substance, the defence was that the promissory note had been executed in favour of Subbayyan Chettiar as a benamidar, the beneficiary and the person who lent the money under the promissory note being Ramalingam Chettiar, the brother-in-law of Subbayyan Chettiar. The plaintiff and his brother Ramalingam were members of a joint Hindu family of which Ramalingam was the manager. The defendant pleaded two payments to Ramalinga Chettiar the earlier of which was admitted by the plaintiff in his plaint, but the latter was not referred to at all in the plaint. It was contended on behalf of the plaintiff that the subsequent payment also being one alleged to have been made not to Subbayyan Chettiar, the payee under the note, but to Ramalinga Chettiar, the payment could not be pleaded as a discharge of the suit claim.

The District Munsif after considering the cases bearing on the point and in particular the Full Bench decision in *Subba-*

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narayana Vathiyar v. *Ramaswami Aiyar*[1] came to the conclusion that the defendant could not plead a discharge by a payment made to the beneficiary under a promissory note, the payee of which is a benamidar. In accordance with this conclusion, he was of opinion that it was unnecessary to decide whether the subsequent alleged payment was made or not, and he accordingly made a decree in favour of the plaintiff. On appeal, the learned Sub-Judge while not disagreeing with the District Munsif on his conclusion on the point of law in so many words, nevertheless thought that it was open to the defendant to put forward a plea that the promissory note itself could not be sued upon by the payee or his indorsee because there was no delivery of the promissory note to the payee by the maker thereof, though it was admitted in the written statement of the defendant that there was a delivery by the maker to the beneficiary who advanced the money. Some argument about the execution of the promissory note to Ramalinga Chettiar as an agent of Subbayyan Chettiar and a subsequent ratification of the same by Subbayyan Chettiar appears to have been addressed to the Court below, and it was in consequence of these arguments that the learned Subordinate Judge was of opinion that the decision of the District Munsif could not be supported unless certain issues relating to these new points were decided, namely:—

(1) Was the promissory note, Ex. A, delivered to Subbayyan Chettiar and did the transaction become complete in his favour?

(2) If there was no delivery to Subbayyan Chettiar, is plaintiff a holder, and if so, a *bona fide* holder in due course?

(3) If the promissory note was not delivered to Subbayyan Chettiar, did he ratify the transaction as per Ex. A? When was such a ratification, and if it was after the alleged payment in May, 1931, does not that bind him?

and so on. These questions did not really arise in the present case and I am of opinion that the Subordinate Judge erred in coming to the conclusion that the decree of the District Munsif could not be supported unless these points were decided in the present suit. This is a suit brought by the indorsee of the payee of a promissory note against the executant, and it is obvious that the claim by the payee or his indorsee cannot be questioned by the maker of the promissory note on the ground that the payee was only a benamidar. The present attempt seems to be to avoid the Full Bench decision in *Subbanarayana Vathiyar* v. *Ramaswami Aiyar*[1] by raising a point about delivery of the

1. (1906) 16 M.L.J. 508: I.L.R. 30 Mad. 88 (F.B.).

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promissory note which really had never been thought of all these years in cases of this kind. The delivery contemplated by S. 46 of the Negotiable Instruments Act, no doubt, must be a delivery by the maker or by some one authorised on his behalf. It need not necessarily be to the person whose name is given in the note as payee. So long as there is delivery made by the maker the note is valid and complete. In this case, the note was admittedly handed over to Ramalingam Chettiar, the beneficiary under the note, according to the defendant. There was thus a delivery which was a sufficient delivery for the purpose of completing the transaction evidenced by the promissory note. No authority has been quoted to me in support of the proposition that delivery must be to the person whose name is given in the promissory note as the payee or to any agent authorised by him in that behalf. So long as there is delivery—as in this case—with the intention of completing the transaction to the person who actually advanced the money under the promissory note, it is, in my opinion, futile to argue that there was no delivery and that the promissory note is not a completed transaction. In many cases of benami promissory notes, the benamidar may not even know of the transaction and if this argument were to be accepted, the promissory note given and taken in exchange for cash would be a worthless document. I have no doubt that there is really no substance in the point about want of delivery and that the point as regards a subsequent ratification by the benamidar or the promissory note executed in his name is equally without foundation. The relationship between the beneficiary and the benamidar is not that of a principal and agent. The relation between them is the result of a trust arising by implication of law between the two. No question, therefore, of ratification can arise as between them.

In these circumstances, I am of opinion that the issues framed by the lower appellate Court for determination by the first Court are not necessary for the disposal of the suit and that, in any case, there was no justification whatever for the lower appellate Court, to have set aside the decree of the trial Court simply because certain issues had to be determined. This is a plain and simple case in which the decree of the District Munsif who heard the suit was obviously right and it should not have been interfered with in any manner by the lower appellate Court.

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The appeal is therefore allowed and the decree of the trial Court restored subject to any alteration that may have to be made as the result of any application made to it under S. 19 of the Madras Agriculturists' Relief Act. This condition is necessary because the learned counsel for the defendant-respondent represents that his client is an agriculturist and would be entitled to certain benefits under the Madras Agriculturists' Relief Act. No actual application is made nor is any affidavit filed to the effect that the defendant-respondent is an agriculturist within the meaning of the Act. Under these circumstances, the best course seems to be to give the defendant-respondent liberty to apply to the trial Court for such reliefs as he would be entitled to under the Madras Agriculturists' Relief Act. The appellant is entitled to have his costs in this Court and in the lower appellate Court from the defendant-respondent who will bear his own.

Leave to appeal is refused.

B.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

M. Govindarajulu Chetty and another .. *Petitioners** (*Petitioners*)

v.

O. C. Ramaswami Chetty and others .. *Respondents* (*Respondents*).

Govindarajulu Chetty v. Ramaswami Chetty.

Execution—Pendency of claim petition—Issue of sale proclamation—Permissibility—Civil Procedure Code (V of 1908), O. 21, r. 58 (2).

It is not permissible for a Court to order the issue of a proclamation of sale while a claim petition is pending. And O. 21, r. 58 (2) of the Code of Civil Procedure will not apply to such a case.

Petition under Ss. 115 of Act V of 1908 and 224 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Dharmapuri dated 16th April, 1937 and made in E. A. No. 33 of 1937 in E. P. No. 429 of 1936 in O. S. No. 826 of 1935, Salem District Munsif's Court.

D. Ramaswami Aiyangar for Petitioners.

R. Ramamurthi Aiyar for Respondents.

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* C. R. P. No. 621 of 1937, 1st August, 1938.

Govindarajulu Chetty v. Ramaswami Chetty.

The Court made the following

ORDER.—It is not I think possible for a Court to order the issue of a proclamation of sale while a claim petition is pending. O. 21, r. 58 (2) of the Civil Procedure Code does not apply to this case. The learned District Munsif's order 'meanwhile the sale will be proclaimed' is therefore without jurisdiction and is set aside.

I make no order as to costs in this petition.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Ayancheri Kovilakath Sankara Varma Raja, Karnavan and Manager of Ayancheri Kovilakam .. *Petitioner* (1st Respondent)*

v.

Ayancheri Kovilakath Cheria Rama Varma Raja and others .. *Respondents (Petitioners and Respondents 2 to 23).*

Sankara Varma Raja v. Cheria Rama Varma Raja.

Malabar Law—Tarwad—Karnavan—Suit for removal—Members if need sue jointly—Suit by one member—Other members as necessary parties.

Every member of a Malabar tarwad has a right to see that the tarwad affairs are conducted by the karnavan properly and if he finds that a karnavan has not been acting in the interests of the tarwad, he would have a right to sue for his removal. It cannot be said that the right to maintain the action for removal of the karnavan can only be exercised by all the members of the tarwad jointly. It is obvious however that when a member sues a karnavan for his removal he is trying to enforce a right in which he is interested with the other members of the tarwad jointly and unless he has filed his suit in a representative capacity it is incumbent upon him to implead the other members as parties to the action.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Tellicherry in O. P. No. 15 of 1936.

D. A. Krishna Variar for Petitioner.

O. T. G. Nambiar and *A. Achuthan Nambiar* for Respondents.

The Court delivered the following

* C. R. P. No. 811 of 1937. 10th August, 1938.

Sankara Varma Raja v. Cheria Rama Varma Raja.

JUDGMENT.—This is a petition for revision against the order passed by the Subordinate Judge of Tellicherry granting leave to the petitioner to sue as a junior member of a Malabar tarwad for the removal of a karnavan from his office and for certain other incidental reliefs *in forma pauperis*. It has not been contended before me that the petitioner, who is a student in the Zamorin's College at Calicut, is in a position to pay the requisite court-fee. Learned Counsel for the petitioner has confined his attack mainly on the grounds that the petition discloses no cause of action and even if it did, the petition should be held not to have been presented in good faith, as the object of the petition is to help defendant 3 to become a karnavan and not for securing any benefit to the petitioner for himself. In other words, the petitioner is alleged to have been instigated by defendant 3 to fight his cause and it has been contended that it would be wholly against public policy to permit him so to do.

In order to substantiate his argument that the petition disclosed no cause of action, Mr. Krishna Variar contended that a junior member of a tarwad had no right to maintain an action for the removal of a karnavan and he could do so only in conjunction with all the other members of the tarwad against whom no relief was sought in the suit. No satisfactory answer was given when a question was put to him as to what would happen if the other members of the tarwad happened to have either conspired with the karnavan or did not wish to array themselves as plaintiffs either because they took no interest in the affairs of the tarwad or were not inclined to exhibit any hostility to the karnavan openly. Reliance was placed in this connection by the counsel for the petitioner on certain observations made by Mr. Sundara Aiyar in his work on Malabar Law (Chapter VII)* where the learned author has referred to the members of the tarwad in plural wherever he has stated that they had a right to sue for the removal of a karnavan. I was not impressed by this argument. Every member of a tarwad has a right to see that the tarwad affairs are conducted by the karnavan properly and if he finds that a karnavan has not been acting in the interests of the tarwad, he would have a right to sue for his removal. What the learned author was trying to convey to his readers was that the right to maintain an action for removal of a karnavan vested in the

* *See* Malabar and Aliyasanthana Law by P. R. Sundara Aiyar, page 100.

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members of the tarwad; but there is no justification to construe those words to mean that they could only do so jointly. It is obvious, however that when a member sues a karnavan for his removal, he is trying to enforce a right in which he is interested with the other members of the tarwad jointly, and he would apparently be doing so not only in his individual interest but in the interest of all the members of the tarwad as well or at all events he is taking a step which will not affect him alone but the other members of the tarwad also. It is therefore only proper that if he has not filed the suit in a representative capacity, he should implead them as parties to the action. It is not denied that all the other members of the tarwad are parties to the suit. I am therefore of opinion that the plaintiff has a *locus standi* to maintain the suit and it cannot be held that the plaint discloses no cause of action.

There is no merit in the other objection either. If the petitioner has a right to sue for the removal of the karnavan, what does it matter if as a result of his success, defendant 3 or any one else would have to function as such? If a particular karnavan has failed to act in accordance with the well-recognised rules and custom and has behaved in a manner that justifies his removal and the next member—let me assume this for the sake of argument—is found not to be fit enough to act as a karnavan, the office will have to devolve on the next person in the order of the precedence in the ordinary course. In the absence of any other reliable evidence, it is impossible to come to the conclusion, as the learned counsel for the petitioner wants me to do, that this circumstance alone is sufficient for a finding that the petition for leave to bring the suit *in forma pauperis* is not *bona fide*. It was alleged on behalf of the contesting defendant that the petitioner had entered into an agreement in regard to the subject-matter of the proposed suit. After a full consideration of the evidence led on behalf of the parties, the lower Court came to the conclusion that the contention had not been made out. Had it been found that this petition was filed in consequence of an arrangement or agreement as alleged by defendant 1, one would be called upon to determine whether the agreement related to the subject-matter of the proposed suit. But in the absence of a finding of fact in favour of defendant 1, it is unnecessary for me to take that aspect of the case into consideration. In the circumstances it must be held that the

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petition for leave to sue *in forma pauperis* has not been filed in bad faith. A number of authorities were cited on behalf of the petitioner before me but in as much as there is no valid reason to hold that the petition before the lower Court was not *bona fide*, they need not be referred to here.

The contentions that the petition for leave to file the suit *in forma pauperis* was not *bona fide* or that it would be against public policy for the petitioner to be permitted to sue in that form are based on the assumptions that the petitioner is not alone entitled to maintain an action even in his own interest and for his own benefit and secondly that he is doing so to help the third defendant. There appears to be no reasonable basis for these assumptions and the petition for revision must therefore be rejected with costs.

B. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sri Chelikani Sitaramayya .. *Appellant** (*Respondent*)

v.

Koppula Pedda Venkanna .. *Respondent* (*Petitioner*).

Sitaramayya v. Venkanna.

Civil Procedure Code (V of 1908), S. 144—Restitution—Deposit of decree money—Reversal of decree—Claim of interest on deposit amount—Whether can be granted.

Where the respondent in appeal, on his own initiative made a cash deposit instead of giving security, and the act of the respondent was ratified and adopted by the Court in its final order staying the decree against him by virtue of the deposit and ordering the appellant to furnish security in his turn as a condition for withdrawing the decree amount deposited, but eventually the decree having been reversed, the respondent applied to Court for restitution of the amount including interest for the period it was in deposit in Court,

Held, that since the Court itself took the responsibility for treating the deposit as the basis for the stay order, it followed that the order of the Court in fact deprived the respondent of the use of money which would have been at his disposal, had it not been for the erroneous decree. Therefore in accordance with the general principles embodied in S. 144, Civil Procedure Code, the order of the Court requiring the appellant to pay interest on the amount of the deposit was correct.

Shanmugasundara Mudaliar v. *Ratnavelu Mudaliar*, (1932) 63 M.L.J. 383: I.L.R. 55 Mad. 1025, distinguished.

Appeal against the order of the Court of the Subordinate Judge of Cocanada dated 26th July, 1935 and made in C. M. A. No. 7 of 1935 preferred against the order of the Court of the

* A. A. A. O. No. 107 of 1936. 18th July, 1939.

Sitaramayya v. Venkanna.

District Munsif of Peddapur dated 11th February, 1935 and made in E. A. No. 1199 of 1934 in O. S. No. 193 of 1931.

K. Bhimasankaram for Appellant.

Ch. Raghava Rao, S. Rajaraman and *S. Kothandarama Nainar* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of an application for restitution made by a judgment-debtor, the decree against whom had been reversed in appeal. The appellant is the plaintiff whose decree was reversed. The full records of the proceedings after this decree are not before me and to a large extent I have had to rely upon statements of the learned Advocates on both sides the correctness of which I do not doubt. It is established that after the decree was passed the appellant took out execution but withdrew his petition on the respondent paying the amount of costs. After this execution petition had been withdrawn the respondent, presumably apprehending further steps in execution, though there was no overt act so far as we are aware by the decree-holder, applied to the Court to stay execution of the decree. This application was opposed and the Court appears to have ordered the respondent (judgment-debtor) to furnish security for the amount of the decree as a condition precedent to the grant of stay. The respondent found difficulty in furnishing security and instead of obeying the Courts' order literally, he deposited into Court the full amount of the decree, praying the Court to order the decree-holder (appellant here) not to draw out the amount except on furnishing security. The Court did so order; but the decree-holder was unable or unwilling to furnish the security, with the result that the decree remained stayed and the money remained in Court. Eventually the decree was reversed in appeal and the respondent applied for restitution, including in his claim interest on the amount in deposit for the period for which it was in Court. The lower appellate Court has awarded interest at 12 per cent. on this amount and it is against this order for interest that the present appeal is preferred by decree-holder.

So far as I am aware there is no case which precisely covers the point now before me though the decision of the Bench in *Shanmugasundara Mudaliar* v. *Ratnavelu Mudaliar*[1]

1. (1932) 63 M.L.J. 383: I.L.R. 55 Mad. 1025.

deals with somewhat similar facts. That was a case of a decree for money in which an application was made for stay at a time when no execution petition was pending, as is also the position here, but the Court itself ordered the deposit of a portion of the decree amount in cash and the giving of security for the remainder and directed the decree-holder not to draw the cash deposit except on furnishing security. The deposit was made; the decree-holder failed to furnish security and draw out the cash deposit and on the decree being reversed, restitution was ordered in the shape of interest on the amount deposited in cash, the reason being that the basis of an order of restitution should not be the benefit which had accrued to the party whose decree has been reversed, but the loss suffered by the successful party as a result of the erroneous decree and the Courts' orders thereunder.

It is argued for the appellant here that the position in the present case is different in that the order of the Court as a result of the decree and the stay application was not for the deposit or cash but for the giving of security and that it was the voluntary act of the present respondent in substituting a cash deposit in place of the security ordered which resulted in the loss of interest on the money so deposited. On the other hand it is contended for the respondent that though the respondent on his own initiative made the cash deposit instead of giving security, the act of the respondent was ratified and adopted by the Court in its final order staying the decree by virtue of this deposit and ordering the appellant to furnish security as a condition for withdrawing the amount deposited. With some hesitation, I accept the contention of the respondent. If once we adopt the criterion laid down in the case just quoted that the basis of restitution is to be the loss suffered by the judgment-debtor by reason of the wrongful decree and the orders resulting therefrom I think it follows that the present respondent is entitled to interest on the deposit. It is true that he could have escaped the necessity for a deposit by furnishing security. He was unable to do so and tendered the money into Court subject to certain terms. The Court accepted the deposit, and decided that the terms suggested by the respondent were suitable terms upon which the appellant should be allowed to withdraw the money and it was on the basis of these terms that the Court stayed execution of the decree. It seems to me

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therefore that though the first act in the making of the deposit instead of furnishing security was due to the initiative of the respondent the Court itself took the responsibility for treating that deposit as the basis for the stay order and imposing certain terms upon the appellant. It follows that the order for the retention of the money in Court as a condition of stay and the terms imposed upon the appellant form part of an act of the Court resulting directly from a decree which has been held to be erroneous and that order has in fact deprived the respondent of the use of money which would have been at his disposal had it not been for the erroneous decree. Therefore in accordance with the general principle embodied in S. 144, Civil Procedure Code, the order of the lower appellate Court requiring the appellant to pay interest on the amount of his deposit is correct. The appeal is therefore dismissed with costs.

Leave to appeal is granted.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Marimuthu Pillai .. *Appellant** (*Plaintiff*)

v.

M. Muthirulappa Pillai and others .. *Respondents* (*Defendants*).

Marimuthu Pillai v. Muthirulappa Pillai.

Madras Proprietary Village Service Act (II of 1894), Ss. 10 (1) (e) and 16—Village Officer convicted of criminal offence—Order of dismissal passed by Sub-Collector—Procedure—Notice or enquiry if necessary—Order of dismissal confirmed in appeal and second appeal—Suit to set aside order—Maintainability in Civil Court.

Where a village officer coming within S. 10 (1) (e) of the Madras Act II of 1894 is dismissed by an order of the Sub-Collector and the same is confirmed by the District Collector on appeal and by the Board of Revenue on second appeal, the order cannot be called in question in a Civil Court unless there was a defect in the procedure adopted before the dismissal was ordered which was so important and serious that it rendered the order of dismissal a nullity. There is no specific provision that in the case of village officers coming within sub-S. (1) (e) of S. 10 of the Act and dismissed on the ground of their having been convicted of a criminal offence, which in the opinion of the Sub-Collector disqualified him from holding the office, that any enquiry should be held or that they should be given notice or be heard before the order of dismissal is made.

Appeal against the decree of the District Court of Ramnad at Madura in O. S. No. 10 of 1934.

* Appeal No. 316 of 1935. 28th February, 1939.

Pillai
v.
Muthiru-
lappa
Pillai.

Pandrang
Row, J.

K. Rajah Aiyar for Appellant.

The Government Pleader (*B. Sitarama Rao*) and *U. Somasundaram* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.—This is an appeal from the decree of the District Judge of Ramnad dismissing the plaintiff's suit for a declaration that the order dismissing him from the office of hereditary karnam of Kilkudi village passed by the Sub-Collector on 15th December, 1930, and the appellate orders of the District Collector in February, 1931, of the Revenue Board in the same year dismissing his appeals to them are illegal, void and not binding on him. The defendants were (1) the karnam who was appointed in the place of the plaintiff after his dismissal, (2) the Secretary of State for India in Council, and (3) the Rajah of Ramnad within whose zamindari the office is held, the office being one governed by Act II of 1894 and not Act III of 1895.

It was contended *inter alia* that the suit itself was not competent and that the order of the District Collector on appeal which was confirmed by the Board of Revenue in second appeal was final and cannot be canvassed in a Civil Court. On this point the decision of the Court below was in favour of the plaintiff. Whether this view is right or not is a matter which gives room for discussion, but as the dismissal of the suit on the other ground, that is to say, on the merits, can be supported, we find it unnecessary to decide the question whether the suit itself is maintainable or not. On the merits, the only objection taken to the order dismissing plaintiff-appellant is that he was not heard or given notice by the Sub-Collector before he was dismissed though the dismissal was because he had been convicted of a criminal offence which, in the opinion of the Sub-Collector, disqualified him for holding the office.

The contention of the learned Advocate for the appellant is that even before forming such an opinion, the Sub-Collector and the District Collector were bound to hear the convicted officer before they ordered his dismissal. The procedure to be followed in the matter of the dismissal of village officers under Act II of 1894 is to be found in S. 16 of the Act. Sub-S. (2) of that section runs as follows:—

"The District Collector or the Revenue Officer aforesaid, may, of his own motion or on complaint and after enquiry, fine, suspend, dismiss or remove any village officer for misconduct or for neglect of duty or incapa-

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Pandrang Row, J.

city as such village officer or for non-residence in the village and shall record his reason for so doing in writing and furnish a copy of the same to the proprietor and to the village officer concerned. Every village officer convicted of an offence of the kind mentioned in sub-S. (1) (*e*) of S. 10 shall be dismissed."

It will be seen therefore that in the case of officers who come within sub-S. (1) (*e*) of S. 10, it is not specifically provided that any enquiry should be held or that they should be given notice. It may be, as is contended on behalf of the appellant, that it is not very reasonable not to give the same opportunity for being heard when the dismissal is ordered in view of sub-S. (1) (*e*) of S. 10 of the Act when such an opportunity is given in cases of dismissal on other grounds or other charges and it is certainly desirable *prima facie* that an order of serious consequence like an order of dismissal should not be made without giving a hearing to the person affected. But we cannot decide in this case what we consider to be the appropriate procedure in cases of this kind. Where it is sought to attack an order of dismissal passed by the Sub-Collector which was confirmed by the District Collector and the Board of Revenue as void and illegal, we must be satisfied that there was a defect in the procedure adopted before the dismissal was ordered which was so important and so serious that it renders the order of dismissal a nullity. There is no specific provision that in the case of dismissal of village officers who have been convicted of offences which in the opinion of the Revenue Divisional Officer disqualify them for holding the office, they should be heard before the order of dismissal is made. It may be a lacuna but we are not able to say definitely it is a lacuna and we cannot ignore the plain words of the section which while requiring notice and enquiry in other cases in the same section make no mention of any such requirement in the case of dismissal in view of sub-S. (1) (*e*) of S. 10. We are therefore of opinion that the conclusion of the learned District Judge on this part of the case is right and that there is no ground for interference in appeal.

The appeal is accordingly dismissed with costs, two sets.

B. V. V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

T. Sivasankara Mudaliar .. *Appellant** (*Petitioner*)

v.

Radhabai Ammal and another .. *Respondents* (*Respondents*).

Guardian and Wards Act (VIII of 1890)—Hindu father—Application for appointment as guardian of minor son—Not maintainable—Custody of minor entrusted to another by father—No interest taken in minor as father for a long time—If father entitled to custody of child under S. 25. Sivasankara Mudaliar v. Radhabai Ammal.

Where a father delivers his infant daughter to the custody of another and for a number of years takes no interest in her but allows others to do what he as a father should do, he is not fitted to exercise the rights of a father. He is not a person in whose favour the Court shall pass an order under S. 25 of the Guardian and Wards Act.

A Hindu father cannot apply under the Guardian and Wards Act for an order appointing him guardian of the property or person of his minor child as he is under law the lawful guardian of his child and a declaration by Court to that effect cannot increase his powers.

K. V. Venkateswaran v *Saradambal*, (1935) I.L.R. 13 Rang. 590, followed.

On appeal from the judgment and order of the Hon'ble Mr. Justice Gentle dated 9th April, 1937, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 42 of 1937.

A. Srirangachariar for Appellant.

M. S. Venkatarama Aiyar for Respondents.

The judgment of the Court was delivered by

The Chief Justice.—This appeal raises a question of the right of a Hindu father to the custody of his minor daughter, the allegation being that he had abandoned the minor. The appellant is the father of the minor who was born in 1922. Her mother suffered from tuberculosis and died a few months after the child was born. Before the mother's death, the appellant entrusted the minor to his sister Gnanambal, who was married to one Subramania Mudaliar. Subramaniam died in August, 1931 and Gnanambal in October, 1932. After the death of Gnanambal the first respondent, who is another sister of the appellant, took charge of the minor and has had charge of her ever since. In 1927 the first respondent went to live with Gnanambal and her husband. Gnanambal owned the house in Leach, C.J.

* O. S. A. No. 34 of 1937. 9th May, 1938.

which she, her husband, the first respondent and the minor were living and by her will left the house to the first respondent and minor jointly. She further provided that on the death of the first respondent the minor should have the property absolutely. The appellant married a second time in 1923 and had a daughter by his second wife. It is said that up to 1934 he used to visit the minor, but it is common ground that he has not visited her since 1934. It is also common ground that she never returned to her father's house. In January, 1937, the first respondent arranged to marry the minor to the second respondent. The appellant's case is that he was not consulted about this and as he disapproved of the marriage he instituted the proceedings out of which this appeal arises. He applied under the Guardian and Wards Act for an order appointing him the guardian of the person and property of the minor. He also asked that the first respondent should be directed to hand over the custody of the minor to him and that the first respondent should be restrained by an injunction from giving away the minor in marriage to the second respondent. The application was heard by Gentle, J., who treated it as one falling within S. 25 of the Guardian and Wards Act and on the ground that the appellant had abandoned the minor dismissed it. The appeal is from this order.

The appellant is not entitled to apply under the Guardian and Wards Act for an order appointing him guardian of the person or property of the minor. Under Hindu Law the father is the lawful guardian of his child and a declaration by the Court cannot increase his powers. I had to consider this very question in *K. V. Venkateswaran* v. *Saradambal*[1], when sitting as a judge of the Rangoon High Court and I see no reason to change the opinion I expressed there. In fact the learned Advocate for the appellant has not challenged the correctness of this decision.

The important question is whether the appellant is entitled to an order under S. 25 of the Guardian and Wards Act. I consider that the learned Judge was right in refusing to pass such an order. I have already referred to the fact that the minor was brought up by her aunts and that she has never been received again in her father's house. It is admitted that he has not contributed anything to her support since he delivered the child to Gnanambal and that he has taken no part in ceremonies

1. (1935) I.L.R. 13 Rang. 590.

which are so important to a Hindu girl, namely, the ear-boring ceremony and the ceremony which takes place when she reaches the age of puberty. The appellant has never even given her a present. The invitation to the ear-boring ceremony was issued by Gnanambal and her husband Subramania Mudaliar. The invitation referred to the minor as the daughter of Gnanambal and her husband and no objection was taken to this by the appellant. The minor has always referred to her father as "uncle" and to Gnanambal and her husband as "mother" and "father". If the fact that the minor referred to her father as "uncle" was all the Court had to consider it might not be a point against the appellant but it can be taken into consideration in the circumstances of this case. While the appellant may have visited the house where the sisters were living, he has not visited the minor since 1934 and throughout the minor's life he has not taken the slightest notice of her. His character can be gauged from the fact that in the course of the evidence he alleged that dissolute persons were in the habit of frequenting the house where the first respondent and the minor were living. There is not the slightest foundation for this statement. The learned Judge was satisfied, as we are, that he made this unwarranted allegation thinking that if he attacked the character of the respondent it would strengthen his case. The learned Judge also held, and again we agree with him, that this application was filed because he had not been consulted about the marriage and he wished to annoy the first respondent. Where a father delivers his infant daughter to the custody of another and for over fifteen years takes no interest in her, but allows others to do what he as a father should do it is evident that he is not fitted to exercise the rights of a father. He is certainly not a person in whose favour the Court should pass an order under S. 25 of the Guardian and Wards Act. It is abundantly clear in this case that the minor will be in far better custody if she remains with the first respondent. The learned Advocate for the appellant contends that even in these circumstances he should be granted an injunction restraining the first respondent from marrying the minor to the second respondent. I fail to see how we can pass an injunction of this nature when the main part of the application has failed. The learned Advocate for the appellant has been unable to point to any section in the Guardian and Wards Act under which he can ask the Court to

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Leach, C. J.

issue an injunction in these circumstances. If the appellant wishes to take other proceedings he is at liberty to do so, but having failed in his application under S. 25 of the Guardian and Wards Act he is not entitled to any order on the present application.

The appeal will be dismissed with costs in favour of the first respondent.

S.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

The Public Prosecutor .. *Appellant**

v.

N. S. Sharma .. *Accused.*

Public Prosecutor v. Sharma.

Criminal Procedure Code (V of 1898 as amended), S. 222 (2)—Criminal breach of trust—Single charge for misappropriation of money and goods—Validity.

The case referred to in S. 222 (2), Criminal Procedure Code, is a case in which the charge is criminal breach of trust or dishonest misappropriation of money and it does not apply to a case of criminal breach of trust or dishonest misappropriation of goods and affords no justification for mixing up moneys and goods or for framing a single charge in respect of the total of the cash said to have been misappropriated and the total value of the goods said to have been misappropriated.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Sessions Judge of South Kanara in Criminal Appeal No. 7 of 1938 on his file (C. C. No. 56 of 1937 on the file of the Court of the Sub-Divisional First Class Magistrate, Mangalore).

The Public Prosecutor (V. L. Ethiraj) appeared in person.

Accused not represented.

The Court delivered the following

JUDGMENT.—This is an appeal preferred by the Public Prosecutor, Madras, from the judgment of the Sessions Judge of South Kanara acquitting one N. S. Sharma of the offence of criminal breach of trust by an agent punishable under S. 409, Indian Penal Code. The man had been sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 800 by the First Class Sub-Divisional Magistrate, Manga-

* Criminal Appeal No. 55 of 1939. 25th January, 1939.

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lore Division. On appeal, he was acquitted by the learned Sessions Judge who dealt with the facts of the case at great length in his judgment. The learned Sessions Judge appears to have come to the conclusion that the entrustment itself had not been proved beyond doubt. The case for the prosecution was that certain goods, namely, Aniline Dyes, etc., had been sent by the Aniline Dyes and Chemical Company, Bombay, to the accused in his capacity as manager of their branch at Mangalore. The learned Sessions Judge has found that the case was not proved that the appellant was the manager of a branch and was entrusted as such with the goods of the company and apparently the learned Sessions Judge thought that the defence of the accused that he had merely purchased the goods from the company as an ordinary customer and was only liable from the point of view of civil law was more likely to be true than the case for the prosecution. It may be there is something to be said in support of the view which found favour with the learned Magistrate. But one important fact is established by the evidence, namely, that the company itself kept their accounts as if the accused was not the manager of a branch and as such entrusted with the goods of the company. While the ledger accounts of other branches were shown in the name of the company, the account of the accused was kept in his personal name and there is no separate account in respect of the alleged branch at Mangalore. In these circumstances, it is really impossible to say that the learned Sessions Judge was wrong in coming to the conclusion that the prosecution had failed to prove the factum of entrustment to an agent.

Another reason why this appeal should not go further is that the trial before the Magistrate appears to have been contrary to law. The charge against the accused in respect of which he was tried no doubt alleged that an aggregate sum of Rs. 757-4-9 was criminally misappropriated within the space of twelve months, that is, between 3rd September, 1936 and 6th May, 1937, and the learned Magistrate thought that on this account under S. 222 (2), Criminal Procedure Code, it would be legal to frame a charge in respect of such gross sum and to try him on that single charge though that charge related to a number of items, namely, 12 in number. No doubt, if a single charge can be justified, the trial could not be said to be illegal, but if the single charge itself was one not permitted by law and

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the offences disclosed were really separate, the trial held could not be said to be legal. S. 222 (2) provides that

"Where the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of S. 234:

Provided that the time included between the first and last of such dates shall not exceed one year."

In this case, however, the case for the prosecution and the evidence adduced in support of it are to the effect that only two sums of money, namely, Rs. 103-12-0 and Rs. 70 collected from P. Ws. 4 and 11 respectively were alleged to have been misappropriated by the accused, while the other ten items do not relate to money at all. They relate to goods supplied to the accused by the company and are covered by various invoices in the names of P. Ws. 5, 7, 8, 9, 10, 11 and 12. The total of these ten items of goods said to have been misappropriated is Rs. 583-8-9. These goods were delivered to the accused on different dates and it is alleged that he misappropriated the goods and covered up the misappropriation by sending bogus invoices to the complainant on different dates. The case referred to in S. 222 (2), Criminal Procedure Code, is a case in which the charge is criminal breach of trust or dishonest misappropriation of *money* and it does not apply to a case of criminal breach of trust or dishonest misappropriation of goods, and affords no justification for mixing up money and goods in the manner in which it has been done by the trial Court or for framing a single charge in respect of the total of the cash said to have been misappropriated and the total value of the goods said to have been misappropriated. The charge therefore was not one which was permitted by law, and if the charges had been properly framed, there could not have been a joint trial according to law. In these circumstances, it seems unnecessary to proceed further with the appeal and have it argued on the merits even if there is a case on the merits.

The prosecution was instituted at the instance of a private complainant and the amount involved is less than about Rs. 800. The private complainant has his civil remedy in respect of the amounts said to have been lost and the interests of public justice do not seem to require that there should be a further

retrial of the accused in respect of what is alleged against him. He has been sufficiently harassed by the proceedings that have already taken place and which ended in acquittal by the Sessions Judge. It would be, in my opinion, very undesirable that he should be further exposed to a retrial in respect of the same matter.

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The appeal is therefore dismissed under S. 421, Criminal Procedure Code.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Thadikonda Sreeramamurty .. *Petitioner** (*Petitioner*)

v.

Mannaluri Rama Rao and another ... *Respondents* (*Respondents*).

Sreeramamurty *v.* Rama Rao.

Civil Procedure Code (V of 1908), O. 45, r. 7 proviso—Grant of certificate—Failure to apply under proviso—Immovable property offered as security—Application preferred at later stage—Sustainability.

Where a person makes no application in terms of the proviso to O. 45, r. 7, Civil Procedure Code, at the time of the grant of the certificate permitting him to appeal to His Majesty in Council he cannot subsequently file a petition asking the Court to accept security in the form of immovable property.

Arunachala Naidu v. *Balakrishna & Co.*, (1924) 48 M.L.J. 134: I.L.R. 48 Mad. 559, followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to accept immovable property as security for the sum of Rs. 4,000 towards costs of the respondents in P. C. Ap. in C. M. P. Nos. 4454 and 4455 of 1936—petitions for grant of a certificate to enable the petitioners herein to appeal to His Majesty in Council against the judgment and order of the High Court dated the 15th February, 1936 and made in A.A.O. No. 102 and 103 of 1934 preferred to the High Court against the orders of the Court of the Subordinate Judge of Masulipatam dated 17th November, 1933 and made in E. A. No. 704 and E. P. No. 55 of 1928 respectively in O.S. No. 12 of 1917.

Ch. Raghava Rao for Petitioner.

V. Govindarajachari for Respondents.

The Court made the following

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*C.M.P. No. 1709 of 1938. 19th April, 1938.

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ORDER.—On the 16th March, 1938, this Court granted to the petitioner a certificate permitting him to appeal to His Majesty in Council. O. 45, r. 7 of the Civil Procedure Code requires a person to whom a certificate is granted to furnish security in cash or in Government securities for the costs of the respondent, but there is a proviso which says that the Court at the time of granting the certificate may, on the ground of special hardship order that some other form of security may be furnished. At the time of the grant of the certificate the petitioner made no application for permission to furnish security otherwise than in cash or in Government securities, but on the 24th March he filed a petition asking the Court to accept security in the form of immovable property. This petition is now before us.

The learned advocate for the respondents has taken a preliminary objection, and has pointed out that this question has already been decided by a Bench of this Court in *Arunachala Naidu* v. *Balakrishna & Co.*[1] There Venkatasubba Rao and Srinivasa Iyengar, JJ., held that the proviso to O. 45, r. 7 to which I have referred precludes the Court from granting an application of this nature at a later stage. This decision is binding on us and we do not question its correctness. The learned Advocate for the petitioner has been unable to point to any Privy Council rule which has the effect of overriding this proviso, and that being so it must be given effect to.

The preliminary objection succeeds and the application must be dismissed with costs.

B.V.V. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD MACMILLAN, LORD ROMER AND SIR GEORGE RANKIN.

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Sir Hari Sankar Paul v. Kedar Nath Saha.

Sir Hari Sankar Paul, Kt. and another .. *Appellants**

v.

Kedar Nath Saha, since deceased (now represented by Srimati Jogemaya Dassa and others) and others .. *Respondents.*

Indian Registration Act (XVI of 1908), S. 17 (1) (b)—Mortgage by deposit of title deeds—Memorandum recording deposit of deeds but contain-

1. (1924) 48 M.L.J. 134: I.L.R. 48 Mad. 559.

* P. C. Appeal No. 80 of 1937. Bengal Appeal No. 62 of 1936. 25th April, 1939.

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ing operative language relating to loan—Whether unenforceable for want of registration.

Where parties professing to create a mortgage by deposit of title deeds' contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, that agreement requires to be registered in accordance with S. 17 (1) (*b*) of the Indian Registration Act, 1908 and in the absence of registration is unenforceable.

Obla Sundarachariar v. *Narayana Aiyar*, (1931) 60 M.L.J. 506: L.R. 58 I.A. 68: I.L.R. 54 Mad. 257 (P.C.), distinguished.

Appeal from a decision dated 6th April, 1937, of the High Court, Fort William in Bengal, in its appellate civil jurisdiction (Costello and Panckridge, JJ.), reversing a decision dated 22nd May, 1936, of that Court in its original civil jurisdiction (Lort-Williams, J.).

The plaintiffs agreed to lend the defendants a sum of money for which certain immovable property in Calcutta was to be security. The terms of the loan having been agreed, the plaintiffs and the defendants met, and the defendants signed a document setting out those terms. The advance was to be made in two instalments, and the document provided that payment of the first instalment would be made on the deposit of the title deeds relating to the property, and that, after payment of the balance of the loan, the defendants would execute a memorandum evidencing the deposit and embodying the conditions of the loan. The defendants, having signed that document, handed over the title deeds saying at the same time that they were depositing the deeds as security or mortgage for the first sum advanced. A few days later, when the balance of loan was paid, the same formalities were carried out, and on the same day one of the defendants on behalf of the others executed a formal and elaborate memorandum which, after reciting *inter alia* that the documents of title specified in a schedule had been deposited as security for the advance, agreed and declared that the deeds had been delivered with intent to create a security on the property in question, "such security having been created prior to the execution of this agreement by delivery of the documents. . . . .", and that they would be held by the plaintiffs as such security for payment of the sum due, together with any costs incurred in obtaining payment of the sums "hereby secured". The memorandum then laid down the other terms of the loan, and conferred a power of sale. The plaintiffs claimed to enforce their rights as mortgagees under that memorandum.

A. M. Dunne, K.C. and *J. M. Pringle*, for Appellants-Mortgagees.—It is not right that the mortgagees' claim should be defeated by the non-registration of the second memorandum of

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2nd August, because that document was only executed at a time when the mortgage was already in being. The money having been advanced to the mortgagors, on the security of title deeds duly delivered, the mortgage was already created, and the mortgagees' title established, for the deposit was expressly made for the purpose of creating a security. The earlier transaction stood on its own legs as a complete transaction of mortgage. The subsequent memorandum, accordingly, could not, it is submitted, itself do the same thing. It was and could be no more than a mere record of what had gone before, and, as such, it did not require registration. The memorandum could not operate to transfer an interest which had already been effectively transferred by the earlier mortgage by deposit of title deeds, and indeed the parties never intended it to have any such effect. Further, it seems inequitable that, when a transfer of an interest in property has thus been validly made by a transaction, complete in itself, of mortgage by way of deposit of title deeds, the subsequently executed memorandum should be allowed to operate restrospectively so as to upset the earlier and valid transaction.

Lionel Cohen, *K.C.* and *J. M. Parikh* for Respondents Mortgagors.—It is submitted that the memorandum of 2nd August is an instrument which comes under S. 17 of the Act of 1908 in that it operates to create, declare or assign a right to immovable property, or effects a mortgage within the meaning of S. 59 of the Indian Transfer of Property Act. The memorandum should therefore have been registered, and as that has not been done the mortgagors cannot seek to enforce it against the property in question. The memorandum cannot be dismissed as a mere record of a transaction previously completed and complete in itself. It is an operative instrument by which the parties effected, or purported to effect, a transfer of an interest in the mortgaged premises. They are now founding upon that operative instrument, and are, it is submitted, barred for non-registration of the document.

25th April, 1939. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—The plaintiffs in this suit, now the appellants, seek to enforce a mortgage for the principal sum of Rs. 25,000 with arrears of interest accrued. Their case is that the mortgage was effected by the delivery to them of the documents of title to certain immovable property in Calcutta with intent to create a security thereon.

The general law in India under the Transfer of Property Act, 1882, is that a mortgage for a principal sum of Rs. 100 or

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upwards can be effected only by a registered instrument duly signed and attested, but the validity of mortgages by deposit of title deeds in Calcutta and certain other places is expressly recognised and saved, doubtless because of the convenience of this form of security in commercial centres [*see* S. 59 of the Act as it stood at the date of the transaction with which this case is concerned, and now, by amendment, S. 58 (*f*)].

That the title deeds of the property were deposited by the respondents with the appellants is not disputed, but the appellants were not content to rely only on this deposit. They insisted on the execution by the respondents of a memorandum of agreement "evidencing the said deposit and embodying the terms and conditions of the loan." The appellants found upon this memorandum in their plaint, and the respondents in their written statement aver that this memorandum constituted the bargain between them and the appellants, and they maintain that, inasmuch as it was not registered as required by S. 17 (1) (*b*) of the Indian Registration Act, 1908, it is inadmissible in evidence and the mortgage is consequently unenforceable under S. 49 of that Act. To this the appellants reply that the memorandum did not effect or constitute any transaction between the parties, but merely recorded a transaction already completed; it therefore did not require registration, not being, in the words of the statute, a non-testamentary instrument purporting or operating "to create, declare, assign, limit or extinguish . . . any right, title or interest . . . to or in immoveable property."

There have been numerous cases, some of which have reached this Board, in which a mortgage, alleged to have been effected by the deposit of title deeds, has been accompanied by a written document, and in which the question has arisen whether that document was of such a character as to require registration. The decision in each case has turned upon the nature of the document in question. It will be sufficient to refer to one or two of the most recent of these cases.

In *Obla Sundarachariar* v. *Narayana Aiyar*[1], the title deeds of certain properties were handed over as security for a loan along with two written documents, namely, a promissory note for the total advance and a signed memorandum consisting of a

1. (1931) 60 M.L.J. 506: L.R. 58 I.A. 68: I.L.R 54 Mad. 257 (P.C).

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list of the title deeds, prefaced with the names of the parties and these words:—

"As agreed upon in person I have delivered to you the undermentioned documents as security."

In the view of their Lordships as expressed by Lord Tomlin, the memorandum was a document which

"merely records particulars of deeds the subject of a deposit . . . it was and remained a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties."

Their Lordships accordingly reached

"the conclusion that the memorandum was not other than a written record of the particulars of deeds the subject of an agreement constituted in fact by the act of deposit and the payment of the money and that it neither purported nor operated to create or declare any right, title or interest in the property included in the deeds, with the result that it did not require registration."

With this case that of *Subramonian* v. *Lutchman*[1], may be contrasted. There, on the occasion of the deposit of the title deeds, a memorandum was signed and delivered to the lender or creditor which stated:—

"We hand you herewith title deeds relating to [certain specified property]. . . this please hold as security against advances made to us."

The memorandum in addition referred to a promissory note and a second mortgage over certain other property, both in favour of the borrowers, which they also handed over as security for the advances made to them, and the document concluded:—

"We promise not to deal with same till your amount due you is fully paid and satisfied."

Lord Carson, in delivering their Lordships' judgment, quoted passages from the cases of *Kedernath Dutt* v. *Shamloll Khettry*[2] and *Pranjivandas Mehta* v. *Chan Ma Phee*,[3] as laying down the law on the subject and stated the criterion to be:—

"Did the document . . . constitute the bargain between the parties or was it merely the record of an already completed transaction?"

On the evidence and on the terms of the document their Lordships had no doubt

"that the memorandum in question was the bargain between the parties and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected."

1. (1922) 44 M.L.J. 602: L.R. 50 I.A. 77: I.L.R. 50 Cal. 338 (P.C.).
2. (1873) 11 Beng. L.R. (O.C.J.) 405.
3. (1916) 31 M.L.J. 155: L.R. 43 I.A. 122: I.L.R. 43 Cal. 895 (P.C.).

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Commenting on this passage, Lord Tomlin, in the case above quoted, said on behalf of the Board:—

"While their Lordships do not think that the language of Lord Carson conveys or was intended to convey the meaning that no memorandum relating to a deposit of title deeds can be within section 17 of the Indian Registration Act unless it embodies all the particulars of the transactions of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties."

With these considerations in mind their Lordships proceed to examine the facts of the present case. It appears that toward the end of 1923, three brothers, Kedar Nath Saha, Atindra Nath Saha and Jnanendra Nath Saha, who, or whose representatives, are the present respondents, arranged with the appellants for a loan of Rs. 25,000, for which certain property in Calcutta owned by the borrowers was to be the security. The parties having reached agreement as to the terms of the loan, the transaction was carried out as follows. On the 24th July, 1924, a meeting took place at the office of the attorneys for the appellants at which were present Hari Mohan Paul, one of the two appellants, on behalf of himself and his brother, the other appellant and Jnanendra Nath Saha, on behalf of himself and his two brothers. At this meeting a document was signed by Jnanendra Nath Saha setting out the terms and conditions of the advance. It provided that Rs. 12,000 should be paid on that day and the balance of Rs. 13,000 on or before 31st July, 1924, that the rate of interest was to be 9 per cent. per annum and that the period of the loan was to be one year from 1st August, 1924. It further provided that the advance of Rs. 12,000 "will be made on the deposit of the documents of title relating to the premises, No. 75, Beniatolla Street, abovementioned, and after the balance of Rs. 13,000 shall be paid the mortgagors will execute in favour of the mortgagee a memorandum evidencing the said deposit and embodying the terms and conditions of the loan."

Jnanendra, having signed this document formally, handed over the title deeds to the appellants' attorneys, saying as he did so: "For the sum of Rs. 12,000 which I have taken out of the loan of Rs. 25,000 I am depositing these documents of title by way of security or mortgage." The sum of Rs. 12,000 was thereupon paid over to Jnanendra, who signed a receipt on the

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memorandum for the sum of Rs. 12,000 advanced "on the security and upon the terms and conditions hereinbefore mentioned."

Subsequently, on 2nd August, 1924, the balance of Rs. 13,000 was paid to Jnanendra who repeated the formality of handing the title deeds to the appellants' attorneys, stating that "for the sum of Rs. 12,000 which I have already received out of Rs. 25,000 and for the sum of Rs. 13,000 which I am receiving now these documents will be kept in security." Later on the same day Jnanendra executed the memorandum of agreement now in question.

This memorandum of 2nd August, 1924, is a formal and elaborate document. It designates the borrowers as the mortgagors and the lenders as the mortgagees and recites that the mortgagors are the owners of the property described in the first schedule, that the mortgagors had applied to the mortgagees to lend them Rs. 25,000, and that the mortgagees had agreed to make this advance on the security of the documents of title specified in the second schedule. It further recites that the mortgagees had on 24th July, 1924, paid to the mortgagors Rs. 12,000, and that as security for this sum the mortgagors had deposited with the mortgagees' agents the documents of title specified in the second schedule, and that the mortgagees, before the execution of the memorandum, had paid over the balance of Rs. 13,000. The memorandum then proceeds to set out that it is thereby agreed and declared between the parties that, in consideration of the two sums of Rs. 12,000 and Rs. 13,000 paid before the execution of the memorandum, the title deeds described in the second schedule, "which said deeds, evidences and writings have as hereinbefore stated prior to the execution of this agreement been delivered by the mortgagors to the mortgagees' said agents in the town of Calcutta with intent to create a security on the said hereditaments and premises described in the said first schedule hereto such as is contemplated in the concluding proviso to S. 59 of the Transfer of Property Act (such security having been created prior to the execution of this agreement by the delivery of the documents hereinbefore mentioned—would (*sc.* shall) be held by the mortgagees as such security as aforesaid for the payment by the mortgagors to the mortgagees at the time and in the manner hereinafter mentioned and the costs (as between attorney and client) charges and

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expenses of and incidental to any proceeding which may be had for the protection of this security or for procuring or obtaining or attempting to obtain payment of the moneys hereby secured." There follows a series of heads dealing with the date of repayment, rate of interest, consequences of default, warranty of title and various other matters, and the memorandum in conclusion confers on the mortgagees a power of sale of the mortgaged property. A receipt for the total sum of Rs. 25,000 is appended.

Such being the tenour of the memorandum of the 2nd August, 1924, and such the circumstances attendant on its execution and delivery, the question is whether it required to be registered. Lort-Williams, J., held that it did not, being satisfied that the "memorandum was nothing but a record of what had been agreed to orally on the 24th July," and was "not a document containing the bargain made between the parties." On appeal, Costello, J., with whom Panckridge, J., concurred, was of the contrary opinion, holding that "the writing was of such a character as calls for registration," for the reasons set out in a long and careful judgment.

Their Lordships find themselves in agreement with the Appellate Court. The leading feature of this case is that the appellants' advisers were evidently quite aware of the niceties of the law in the matter, and deliberately endeavoured to effect a valid mortgage by delivery of title deeds and at the same time to accompany it with an effective written document which would nevertheless not require registration. The appellants, in their Lordships' opinion, have over-reached themselves and have failed to achieve their purpose.

In the first place, it is made clear by the earlier memorandum of 24th July, 1924, that the parties contemplated from the outset that a document should be executed "evidencing the said deposit and embodying the terms and conditions of the loan," and this earlier memorandum bears an acknowledgment of the receipt of the first instalment of the loan as having been advanced "on the security and upon the terms and conditions hereinbefore mentioned." When the memorandum of 2nd August, 1924, subsequently executed, is examined, it is found to contain all the essentials of the transaction. It states that it is *hereby* agreed and declared between and by the parties that in consideration of the sums advanced the title deeds of the

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property shall be held as a security on the said property, and refers to any proceeding which may be had for the protection of *this security* or for procuring payment of the moneys *hereby secured*. It then sets out all the details of the transaction and specifically confers a power of sale on the mortgagees. It is true that in the parenthetical passage, quoted above, the title deeds are stated to have been previously delivered with intent to create a security, but that does not alter the character of the memorandum itself, which, if the parenthetical passage be disregarded, is an instrument effective to create an interest in the property in favour of the mortgagees. Having purported to create a mortgage by delivery of title deeds, the parties proceeded to create it over again in writing. The memorandum does not merely evidence a transaction already completed: its language is operative. It is contractual in form and it embodies an agreement that the title deeds in question are to be held as security for the advances made and it speaks of the moneys "*hereby secured*." It not only contains all the terms on which the moneys were advanced, but it expressly confers a power of sale. It is noteworthy that in the appellants' "concise statement" of their claim in the plaint they state that they sue for a decree "for realisation of the principal and arrears of interest due and payable under a memorandum of agreement dated the 2nd August, 1924."

Their Lordships are of opinion that where, as here, the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction and is itself an operative instrument and not merely evidential, such a document must under the statute be registered. The appeal accordingly fails.

Their Lordships will humbly advise His Majesty that the decree of the Appellate Court of the 6th April, 1937, be affirmed, and the appeal dismissed. The legal representatives of the respondent Kedar Nath Saha, who alone appeared, will have their costs of the appeal.

Solicitors for Appellants: *W. W. Box & Co.*

Solicitors for Respondents: *Stanley, Johnson & Allen.*

R.C.C.

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Rakapalli Vira Raghavulu Naidu .. *Appellant** (*Plaintiff*)

v.

Dhara Chinna Rajalingam and others .. *Respondents* (*Defendants*).

Vira Raghavulu Naidu *v.* Rajalingam.

Promissory note—Executed by only one—Indorsement for collection in favour of another—Indorsee's rights as against the father and son of the executant—Whether any transfer of a debt or actionable claim effected by the indorsement—Transfer of Property Act (IV of 1882), S. 8.

In a suit to recover an amount due on a promissory note executed by the first defendant in favour of the father of the plaintiff's indorsers, not only the maker of the note the first defendant, but also his father (second defendant) and his son (third defendant) were proceeded against, and the lower Court passed a decree against the estate of the first defendant which had by then vested in the Official Receiver, and dismissed the suit as against the defendants 2 and 3,

Held, that it was obvious that neither the son nor the father of the first defendant would be made liable directly on the pronote in which neither of them was mentioned. This was not however a case in which there had been any transfer in law of either a debt or of any actionable claim. What was transferred by the indorsement was only the property in the pronote and nothing more. Hence the particular portion of S. 8 of the Transfer of Property Act stating that "where the property is a debt or other actionable claim, the securities therefor", would not apply.

Maruthamuthu Naicker v. *Kadir Badsha Rowther*, (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.), referred to.

Appeal against the decree of the District Court of Kistna dated 12th April, 1935 and passed in O. S. No. 15 of 1933.

V. Govindarajachari and *K. Jagannadha Rao* for Appellant.

Y. Suryanarayana for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This is an appeal from the decree of the District Judge of Kistna dated 12th April, 1935, in O. S. No. 15 of 1933, a suit to recover the amount due on a promissory note Ex. A, dated 12th February, 1930, executed by the first defendant in favour of the late Mallikarjuna Rao, the father of the plaintiff's indorsers. The suit was directed not merely against the maker of the note, the first defendant, but

* Appeal No. 414 of 1935. 28th March, 1939.

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Pandrang Row, J.

also against his father, the second defendant, and his son, the third defendant. It may be mentioned in this connection that the first defendant became insolvent and the Official Receiver of Vizagapatam was brought on record as the fourth defendant. The learned District Judge passed a decree only as against defendants 1 and 4, that is to say, as against the estate of the first defendant, and dismissed the suit as against defendants 2 and 3. The plaintiff has preferred this appeal from the decree of the Court below dismissing the suit against defendants 2 and 3, and the only question for determination in this appeal is whether the plaintiff is entitled to a decree against defendants 2 and 3.

It must be remembered that the suit is by an indorsee and is based on the promissory note, Ex. A. In paragraph 4 of the plaint it is mentioned that the endorsement was obtained of the note in order to collect the amount due thereunder, and it would appear as if the plaintiff is only an indorsee for collection and not for value. The plaint does not allege that the plaintiff paid anything for the indorsement, and on the other hand it is stated in paragraph 4 that the transfer of the promissory note was obtained in order to collect the amount due on the note. It is obvious that neither the son nor the father of the first defendant could be made liable directly on the promissory note in which neither of them is mentioned. It is enough in this connection to refer to the recent Full Bench decision in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[1], in which the head note runs as follows:—

"The indorsee of a promissory note executed by the managing member of a Hindu joint family is limited to his remedy on the note unless the indorsement is so worded as to transfer the debt as well and the stamp law is complied with; and therefore in the case of an ordinary endorsement the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu Law."

In the present case the indorsement is of the ordinary kind; it is not so worded as to transfer the debt itself nor has any stamp duty been paid on the indorsement. It was alleged in the plaint that there was an agreement by the second defendant on the 12th January, 1931, whereby he paid Rs. 2,000 being part of the amount due to the original payee and the balance was promised to be paid after some time. This agreement, which is marked as Ex. F in this case, is however not an agree-

1. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.)

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ment with the plaintiff in the present suit but only with the original payee, and it is not the plaintiff's case that the rights under this agreement were also transferred to the plaintiff along with the promissory note. While the promissory note was filed along with the plaint, this letter Ex. F was not filed, and if it had really been relied upon as part of the cause of action as it is now sought to be, it would have been filed along with the plaint. Even assuming that the plaintiff is not a mere indorsee for collection but is an indorsee for value, it would not follow that the indorsement *ipso facto* transferred the rights under the letter Ex. F to the plaintiff. The Advocate for the appellant relies on S. 8 of the Transfer of Property Act and in particular the following passage therein, namely :—

"Where the property is a debt or other actionable claim, the securities therefor."

This is not however a case in which there has been any transfer in law of either a debt or of any actionable claim. What was transferred by the endorsement was only the property in the promissory note and nothing more. This is therefore a case to which the particular portion of S. 8 of the Transfer of Property Act relied upon will not apply. We are therefore of opinion, though not for the reasons found in the judgment of the Court below, that the Court below was right in dismissing the claim of the plaintiff as against defendants 2 and 3. The appeal therefore fails and is dismissed with costs of respondents 2 and 3.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE NEWSAM.

Vedantam Subbarayudu (dead) and others .. *Appellants* (Defendants 6 and 7 and Nil)*

v.

Chattapalli Lakshminarasamma and others .. *Respondents (Plaintiff and Defendants 1 to 5 and Nil).*

Subbarayudu *v.* Lakshminarasamma.

Transfer of Property Act (IV of 1882 as amended by Act XX of 1929), S. 92 (iii)—Vendee advancing money for discharging a prior mortgage decree—If entitled to right of subrogation in respect of that sum in the

* Appeal No. 213 of 1936 and C. M. P. No. 1011 of 1939. 13th April, 1939.

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absence of a registered instrument reserving the right as required by S. 92 (iii).

In execution of a decree obtained on a mortgage the mortgaged property was about to be sold. The mortgagors agreed to sell a portion of the property to strangers who advanced the money with which the decree debt was satisfied. They obtained a sale-deed and in a suit by a subsequent mortgagee they claimed a right of subrogation to the rights of the earlier mortgagee whose decree was discharged by the money advanced.

Held, the vendees not having obtained a registered agreement stipulating that they should be subrogated to the rights of the mortgage which they have discharged they are not entitled to set up any claim of priority over the subsequent mortgage.

Case-law reviewed.

Per *Newsam, J.*—Conflict of opinion has been clarified and stilled by the amending Act XX of 1929 giving effect to the rule of equity as to subrogation.

Appeal against the decree of the Court of the Subordinate Judge of Narasapur dated 21st January, 1936 and made in O. S. No. 61 of 1934 and petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the scaling down of the decree debt in O. S. No. 61 of 1934 on the file of the Court of the Subordinate Judge of Narasapur according to the provisions of the Madras Agriculturists Relief Act (IV of 1938) in the event of the failure of the Appeal No. 213 of 1936—appeal preferred against the decree of the said Court of the Subordinate Judge of Narasapur in the said O. S. No. 61 of 1934.

P. Satyanarayana Rao and *V. Parthasarathi* for Appellants.

V. Viyyanna for Respondents.

The Court delivered the following

Venkataramana Rao, J.

JUDGMENTS: *Venkataramana Rao, J.*—This appeal raises a question of subrogation. The facts necessary for the disposal of the same lie in a narrow compass. The plaintiff sued to recover a sum of Rs. 8,000 on a mortgage dated 3rd October, 1925, executed by defendants 1 to 4 and their father late Subbarayudu in her favour. There was a prior mortgage on the said property dated 1st August, 1914. In execution of a decree obtained thereon the property mortgaged was about to be sold. To discharge the said decree debt the mortgagors—late Subbarayudu and his sons—agreed to sell a part of the said property, namely, plaint items 3 to 7, 9 and 15 to defendants 6 and 7. In pursuance of the said contract, the defendants 6 and 7 obtained a sale-deed dated 2nd November, 1933, and advanced the money with which

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the said decree debt was satisfied. They therefore claim a right of subrogation in respect of the said sum on the ground that by their having discharged the said decree debt they are subrogated to the rights of the mortgagee under the deed dated 1st August, 1914. The learned Subordinate Judge refused to give them the said relief on the ground that there is no registered instrument reserving the right as required by S. 92 (*iii*) of the Transfer of Property Act. It is this view that is now canvassed in this appeal by Mr. Satyanarayana Rao on their behalf.

It is conceded that the matter is governed by S. 92 of the Transfer of Property Act, but it is contended that defendants 6 and 7 have a right of subrogation under cl. (*i*) of the said section. This contention is directly opposed to the interpretation placed on the said section by the Full Bench decision in *Lakshmi Amma* v. *Sankara Narayana Menon*[1]. But it is contended that the observations regarding the interpretation of that section are *obiter* and that a different note was struck in a recent judgment by their Lordships Venkatasubba Rao and Abdur Rahman, JJ., in *Srinivasulu* v. *Damodarasami*[2]. In *Lakshmi Amma* v. *Sankara Narayana Menon*[1], I observed as follows:—

"The first clause enunciates no new principle (*vide* S. 74 of the Transfer of Property Act since repealed). It applies to all persons who have an interest in the equity of redemption and are under no personal obligation to discharge prior encumbrances. The third clause has been enacted to confer a benefit on persons who advance money to discharge an incumbrance only 'if the mortgagee has by a registered instrument agreed that such persons shall be subrogated.' The clause is intended to apply to all persons who acquire an interest in the mortgaged property by advancing moneys to discharge prior incumbrances and there is no warrant for restricting the scope of that clause to persons other than purchasers or mortgagees as contended by Mr. Kuttikrishna Menon. The distinction between the two classes of cases aforesaid, namely, those who have an existing interest in the property and those who acquire an interest therein by advancing money, is well recognised in the law relating to subrogation."

This is also the view taken by Varadachariar, J.—*Vide* pages 367 and 368 and by Cornish, J. (page 362). Since the date of this decision the matter was considered by a Full Bench of the Allahabad High Court and a Full Bench of the Nagpur High Court. The Full Bench decision of the Allahabad High Court is reported in *Hira Singh* v. *Jai Singh*[3]. Sulaiman, C. J., after considering the decision in *Lakshmi Amma* v. *Sankara*

1. (1935) 70 M.L.J. 1: I.L.R. 59 Mad. 359 at 375 (F.B.).
2. A I.R. 1938 Mad. 779.
3. I.L.R. (1937) All. 880 (F.B.).

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Narayana Menon[1] and the previous Full Bench decision in *Tota Ram* v. *Ram Lal*[2], which was dissented from in *Lakshmi Amma* v. *Sankara Narayana Menon*[1] affirmed the view taken by us. In that case certain properties were sold for discharging the prior encumbrances and as there was no registered instrument in the case, the right of subrogation was refused. The learned Chief Justice concluded his judgment thus:

"Having paid the amounts which under their contracts of sale they were bound to pay as part of their sale consideration, and not having obtained any agreement in writing registered that they would be subrogated to the rights of the prior mortgagee, they are not entitled to any such benefit."

The Full Bench decision of the Nagpur High Court is reported in *Taibai* v. *Wasudeorao*[3]. The actual decision in that case is that:

"A purchaser of a property with whom is left part of the consideration of the sale in his favour for paying off a mortgage but in whose favour there is no express agreement of subrogation in writing registered is not entitled to claim subrogation against a later mortgagee under S. 92 of the Transfer of Property Act as amended by Act XX of 1929.".

It also affirms the view taken by us in our Full Bench decision. Mr. Satyanarayana Rao canvasses the reasoning in both the above judgments. What he contends for is that the interpretation placed on S. 92 (*iii*) of the Transfer of Property Act was based upon a principle which according to him was not well founded. In the course of the Full Bench judgment in *Lakshmi Amma* v. *Sankara Narayana Menon*[1], Varadachariar, J., observed thus:—

"There is a well-established distinction between cases in which a person who has a pre-existing interest in property pays off a prior charge on that property for the protection of his own interest and cases in which a person acquires an interest in property only by reason of his advancing money to pay off an existing mortgage debt. It seems to me that the first clause of S. 92 must be held to relate to the first type of cases above referred to and the third clause to the second type."

This is also the view which I took. It is this view which Mr. Satyanarayana questions and in support thereof relies upon the observations of Venkatasubba Rao, J., in *Srinivasulu* v. *Damodarasami*[4]. The learned Judge remarks thus at page 783:—

"We must say we find it difficult to follow the distinction adverted to between a person with a pre-existing right and a person acquiring a right by

1. (1935) 70 M.L.J. 1: I.L.R. 59 Mad. 359 (F.B.).
2. (1932) I.L.R. 54 All. 897 (F.B.).
3. I.L.R. (1938) Nag. 206 (F.B.).
4. A.I.R. 1938 Mad. 779.

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reason of the advance he makes. Not the slightest support is to be found for this supposed distinction in any of the rulings of the Judicial Committee; on the contrary, as already shown, it finds no countenance in them."

But the learned Judge did not however express any opinion on the interpretation placed by us. The learned Judge again remarks:

"To construe cls. (i) and (iii) of the new S. 92 is not within our purview. It is not therefore for us to say whether the construction adopted in *Lakshmi Amma* v. *Sankara Narayana Menon*[1] is right or not, whatever may be our own view on the matter."

Mr. Satyanarayana Rao contends that the observations of Venkatasubba Rao, J., are well founded in principle and the distinction sought to be made in *Lakshmi Amma* v. *Sankara Narayana Menon*[1] does not exist and that on a proper construction of S. 92, a person who advances money to a mortgagor and takes a mortgage or sale would come within cl. (*i*) of S. 92. Considerable reliance was placed upon certain decisions of the Judicial Committee and the interpretation placed upon them by our High Court and other High Courts. Those decisions are *Mohesh Lal* v. *Mohant Bawan Das*[2], *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*[3], *Dinabandhu Shaw Chowdhry* v. *Jogmaya Dasi*[4], *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*[5] and *Jagmohan* v. *Jugal Kishore*[6]. I shall now proceed to examine the soundness of the contention and the scope of the said Privy Council decisions. The cases in *Mohesh Lal* v. *Mohant Bawan Das*[2] and *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*[3] were decided before the Transfer of Property Act (1882) was enacted and the other cases were decided after the enactment of the Act but before the recent amendment in 1929 and 1930. Both in 9 and 10 Calcutta cases, their Lordships applied certain rules of English Law as rules of justice, equity and good conscience. They approved of the rule in *Adams* v. *Angell*[7] and disapproved of the rule in *Toulmin* v. *Steere*[8], the one on the ground that it was in consonance with the rules of justice equity and good conscience and the other, on the ground that it was not. I shall first explain the scope of the rule in *Toulmin* v. *Steere*[8].

1. (1935) 70 M.L.J. 1: I.L.R. 59 Mad. 359 (F.B.).
2. (1883) L.R. 10 I.A. 62: I.L.R. 9 Cal. 961 (P.C.).
3. (1884) L.R. 11 I.A. 126: I.L.R. 10 Cal. 1035 (P.C.).
4. (1901) 12 M.L.J. 73: L.R. 29 I.A. 9: I.L.R. 29 Cal. 154 (P.C.).
5. (1912) 22 M.L.J. 468: L.R. 39 I.A. 68: I.L.R. 39 Cal. 527 (P.C.).
6. A.I.R. 1932 P.C. 99 (P.C.).
7. (1877) 5 Ch.D. 634.
8. (1817) 3 Mer. 210: 36 E.R. 81.

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It is well settled that a mortgagor who has created more than one encumbrance cannot set up a prior encumbrance which he has discharged against a later encumbrance. This is on the principle that a person who borrows money cannot be his own creditor and he would be derogating from his own grant. But *Toulmin* v. *Steere*[1] carried the principle a step further and applied the same principle to a person who acquired an equity of redemption. The soundness of the decision was always questioned in English Courts though it was not overruled. Its application was limited as far as possible. The limit of the rule as enunciated therein is thus explained by Lord Macnaughten in *Thorne* v. *Cann*[2]:

> "A purchaser who took a conveyance purporting to be free from encumbrances could not set up a mortgage which had been paid off out of the purchase money against an encumbrance subsequent in date of which he had constructive notice. The authority of that case cannot nowadays be treated as going beyond the actual decision."

This rule was considered by their Lordships of the Judicial Committee as not being in accordance with justice, equity and good conscience. They further stated that they were not prepared to extend that doctrine to India.

I shall now deal with the rule in *Adams* v. *Angell*[3]. In that case, Jessel, M.R., after laying down the general proposition that the mere fact of a charge having been paid off does not decide the question whether it is extinguished, proceeded to explain in what cases it could be said to have extinguished and in what cases, not. He instanced the case of a charge paid off by a tenant for life without any expression of his intention and in such a case he observed that it was presumed that his intention was to keep it alive. He then proceeded to instance the case of an owner of an estate in fee or tail. In dealing with this, he observed the presumption was the other way remarking that if there was no reason for keeping it alive, equity, would, in the absence of any declaration of his intention, destroy it, but if there was a reason for keeping it alive, equity would not destroy it. He then took the case of a purchaser and observed that if he paid off a charge, he might have it assigned to a trustee for himself or might have a declaration inserted in the deed that the charge should be treated as remaining on foot for the purpose of protecting him against any encumbrances. The

1. (1817) 3 Mer. 210: 36 E.R. 81. 2. (1895) A.C. 18.
3. (1877) 5 Ch. D. 634.

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learned Master of the Rolls then wound up thus:

"The intention, therefore, if expressed, governs the case, but if no intention is expressed, then *Toulmin* v. *Steere*[1] says that in the incumbrance which is paid off is merged, and the subsequent incumbrancers let in."

On the actual facts of that case, he found that the intention was clearly shown not to let in the subsequent incumbrancer. According to *Adams* v. *Angell*[2], a purchaser who pays off a charge must show an intention to keep it alive if he wishes to prevent its merger and such an intention was shown in that case. (This is also how Lord Justice Lindley understood the case.) See *Liquidation Estates Purchase Company* v. *Willoughby*[3]. Let us see how the Privy Council applied the rule. In 9 Calcutta case the right of subrogation was negatived. In that case one Mangal Das as the agent of an Asthal executed a mortgage in favour of one Lachminarain. During that time one Balgobind was the Mahant. After the death of Balgobind disputes arose between Mangal Das and another as to succession. In 1872 Mangal Das purporting to act as the proprietor executed a mortgage in favour of one Mohesh Lal and a part of the consideration for the mortgage was utilised in discharging the prior mortgage in favour of Lachminarain. Their Lordships of the Judicial Committee after citing the rule in *Adams* v. *Angell*[2] as enunciated by Jessel, M.R., proceeded to apply the said rule in the following words:

"Applying that rule to the present case, it must be presumed, in the absence of any expression of intention to the contrary, that Mangal, who when he borrowed the money to pay off Lachminarain's mortgage, claimed to be the owner of the estate, and was stated on the face of the bond to be so, intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate encumbrance. Although the money was paid by the plaintiff's gumastha to Lachminarain's estate, it was paid with money borrowed from the plaintiff by Mangal, and for which Mangal was liable to him. The mortgage was therefore paid off by Mangal and not by the plaintiff."

It will be seen that Mangal was treated as the owner in fee and the amount borrowed by him and paid in discharge of the prior mortgage was treated as money paid by the owner in fee. Though the money was expressly borrowed for the purpose of paying off the prior mortgage, their Lordships negatived the right of subrogation. The principle is this, that money received in consideration of a mortgage or sale of a property will be the

1. (1817) 3 Mer. 210: 36 E.R. 81.
2. (1877) 5 Ch. D. 634.
3. (1896) 1 Ch. 726 at 734.

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property of the mortgagor or a vendor. *Prima facie* therefore the money that goes in discharge of the prior mortgage will be the money of the mortgagor or the vendor and therefore it will be payment by the owner in fee. Though in that case it was paid by Mohesh Lal the mortgagee's gumastha, still their Lordships observed that the mortgage was paid by Mangal and not by Mohesh Lal. Their Lordships remarked that as there was no intermediate encumbrance, the charge must be deemed to be extinguished and they declined to raise an equity in favour of Mohesh Lal. In order to have this equity there must be a declaration of his intention and in the absence of such a declaration for keeping it alive, their Lordships observed that it was extinguished.

I shall now take the 10 Calcutta case and see how the rule was applied. In that case, a person in execution of a money decree purchased in Court auction a certain property which was admittedly subject to more than one mortgage. As purchaser of the equity of redemption, after the purchase he discharged the first mortgage and was held entitled to the right of subrogation in respect thereof against the later mortgage. After referring to *Adams* v. *Angell*[1] and *Toulmin* v. *Steere*[2], Sir Richard Couch formulates the question thus and answers it:

> "The obvious question to ask in the interests of justice, equity and good conscience is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life estate and remainder or by way of successive charges In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid."

Their Lordships therefore treated the case of a purchaser of an equity of redemption in exactly the same position as a life tenant, that is, a person having an existing interest in the property and discharging a prior mortgage by reason of such an existing interest and not being under a personal liability to pay the charge or being under a contractual liability to pay the encumbrance. The expression "the owner of a partial interest" would take in the case of a second and every subsequent mort-

1. (1877) 5 Ch. D. 634.
2. (1817) 3 Mer. 210: 36 E.R. 81.

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gagee. The money that is paid by the second mortgagee or the purchaser in such a case would be his own money and cannot in any sense be considered to be the money of the mortgagor because the money is paid as owner of an existing interest, that is, the purchaser as owner of equity of redemption. Where a mortgagor mortgages or sells a property for discharging a subsisting mortgage, whether the mortgagor discharges by receiving the money or the mortgagee or vendee discharges by covenanting to do so retaining the consideration money for the mortgage or sale, it will in either case be a discharge by the mortgagor. Where the mortgagee or vendee covenants with the mortgagor to discharge a particular incumbrance, he assumes the duty of the mortgagor. *Prima facie* therefore as stated by Jones in his book on 'Mortgages', S. 258:

> "If the money be paid by one who has assumed the duty of paying the debt, either by contract with the mortgagor or with those who may have succeeded to his rights, this must be taken, as regards other subsequent interests, as a payment"

and

> "as the payment was in pursuance of his agreement, it may be regarded as made with the mortgagor's money." (S. 864.)

In dealing with the case of a mortgagee who purchases an equity of redemption, Vice-Chancellor Hall in *Adams* v. *Angell*[1] states the principle thus at page 642:—

> "A mortgagee who purchases an equity of redemption from a vendor liable to pay the mortgage debt, ought, it would seem, in the absence of contract to the contrary, ordinarily to be considered as giving up his claim as creditor against the estate, and not merely his personal remedy against the mortgagor. The parties can well arrange to the contrary, but not doing so, it seems reasonable that the debt satisfied for one purpose should be deemed satisfied for all purposes. That this involves a second mortgagee being placed in a better position than he previously was, does not seem to me to affect the question. Indeed the improved position of the second mortgagee would seem, after all, to be only consistent with his contract, if such contract be considered (as it reasonably may be) to have been a contract that he should have a security on the property, but subject to a prior charge so long as the creditor having that charge remained unpaid."

It will be seen from this passage that it is open to the parties to arrange to the contrary. Of course, where no such arrangement is made, the English law modified the rule in *Toulmin* v. *Steere*[2], where a person advancing the money had no notice of an intermediate encumbrance or other circumstances

1. (1877) 5 Ch. D. 634.
2. (1817) 3 Mer. 210: 36 E.R. 81.

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which would raise equity in his favour. Even in such cases where from the terms of the mortgage deed or purchase deed it is clear that the intention to keep alive a charge is inconsistent with the real intention of the parties it would not be kept alive because the mortgagee or purchaser finds it would have been better for him to have kept the charge alive. (*Vide* the observations of Lord Justice Lindley in *Liquidation Estates Purchase Company* v. *Willoughby*[1].) *Mohesh Lal* v. *Mohant Bawan Das*[2] illustrates this rule very clearly. That case was one in which the mortgagee had not an existing interest but acquired an interest in consideration of certain money paid to the mortgagor and *prima facie* the money so paid to the mortgagor would be the money of the mortgagor with which the prior mortgage would have been redeemed. Both these cases illustrate the distinction between the case of a person having an existing interest and the case of a person acquiring an interest. As I said, these cases arose before the Transfer of Property Act was enacted.

Now let us see how the matter stood under the Act. Ss. 74 and 75 of the Act enacted that every second or subsequent mortgagee on discharging a prior mortgage will be entitled to all his rights. The sections gave effect to the recognition of the principle that a person having an existing interest and not being under personal or contractual liability to pay an encumbrance is entitled to be subrogated to the rights of a prior encumbrance which is discharged. S. 95 provides for the case of a co-mortgagor. S. 101 provides for the case of a union of interests, that is, the case of an incumbrancer becoming owner of the property. It was applied also to the case of a purchaser of equity of redemption discharging a prior encumbrance. It will be seen from the language of S. 74 that it is a statutory right and the Courts do not go into the question whether it was for the benefit of the subsequent mortgagee to keep the prior mortgage alive or not; the presumption which was automatically raised in such cases in England was recognised as a statutory right.

In the case of a person who advances money for the purpose of paying off a mortgage and takes a mortgage or sale, the principle would be that *prima facie* the prior mortgage is discharged unless there is an agreement that it should be kept

1. (1896) 1 Ch. 726 at 734.
2. (1883) L.R. 10 I.A. 62: I.L.R. 9 Cal. 961 (P.C.).

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alive or the mortgagee or the vendee shows that there is some reason for presuming or implying such an agreement in his favour as the subsistence of an intermediate incumbrance, that is, the onus is on him to prove it. The presumption and onus are not the same as in the two classes of cases, that is, in the case where a person having an existing interest discharges a prior mortgage and a person acquiring an interest discharges a mortgage. The result of the case-law in regard to presumption and onus in cases where a charge is not discharged by a mortgagor and in the absence of an expression of intention or an express agreement to have the charge kept alive may be summarised thus:

(1) If a charge is paid off by a tenant for life, he retains the benefit of it against the inheritance. The presumption is that he intends to keep it alive. *Adams* v. *Angell*[1] and *W. Tasker & Sons, Ltd.*, In re: *Hoare* v. *W. Tasker & Sons, Ltd.*[2] The burden of proof is upon those who allege that in paying off the charge he intended to exonerate the estate. (*Burrell* v. *Earl of Egremont*[3].) This is irrespective of any existence of an intermediate encumbrance. (*Jones* v. *Morgan*[4] and *Walker* v. *Symonds*[5].)

(2) Where a second or a subsequent mortgagee discharges a first or prior mortgage, the same presumption and onus are raised as in the case of a tenant for life. As the Privy Council remarks in *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*[6]:

"It cannot signify whether the division of interests in the property is by way of life estate and remainder, or by way of successive charges."

(S. 74 of the Transfer of Property Act.)

It would seem that the Privy Council applied the principle applicable to cases coming under this class to the case of a purchaser of an equity of redemption discharging a mortgage apparently on the ground that the charge was by an owner of an existing interest. (*Gokaldas Gopaldas* v. *Puranmal Premsukh Das*[6].) It appears to me that it would more appropriately come under the next class of cases.

(3) Where the owner of an estate in fee pays off a charge, the presumption is the other way. Equity would in the absence

1. (1877) 5 Ch. D. 634. 2. (1905) 2 Ch. 587 at 602.
3. (1844) 7 Beav. 205: 49 E.R. 1043. 4. (1783) 28 E.R. 1086.
5. (1818) 36 E.R. 751 at 784.
6. (1884) L.R. 11 I.A. 126: I.L.R. 10 Cal. 1035 at 1046 (P.C.).

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of any declaration of his intention destroy it, but if there was a reason for keeping it alive such as the existence of another encumbrance, equity would not destroy it. *Adams* v. *Angell*[1]; also *W. Tasker & Sons, Limited*, In re: *Hoare* v. *W. Tasker & Sons, Limited*[2].

As the learned Editor of the Article on 'Mortgages' in Hailsham's Edition of Halsbury's Laws of England, Vol. 23, points out in the footnote at page 516:

> "When a tenant in fee simply pays off a charge, the original presumption is in favour of merger. Where under the circumstances it is for his advantage to keep the charge alive, there may be a rebutting presumption which prevents merger."

Take the case of a person who becomes entitled to an equity of redemption by descent or devise. If he pays the charge created by his predecessor, the presumption is merger but he can keep it alive or if there is an intermediate incumbrance or other circumstances which will have to be proved, a rebutting presumption will be made in his favour. (*Vide* the observations of Sir John Romilly in *Davis* v. *Barrett*[3], the case of an heir discharging an encumbrance created by his predecessor.) The onus of proving such circumstances is on him, though admission of them might dispense with proof in some cases.

Under this category, in my opinion, would come the case also of a purchaser of an equity of redemption discharging a mortgage. The presumption would be merger but where there is an expression of an intention or an intermediate encumbrance or such a continuance would be for his benefit, a rebutting presumption will be made in his favour. This is the rule embodied in S. 101 of the Transfer of Property Act before the Amendment.

(4) Where a person advances money to discharge a mortgage and takes a mortgage or sale, the presumption is that the mortgage is extinguished. But if it is shown that there is an intermediate encumbrance or other circumstances which raise equity in his favour, the presumption shifts or is rebutted and an agreement with the borrower that the mortgage was to be kept alive is presumed or implied. The agreement is often

1. (1877) 5 Ch. D. 634 at 645.
2. (1905) 2 Ch. 587 at 602.
3. (1851) 14 Beav. 542: 51 E.R. 394 at 397.

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implied from such circumstances as an arrangement with the mortgagor that after the discharge of the mortgage the mortgage deed should be surrendered to him and a new document would be executed in his favour or a sale free from encumbrance. (Vide *Dinabandhu Shaw Chowdhry* v. *Jogmaya Dasi*[1] and *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*[2].) The onus is on him to prove them. (*Purnamal Chand* v. *Venkata Subbarayadu*[3].)

Where there is no intermediate incumbrance or any other circumstances which would raise an equity in his favour, the original presumption that the mortgage is extinguished will not give place to a rebutting presumption in his favour and the onus is on him to prove that there was an express agreement to keep the mortgage alive. This principle is exemplified by the cases in *Mohesh Lal* v. *Mohant Bawan Das*[4] and *Kalagayya* v. *Yanadamma*[5].

(5) Where one advances money to another for paying off a mortgage without stipulating for any security, the presumption is that the mortgage is discharged unless by an agreement with the borrower he is subrogated to the mortgage security. (*Ram Tuhul Singh* v. *Biseswar Lall Sahoo*[6].) The rule in English law appears to be different. (Vide *Cracknall* v. *Janson*[7], which appears to treat him as an equitable transferee of the debt.)

Whether it is a case of an original presumption as in (1) and (2) or a case of rebutting presumption as in (3) and (4), the theory on which the presumption and onus are rested is that an intention in favour of a gift will not be presumed. (*Vide* the observations of Lord Justice Fletcher Moulton in *Manks* v. *Whiteley*[8].) This judgment was upheld in *Whiteley* v. *Delaney*[9].

Both *Dinabandhu Shaw Chowdhry* v. *Jogmaya Dasi*[1] and *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*[2] are cases of mortgages and not purchases. In the 29 Calcutta case, one Mustafi advanced a sum of Rs. 40,000 for the purpose

1. (1901) 12 M.L.J. 73: L.R. 29 I.A. 9: I.L.R. 29 Cal. 154 (P.C.).
2. (1912) 22 M.L.J. 468: L.R. 39 I.A. 68: I.L.R. 39 Cal. 527 (P.C.).
3. (1897) 7 M.L.J. 198: I.L.R. 20 Mad. 486 at 487.
4. (1883) L.R. 10 I.A. 62: I.L.R. 9 Cal. 961 (P.C.).
5. (1910) 21 M.L.J. 180.
6. (1875) L.R. 2 I.A. 131 (P.C.).
7. (1879) 11 Ch. D. 1 at 18.
8. (1912) 1 Ch. 735 at 764.
9. (1914) A.C. 132.

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of discharging two prior mortgages. The mortgages were discharged with the amount. A question arose whether the mortgage in favour of Mustafi had priority over an attachment of property which came into effect before the date of the mortgage. Their Lordships from the nature of the transaction inferred an agreement that the mortgages intended to be discharged should be kept alive. After referring to *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*[1], they remarked thus:—

"Here the mortgagor was paying off his own debts, but he was doing so for the benefit of Mustafi and in performance of the agreement with him."

Therefore their Lordships recognised that though the money would *prima facie* become the money of the mortgagor as in the 9 Calcutta case, as the money was paid in performance of an agreement with the mortgagee, it should be kept alive. This their Lordships inferred from the fact that it was intended that the mortgagee should have an unencumbered property and the charge in his favour should have priority over all other charges. It would have been very easy for their Lordships to apply the rule under S. 74 of the Transfer of Property Act by treating Mustafi as a second mortgagee; but they would not apply that section because that section was intended to relate only to a person having an existing interest in the property and discharging a prior mortgage out of his own money without being under a stipulation with the mortgagor to discharge it from and out of the consideration money for his mortgage. Therefore the distinction between a person having an existing right and the person acquiring an interest was kept in view by their Lordships of the Privy Council. Again, in *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*[2], there was a mortgage in favour of one Alfan on 17th February, 1888, which was effected for the purpose of discharging a *serpeshgi* debt dated 20th November, 1874. Their Lordships gave the benefit of subrogation to Alfan in respect of the *serpeshgi* deed dated 20th November, 1884, by inferring an agreement that that mortgage should be kept alive. At page 554 this is what their Lordships observe:

"The Rs. 12,000 lent by Musammat Alfan were in accordance with the agreement between Musammat Alfan and Kishan Kumar Singh applied in paying off the *serpeshgi* debt, that on payment of that debt the *serpeshgi* deed

1. (1884) L.R. 11 I.A. 126: I.L.R. 10 Cal. 1035 (P.C.).
2. (1912) 22 M.L.J. 468: L.R. 39 I.A. 68: I.L.R. 39 Cal. 527 (P.C).

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of the 20th November, 1874, was handed over to Musammat Alfan, and that Musammat Alfan when she lent her Rs. 12,000 intended to keep alive for her benefit and protection the charge which had been created by the *serpeshgi* deed of the 20th November, 1884."

After referring to *Mohesh Lal* v. *Mohant Bawan Das*[1] and *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*[2], they observe that applying the rule of justice, equity and good conscience, the charge was kept alive. It is also significant that their Lordships did not apply S. 74 of the Transfer of Property Act but invoked the principle of equity, thus again illustrating the distinction between a person having an existing interest and a person acquiring an interest. This principle was again illustrated in *Jagmohan* v. *Jugal Kishore*[3], where in respect of half of the purchase money their Lordships did not give the benefit of subrogation by implying an agreement because there was no intermediate encumbrance. Mulla does recognise that 29 and 39 Calcutta cases were based on conventional subrogation and that S. 74 of the Transfer of Property Act would not apply to cases where a person is under a contractual liability to discharge a mortgage.

In order therefore to avoid questions of intention and onus being gone into by Courts and with a view to place the right of subrogation on a statutory basis the Legislature enacted S. 92 of the Transfer of Property Act. As remarked by Mulla, S. 92 (*i*) deals with the case of a person having an existing interest and S. 92 (*iii*) deals with the case where under the previous state of the law the right of subrogation was invoked on the doctrine of conventional subrogation. This follows from the plain language of the section and there is very good reason why the Legislature adopted this view. In the case of a person having an existing interest, there is no need to resort to any agreement express or implied and S. 74 of the Transfer of Property Act before the amendment gave partial recognition in favour of second and subsequent mortgagees and S. 92 (*i*) only extended the said principle. In other cases the Court had to go into questions of intention, in certain cases coming to the conclusion that there was an intention to keep the mortgage alive and in certain other cases, that there was no such intention. The Legislature therefore enacted the rule in S. 92 (*iii*) as it

1. (1883) L.R. 10 I.A. 62 : I.L.R. 9 Cal. 961 (P.C.).
2. (1884) L.R. 11 I.A. 126: I.L.R. 10 Cal. 1035 (P.C.).
3. A.I R. 1932 P.C. 99 (P.C.).

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is always open to a person who advances money to enter into an agreement. I do not see any injustice in enacting such a rule. The legislature does give the benefit of the principle of subrogation even in such cases but the legislature requires that the person intended to take advantage of the benefit must comply with certain requirements, the requirements being a registered instrument for keeping alive the prior mortgage which can always be done even by the very transaction—sale or mortgage—under which the money was advanced by making a declaration that it was agreed between the parties that the prior mortgage was intended to be kept alive.

It is contended by Mr. Satyanarayana Rao that the words in cl. (*iii*), "a person who has advanced money to a mortgagor money with which the mortgage has been redeemed", are only intended to cover the case of a person who merely lends money without stipulating for any security as such a person cannot in law acquire any right of subrogation but for the statutory provision. There is no warrant for placing such a narrow construction. The words are wide enough to cover the case of a mortgagee or a vendee who advances money in consideration of a mortgage or sale. All that the section requires is that money must have been received by the mortgagor from the person who advances it and with which the mortgage must have been redeemed. What is contemplated by the section is the receipt of money by a mortgagor for the discharge of a mortgage and the redemption of such a mortgage with that money. The money may have been received by the mortgagor either by raising a loan by a mere personal security or by a transfer of the mortgaged property by way of a mortgage or sale. In such cases the money with which the mortgage is redeemed will be the money of the mortgagor obtained by him in any of the modes indicated above. *Prima facie* therefore the redemption of the mortgage being with the mortgagor's money, the mortgage is discharged. But as and by way of equity an agreement was inferred in cases where there is no express agreement for keeping the mortgage alive. As the inference of such an intention is dependent upon a number of circumstances and to avoid Courts going into them, cl. (*iii*) was enacted to confer a statutory right in such cases provided the person seeking the benefit of it fulfils the conditions mentioned in the section.

I am therefore of the opinion that the vendees in this case not having obtained a registered agreement stipulating that they should be subrogated to the rights of the mortgage which they have discharged, they are not entitled to set up any claim of priority over the plaintiff's mortgage. In the result, the appeal fails and is dismissed with costs.

Newsam, J.—This was a suit on a mortgage dated 3rd October, 1925, executed by a Hindu father and his four major sons. Defendants 6 and 7 purchased seven items of the hypotheca on 2nd November, 1933. The sale of these items to defendants 6 and 7 was expressly stated to be in order to avoid at sale in execution of a decree based on a prior mortgage of the same property dated August, 1914. The question is whether defendants 6 and 7 are by virtue of their purchase subrogated to the rights of the mortgagee whose mortgage was redeemed with their money. The Court below has answered this question in the negative.

The law to be applied is admitted to be found in Ss. 91 and 92 of the Transfer of Property Act.

In order to be subrogated to the rights of a mortgagee whose mortgage you redeem you must be either—

(*a*) a person entitled to sue for redemption [cl. (*i*) of S. 92]; or

(*b*) a person who has advanced money to a mortgagor for redeeming a mortgage and a person who has contracted for subrogation with the mortgagor by a registered instrument [cl. (*iii*) of S. 92].

S. 91 tells us who are persons entitled to sue for redemption. The mortgagor, of course, but the equitable doctrine of subrogation obviously does not apply to mortgagors. Persons entitled to institute a suit for redemption fall into three classes only:

(1) any person who has an interest in or charge upon the property mortgaged or an interest in or charge upon the right to redeem;

(2) any surety for payment of the mortgage debt or a part thereof;

(3) any creditor of the mortgagor who in a suit for administration of his estate has obtained a decree for sale of the mortgaged property.

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Excluding the mortgagor, this is an exhaustive list of the persons entitled to sue for redemption. The question is whether defendants 6 and 7 fall into one or other of these categories. The answer is that they obviously do not. They were *not* persons entitled to sue for redemption when they purchased property burdened with a mortgage-debt. They did not therefore by their purchase 'redeem' a mortgage. Since they were not persons entitled to sue for redemption their purchase cannot be deemed in equity to be a redemption. That is the principle laid down in the first clause of S. 92. A rule of equity has been given statutory recognition, and it has been strictly confined and limited to persons entitled to sue for redemption. A person not entitled to sue for redemption who purchases property subject to mortgage becomes *ipso facto* a person entitled to sue for redemption which is the very reverse of saying that he is subrogated to the rights of the mortgagee. A person not entitled to sue for redemption who buys mortgaged property (that is, advances money to the mortgagor with which the mortgage is redeemed) may however contract with the mortgagor for the right to be subrogated to the mortgagee whose mortgage has been redeemed. But the contract must be in writing and registered. That is the gist of cl. (*iii*) of S. 92. It is an extension of the principle *"caveat emptor"*. A would-be purchaser of property subject to more than one mortgage must protect himself by a registered instrument. He must contract with the mortgagor for discharge of the prior mortgagee or mortgagees and for the rights of the prior mortgagee or mortgagees, and he can only do so by a registered instrument. Where a statute is as clear as Ss. 91 and 92 are, authority is strictly speaking superfluous. The state of the law on the subject of subrogation before the Amending Act (XX of 1929) is a matter of academic interest, but as a matter of fact the Amending Act merely gave effect to a simple rule of equity, the application of which to the various classes of persons who claimed its benefits was difficult. The application of this rule of equity has now been placed on a statutory and easily intelligible basis. The rule has been defined and the persons to whom the rule is applicable have been classified. Conflict of opinion has been clarified and stilled.

I agree with my learned brother that this appeal fails and must be dismissed with costs.

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The decree that we pass herein will be without prejudice to the right of the mortgagors and the purchasers of the equity of redemption to claim any relief under the Madras Agriculturists' Relief Act. The application that has been filed here for this purpose will be remitted to the lower Court for being dealt with on its merits.

The Memorandum of Cross-objections is dismissed. No costs.

K. S. *Appeal and Memorandum of Cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Vanjiappa Goundan .. *Petitioner** (*Petitioner—2nd Plaintiff*)

v.

N.P.V.L.R. Annamalai Chettiar and others .. *Respondents* (*Respondents—1st Plaintiff and Defendants 1 and 2*).

Vanjiappa Goundan v. Annamalai Chettiar.

Civil Procedure Code (V of 1908), O. 1, rr. 1 and 10 (2)—Person impleaded as second plaintiff—Interest adverse to the first plaintiff—Name whether to be struck out as plaintiff—Transposition as defendant—Necessary party for effectual adjudication of all questions involved.

Where the petitioner was added as the second plaintiff in a suit by the first plaintiff for recovering a certain amount from the defendants who were the owners of certain villages charged with the payment of an annuity and the petitioner alleged that the first plaintiff added him without his knowledge and that the first plaintiff's interests were adverse to that of his own,

Held, that since there was no right to relief alleged to exist in the petitioner jointly, severally or in the alternative, and as the petitioner claimed adversely also to the first plaintiff in the suit, it would be expedient to strike out his name as second plaintiff. But as he was clearly a person whose presence before the Court was necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit, he could be transposed as a defendant in the suit.

Mathews, In re: *Oates* v. *Mooney*, (1905) 2 Ch. 460, followed.

Where several disputes arise out of one subject-matter, all the parties interested in such disputes should be brought before the Court and all questions in controversy between them should be completely settled in that action.

Secretary of State for India v. *Murugesa Mudaliar*, (1928) 29 L.W. 753, referred to.

Petitioner under S. 115 of Act V of 1908, praying the High Court to revise the order dated the 13th day of December,

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* C.R.P. No. 371 of 1939. 2nd May, 1939.

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1938, in I.A. No. 608 of 1938 in O. S. No. 103 of 1937 on the file of the Court of the District Munsif of Palani.

C. A. Seshagiri Sastri and *T. R. Srinivasa Aiyar* for Petitioner.

K. Rajah Aiyar and *K. S. Ramamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—This Revision Petition is filed against the order of the Court below refusing to strike out the petitioner's name from the plaint. The petitioner who is the second plaintiff in the suit sold to the first plaintiff the first respondent herein a certain village called Puducottah which, along with certain other villages belonging to the defendants in the suit some of whom are the other respondents here, was charged with the payment of a certain annuity. In execution of a decree obtained for the recovery of such annuity, the petitioner's village was sold but the sale was set aside under O. 21, r. 89 on the petitioner depositing Rs. 2,976-9-6 in Court. The petitioner alone having thus paid the entire amount which was payable from out of all the villages charged with such payment, he claimed to be entitled to recover Rs. 2,514 by way of contribution from the owners of the other villages. Subsequently, the petitioner sold the village of Puducottah to the first respondent with all rights appurtenant thereto. The sale-deed purports to convey also the petitioner's right to recover this sum of Rs. 2,514 and the present suit was accordingly brought by the first respondent impleading the petitioner as second plaintiff for recovering this sum from the defendants who are the owners of the other villages charged with the payment of the annuity.

In the application filed by the petitioner in the Court below, however, he alleged, that the sale by him to the first respondent was never intended to convey his right to recover the amount in question, that the clause purporting to convey this sum also was included in the sale-deed by the first respondent fraudulently, advantage being taken of his ignorance and illiteracy and that he was impleaded as the second plaintiff in the suit without his knowledge. The lower Court, however, found that the petitioner did sign the plaint and also the vakalath executed to the first respondent's pleader in the Court below and the petitioner's learned Advocate has not attacked that finding before me.

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He contends that inasmuch as there is no prayer in the plaint for any relief being awarded to the petitioner, either primarily or in the alternative, he could not be regarded as a plaintiff at all in the proper sense of the term, and his joinder as second plaintiff was improper, and the Court below should therefore have struck out his name under O. 1, r. 10 (2), Civil Procedure Code. The first respondent objects on the ground that the petitioner's application was vaxatious and inspired by the first defendant (second respondent herein) who wants to defeat his right to recover the amount in question under the sale from the petitioner, and that the striking out of the latter's name from the suit would be highly prejudicial to him. The second respondent has no objection to the petitioner's name being struck off as second plaintiff, provided he is added as a defendant but insists that the petitioner should remain on the record, as his presence is necessary for a complete and effectual adjudication of all the matters in controversy between the parties.

The Court below held that the joinder of the petitioner as second plaintiff was not shown to be improper and that he had no absolute right of withdrawing from the suit under O. 23, r. 1, Civil Procedure Code, without the consent of the first respondent and therefore dismissed the application. The petitioner's learned Advocate conceded that the view of the lower Court is right so far as O. 23, r. 1 is concerned, in view of the decision of this Court reported in *Ramaswami Chettiar* v. *Rengan Chettiar*[1], but he urged that the petitioner's joinder as a plaintiff was improper and that, in any case, as he now claims the amount in dispute adversely to the first respondent, he cannot continue to be a co-plaintiff with the latter but should be transposed as a defendant, if he could not be removed from the suit altogether. I see considerable force in this contention. The joinder of the petitioner as second plaintiff is not authorised by the terms of O. 1, r. 1, Civil Procedure Code, as no right to relief is alleged to exist in the petitioner jointly, severally or in the alternative, and when the petitioner begins to set up a claim to the amount in suit adversely to the first respondent, it will be highly expedient, if not necessary, to strike out his name as second plaintiff as desired by him. But as he is clearly a person whose presence before the Court is necessary in order to enable the Court effectually and completely to

1. (1933) 65 M.L.J. 693: A.I.R. 1933 Mad. 824.

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adjudicate upon and settle all the questions involved in the suit, the proper order, in my opinion, would be to direct the petitioner to be transposed as a defendant in the suit, see *Mathews*, In re: *Oates* v. *Mooney*[1], where it was observed,

> "The general rule is that where co-plaintiffs disagree, the name of one is struck out as plaintiff and added as defendant".

The Court below has taken the view, relying upon *Banbihari Mukherji* v. *Bhejnath Singh Mahapatra*[2], that the 'questions involved in the suit' referred to in O. 1, r. 10 (2) must mean the questions which are involved in the suit as originally framed between the parties to the suit. But this High Court has placed a wider interpretation on those words and has held that the object of the provision is that where several disputes arise out of one subject-matter, all the parties interested in such disputes should be brought before the Court and all questions in controversy between them should be completely settled in the action—see *Secretary of State for India* v. *Murugesa Mudaliar*[3].

Further, the Court below has not considered the question from the point of view of the rights of the parties. Assuming that the petitioner's allegation that the right to recover the amount in question was never intended to be conveyed by him to the first respondent is true—as to which I express no opinion—the effect the order of the lower Court would clearly be to nullify that right by precluding him from suing the defendants again for the recovery of the amount, while in this suit he cannot obviously get that relief. The first respondent's learned Advocate suggested that the petitioner might, if his allegation is true, sue the first respondent later on for the recovery of any sum that might be decreed to the latter in this suit. But apart from possible technical objections to which such a suit might be open by reason of the petitioner having signed the plaint in this suit, it would be a suit to enforce a cause of action which the Court would have helped to bring into existence by enabling the first respondent to commit, under its own ægis, what undoubtedly would be a wrongful act on the hypothesis assumed.

Having regard to all these considerations, I set aside the order of the Court below and direct the name of the petitioner

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1. (1905) 2 Ch. 460.
2. (1931) I.L.R. 59 Cal. 329.
3. (1928) 29 L.W. 753.

to be struck out as plaintiff and added as a defendant in the suit. Each party will bear his own costs here and below. Vanjiappa Goundan v. Annamalai Chettiar.

K.C. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

A. Seetha Ramappa and others .. *Appellants** (*Creditors Nos. 7, 8 and 9*)

v.

G. C. Ramappa .. *Respondent* (*Insolvent*).

Seetha Ramappa v. Ramappa.

Provincial Insolvency Act (V of 1920), Ss. 41 (2) (c) and 42 (1)—Discharge—Suspension of order for 18 months—Effect of—Matters to be looked into before an absolute order for discharge is made.

The only conditions that can be imposed under S. 41 (2) (*c*) of the Provincial Insolvency Act are conditions with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after-acquired property. It is not possible to impose a condition that the insolvent shall pay any specified proportion of his debts.

Where an insolvent's debts exceeded Rs. 18,000 and his total assets realised were a little above Rs. 50 the Court was obliged under S. 42 (1) to refuse an absolute order of discharge, unless the insolvent satisfied the Court that the fact that the assets were not of a value equal to 8 annas in the rupee on the amount of his unsecured liabilities had arisen from circumstances for which he could not justly be held responsible.

The operation of an order of discharge can only be suspended after the order has come into existence.

Appeal against the order of the District Court of Anantapur dated 7th November, 1936 and made in I. A. No. 188 of 1935 in I. P. No. 6 of 1933.

V. V. Chowdari and *G. S. Venkataraman* for Appellants.

P. Chandra Reddi for Respondent.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—The order of the learned District Judge in this case cannot be supported. The insolvent's debts exceeded Rs. 18,000 and his total assets realised is a little over Rs. 50. In these circumstances the Court was obliged by S. 42 (1) to refuse an absolute order of discharge unless the insolvent satisfied the Court that the fact that the assets were not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities had arisen from circumstances for which he could not justly be held responsible. There were also allegations that the insolvent had continued to trade after knowing himself to be

* A. A. O. No. 182 of 1937. 12th April, 1939.

Seetha Ramappa v. Ramappa.

Burn, J.

insolvent. The learned District Judge did not consider these matters at all. He has made no reference to S. 42 but he has passed an order which on the face of it is wholly indefensible. He says that the petitioner is given an absolute order of discharge subject to the condition of paying two annas in the rupee. That is an impossible condition. The only conditions that can be imposed under S. 41 (2) (*c*) are conditions with respect to any earnings or income which may afterwards become due to the insolvent or with respect to his after-acquired property. It is not possible to impose a condition that the insolvent shall pay any specified proportion of his debts. The learned Judge has further ordered that failing that, that is, failing payment of two annas in the rupee, the operation of the order of discharge be suspended for a period of 18 months. This order of the learned Judge was passed on the 7th of November, 1936 and the contention raised on behalf of the respondent is that, by the 7th of May, 1938, this had worked itself out, and the respondent had thereby become discharged. There is considerable confusion in the arguments addressed to us on this point.

Learned Counsel for the respondent has observed that under S. 41 (2) the Court may (*a*) grant or refuse an absolute order of discharge; or (*b*) suspend the operation of the order of discharge for a specified time; or (*c*) grant an order of discharge subject to conditions.

Learned Counsel appears to be labouring under a delusion that if the Court says "I will suspend the operation of the order for 18 months", some order of discharge will automatically come into existence at the end of 18 months. This is obviously wrong. The operation of an order can only be suspended *after* an order has come into existence. It is not possible to suspend the operation of an order which has not yet been passed. Therefore it follows that if the operation of the order of the respondent's discharge has been suspended by the learned Judge for 18 months, the learned Judge must have granted him an order of discharge on or before the 7th of November, 1936. But under S. 42 (1) of the Act the learned Judge could not grant him an absolute order of discharge without considering the further matters mentioned in that section.

The order of the learned District Judge is therefore set aside and the petition is remanded to the lower Court for dis-

posal according to law. The appellant will recover the costs of the appeal from the respondent.

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The Memorandum of Objections preferred by the respondent contending that he ought to have been granted an absolute order of discharge is dismissed with costs.

K. C. —— *Appeal allowed.*
Memo. dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Saminatha Aiyar (died) and another .. *Appellants** (*Defendants 1 and 2*)

v.

Minor Vageesan, by guardian Sivakami Ammal .. *Respondent* (*Plaintiff*).

Saminatha Aiyar v. Vageesan.

Hindu Law—Adoption—Only daughter's son—Datta homam not necessary—Yama's text—Ceremonial competence of putrika putra recognised, even otherwise.

Where an only daughter's son is adopted by a Brahmin, it is valid despite the fact that the *datta homam* ceremony is not performed.

Yama's text relied upon. 20 C.W.N 19, referred to.

Case-law reviewed.

Per *Patanjali Sastri, J.*—The context makes it clear that the expression 'Vāgdanadēva' (by mere verbal gift) is used in contradistinction to 'homadi niyama' (prescription of homa or the like), to convey the meaning that no gift accompanied by the burning of the sacrificial fire and *vyakrities*, etc., is necessary, but a mere gift with a verbal declaration of intention to give is sufficient.

It would not be unreasonable to hold also that the *datta homa* ceremony is not necessary in the case of the adoption of a daughter's son who, according to the Hindu Dharma Sastras, is already endowed with such ceremonial competence.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam dated 29th November, 1933 and passed in A. S. No. 28 of 1932, preferred against the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 31 of 1930.

K. S. Desikan and *N. R. Raghavachariar* for Appellants.

K. Rajah Aiyar, R. Viswanathan and *V. Ramaswamy* for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS: *The Chief Justice.*—The question which falls for decision in this case is whether the performance of the

* S. A. No. 404 of 1934. 17th April, 1939

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datta homam ceremony is essential when a Brahmin adopts the son of his daughter. Natesa Aiyar, the brother of the first appellant, adopted the respondent, the son of his only daughter. Natesa Aiyar was joint with his brother and his brother's son, the second appellant. Natesa Aiyar died on the 23rd September, 1929, and the respondent filed the suit out of which this appeal arises on the 22nd January, 1930, for partition of the family properties. The appellants denied the factum of adoption and advanced the alternative plea that if the respondent had been adopted, the adoption was invalid as the *datta homam* ceremony had not been performed. They also averred that if the respondent's adoption was valid, the partition of the family estate was not for his benefit. The District Munsif of Kumbakonam, who tried the suit, held that the adoption had taken place, but the *datta homam* ceremony had not been performed. As the District Munsif considered that the ceremony was not necessary for a valid adoption and being of the opinion that the suit was for the benefit of the respondent he granted the decree prayed for. The appellants appealed to the Subordinate Judge, who concurred in all the findings of the District Munsif. The appeal to the Subordinate Judge having failed, the appellants have appealed to this Court. The findings of fact of the Subordinate Judge are conclusive and the only question which we have to decide is whether the performance of the *datta homam* ceremony was essential in this case, the family being of the Brahmin caste.

By the decision of the Privy Council in *Bal Gangadhar Tilak* v. *Shrinivas Pandit*[1], it has now been finally settled that the *datta homam* ceremony is not necessary when the adoption is of a Brahmin boy of the same *gotra*. I shall return to the judgment in that case presently; but before doing so I desire to trace the course of decisions in this Province. In *Singamma* v. *Ramanujacharlu*[2], it was held that in order to establish a valid adoption in a Brahmin family proof of the performance of *datta homam* was not essential; proof of the giving and taking was sufficient. In that case it was not known whether the adopted boy was or was not of the same *gotra*, and the decision must, therefore, be taken to apply to the adoption of a boy of a different *gotra*. This decision was followed by Kindersley and

1. (1915) 29 M.L.J. 34: L.R. 42 I.A. 135: I.L.R. 39 Bom 441 (P.C.).
2. (1868) 4 M.H.C.R. 165.

Muttuswamy Aiyar, JJ., in *Chandramala* v. *Muktamala*[1], which related to an adoption by a Kshatriya. Muttuswamy Aiyar, J., however, observed that if the question whether religious ceremonies were essential to adoption were *res integra*, he would have felt considerable difficulty in holding that the ceremony of *datta homam* was not of the essence of a valid adoption among the three higher classes. The same doubt was expressed in the judgment of Turner, C. J. and Muttuswamy Aiyar, J., in *Venkata* v. *Subhadra*[2]. In *Govindayyar* v. *Dorasami*[3], a Full Bench, consisting of Collins, C. J. and Kernan, Muttuswamy Aiyar, Brandt and Parker, JJ., held that the ceremony of *datta homam* was not essential to a valid adoption among Brahmins in Southern India when the adoptive father and son belonged to the same *gotra*. To that extent the Court felt it might adhere safely to the decision in *Singamma* v. *Ramanujacharlu*[4]. It did not expressly say that that decision went too far and therefore, it cannot be said that the decision was overruled, but the doubts apparently still existed.

The case of *Bal Gangadhar Tilak* v. *Shrinivas Pandit*[5] related to an adoption from the same *gotra* and in delivering the judgment of the Judicial Committee, Lord Shaw observed:—

> "The question whether the *datta homam* is a legal requisite in Bombay for adoption among the three twice born classes does not, however, in the view of their Lordships, broadly arise in the present case. It is in no way necessary to canvass or call in question any dicta upon that general point, nor does the question arise, whether, for instance, the principle extends to India at large of the decision of the Madras Full Bench in *Govindayyar* v. *Dorasami*[3] or of the Madras High Court in *Singamma* v. *Ramanujacharlu*[4], both decisions being of value as containing a careful study of the authorities, and affirming that the ceremony of *datta homam* is not essential to a valid adoption among Brahmins in Southern India, for, in the opinion of the Board, the necessity does not arise where the child to be adopted belongs to the same *gotra* as that of the adoptive father."

In view of this statement and bearing in mind that in *Govindayyar* v. *Dorasami*[3], there was no express limitation of the decision in *Singamma* v. *Ramanujacharlu*[4], it is certainly arguable that the latter decision still stands. If it stands, it is binding on us and provides a short answer to the appellants' case. It is, however, not necessary to come to a definite decision on the question whether it binds us or to inquire into the

1. (1882) I.L.R. 6 Mad. 20.
2. (1884) I.L.R. 7 Mad. 548
3. (1887) I.L.R. 11 Mad. 5 (F.B.).
4. (1868) 4 M.H.C.R. 165.
5. (1915) 29 M.L.J. 34: L.R. 42 I.A. 135: I.L.R. 39 Bom. 441 (P.C.).

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question whether the judgment went too far, because the appeal may be disposed of on another ground.

There is ancient authority for the proposition that the *datta homam* ceremony is not essential in the case of an adoption by a father of his daughter's son and the authority is the Yama text. The text is set out in the judgment of Sir Asutosh Mookerjee in *Retki* v. *Lak Pati Pujari*[1] and reads as follows:—

"The *homa* or the like ceremony is not necessary in the case of adoption of the daughter's or the brother's son; by the verbal gift and acceptance alone, that is accomplished; this is declared by the Lord Yama."

Little is known of Yama but his name appears in the list of law-givers set forth in the Smriti of Yajnavalkya. Sir Asutosh Mookerjee accepted the text as of unquestionable genuineness and authority and set forth his reasons in detail. The text was accepted by the Bombay High Court in *Valubai* v. *Govind Kashinath*[2], and was accepted as authority for the proposition that the *datta homam* ceremony was not required in the case of adoption of a daughter's son in the course of the arguments in *Bal Gangadhar Tilak* v. *Shrinivas Pandit*[3]. In *Bhagwan Singh* v. *Bhagwan Singh*[4], Banerjee, J., did cast doubt on the authenticity of the text, but I do not consider that his criticism should outweigh its acceptance in *Retki* v. *Lak Pati Pujari*[1], *Valubai* v. *Govind Kashinath*[2] and *Bal Gangadhar Tilak* v. *Shrinivas Pandit*[3]. Moreover, the case of *Bhagwan Singh* v. *Bhagwan Singh*[5] was carried to the Privy Council, and there is no indication in the judgment of the Board of the acceptance of the criticism of Banerjee, J. On the other hand Lord Hobhouse in delivering the judgment referred to the fact that

"One ancient sage called the holy Yama expressly asserts the right to adopt a sister's son."

It is true that the Yama text is in conflict with the Dattaka Chandrika in that the latter does not recognise the validity of the adoption of a daughter's son. The prohibition has, however, not been observed in Southern India, where a custom exists of

1. (1914) 20 C.W.N. 19.
2. (1899) I.L.R. 24 Bom. 218.
3. (1915) 29 M.L.J. 34: L.R. 42 I.A. 135: I.L.R. 39 Bom. 441 (P.C.).
4. (1895) I.L.R. 17 All. 294 (F.B.).
5. (1899) L.R. 26 I.A. 153: I.L.R. 21 All. 412 (P.C.).

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adopting a sister's or a daughter's son (vide *Vayidinada* v. *Appu*[1]). It does not, of course, follow from the fact that there is this custom that the *datta homam* ceremony is not essential in the case of the adoption of a daughter's son, and there is no evidence that it is customary to dispense with the *datta homam* ceremony in such a case, but if the Yama text is accepted it must be held that the ceremony is not essential to a valid adoption. I see no reason why it should not be accepted and consequently I hold that the adoption in this case was valid despite the fact that the *datta homam* ceremony was not performed.

Mr. Rajah Aiyar on behalf of the respondent advanced the argument that the reason why the *datta homam* ceremony is not essential in the case of the adoption of a daughter's son is because the Hindu Law regards a daughter's son as being in the same position as a son's son in the performance of the obsequies and other ceremonies following the death of the grandfather. He referred in this connection to the judgment of Venkataramana Rao, J. In *Panchapakesa Iyer* v. *Gopalan*[2], where the learned Judge quoted these words of Vishnu:

"In regard to the obsequies of ancestors, daughter's sons are considered son's sons"

and the following words of Manu:

"Between a son's son and the son of a daughter there exists in this world no difference; for even the son of a daughter saves him (who has no sons) in the next world, like the son's son."

This may be the reason why Yama declared that the *datta homam* ceremony was not essential in the case of the adoption of a daughter's son, but the validity of the text does not depend on the discovery of the reason for the rule.

For the appellant it has been argued that the Yama text refers to the son of a daughter born after the daughter's appointment by the father to continue his line. The wording of the text does not support this argument and the argument is obviously fallacious because adoption is not necessary when the appointed daughter bears a son. The son is regarded from the moment of his birth as the son of the daughter's father and not as the son of her husband.

I consider that the case was rightly decided below and as my learned brother shares this opinion the appeal will be dismissed with costs.

1. (1885) I.L.R. 9 Mad. 44 (F.B.). 2. (1938) 48 L.W. 887.

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Patanjali Sastri, J.

Patanjali Sastri, J.—This second appeal raises the question of Hindu Law whether *datta homa* is essential to the validity of the adoption of a daughter's son by a Brahmin. The general question whether that ceremony is an essential requisite for a valid adoption among Brahmins and other twice-born classes was also raised, but it is not necessary in this case to decide it, as I am clearly of opinion that no *datta homa* is necessary even among Brahmins for the adoption of a daughter's son.

As there is no decided case on this precise question, the discussion before us had to turn to some extent on the Hindu Law texts and text books. The learned Advocate for the appellants urged that Dattaka Chandrika and Dattaka Mimamsa are works of great and unquestionable authority on Hindu Law in matters relating to adoption and that both of them clearly laid down that *datta homa* is essential among the twice-born classes to the establishment of the filial relationship of the person adopted. This is no doubt the general rule according to these authorities, but an exception based on a text of Yama in the case of a brother's son's adoption has been recognised in decided cases. If the authority of this text is to be acted upon, it concludes the question in favour of the respondent as it excepts the adoption of a daughter's son also from the rule requiring *datta homa*. The appellant's learned Advocate therefore directed his attack against the genuineness and authority of this text, and drew our attention to the observations of Banerjee, J., in *Bhagwan Singh* v. *Bhagwan Singh*[1], where that learned Judge throws doubt on the authenticity thereof. It is no doubt true that this text does not appear in Yama Smriti and Yamadharma Sastra as they are now extent. But the authenticity and the authority of the text have been accepted in a long course of decisions in this country beginning with *Hulbant Rao Mankur* v. *Govindarao Bulwant Rao Mankur*[2], and Mr. Mandlik has also regarded its authenticity as beyond question. In *Retki* v. *Lak Pati Pujari*[3], Mukherjee, J., after an elaborate examination of the authorities bearing on the point definitely accepted its authenticity and relied upon its authority in the case of the adoption of a brother's son which was there in question. It was also accepted as genuine and acted upon by the Allahabad High Court in

1. (1895) I.L.R. 17 All. 294 at 325 (F.B.).
2. (1821) 2 Borr. 83,
3. (1914) 20 C.W.N, 19.

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Atma Ram v. *Madho Rao*1 and by the Bombay High Court in *Valu Bai* v. *Govind Kashinath*2, both cases relating to adoption of a brother's son. In view of these decisions it seems to me that the authenticity as well as the authority of the text of Yama is no longer open to question.

The learned Advocate for the appellants further contended that even if the text is accepted as genuine, it must, on its true construction, be taken to apply only to the case of a *putrika putra* and a *Dwayamushyayana* adoption and not to Dattaka adoptions. The text runs thus:

"Daubitre Bhratru putre cha
Homadiniyamo na hi I
Vagdanadeva tatsiddih
Ityaha Bhagvan Yamah"* ||

which may be translated as follows:—

"Homa or the like is not prescribed in the case of a daughter's son or a brother's son; by verbal gift alone that is accomplished. So declared holy Yama."

The argument is that the expression 'Vagdanadeva' (by verbal gift alone) cannot apply to a Dattaka form of adoption as corporeal delivery and acceptance of the child is universally treated as the essential part of an adoption in the Dattaka form. It seems to me that this argument proceeds on a misconception. The context makes it clear that the expression 'Vagdanadeva' (by mere verbal gift) is used in contradistinction to 'Homadi niyama' (prescription of homa or the like), to convey the meaning that no gift accompanied by the burning of the sacrificial fire and Vyahrities, etc., is necessary, but a mere gift with a verbal declaration of intention to give is sufficient. 'Dana' or gift ordinarily imports corporeal delivery and 'Vagdana' is used merely to make it clear that the delivery is to be made with appropriate words showing an intention to give. Moreover, in the case of *putrika putra*, there was no adoption by the maternal grandfather at all. The daughter's son when born automatically became the son of the maternal grandfather if the latter had no male issue. He was recognised as one of the subsidiary sons in the Hindu Law not by virtue of any adoption but by mere intention on the part of the maternal grandfather and without any consent asked for or obtained (*see* Mayne's Hindu

1. (1884) I.L.R. 6 All. 276 (F.B.). 2. (1899) I.L.R. 24 Bom. 218.

* दौहित्रे भ्रातृपुत्रे च होमादिनियमो न हि ।
वाग्दानादेव तत्सिद्धिरित्याह भगवान् यमः ॥

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Law, 10th Edn., p. 113). The reference in the text to Vagdana being sufficient would therefore be devoid of any meaning as applied to a *'putrika putra'*. Nor has the reference to a brother's son ever been understood to relate only to *Dwayanushyayana* adoption. This contention of the appellant's learned Advocate must therefore be rejected.

Apart from the text of Yama referred to above, it has been contended by the learned Advocate for the respondent that the reason of the now well-established rule that no *datta homa* is necessary in cases where the adopted son and the adoptive father belong to the same gotra would apply equally to the adoption of a daughter's son. In the Full Bench decision in *Govindayyar* v. *Dorasami*[1], which laid down this rule for this Province, it is said at p. 9:

"Both Manu and Caunakha declare that one who is eligible for adoption should be the reflection or have the resemblance of a son and the commentators apparently thought that as adoption is made partly to secure spiritual benefit arising from the performance of obsequies, the prescribed ceremony was necessary to ensure to the adopted son competency to perform those obsequies with efficacy."

If, thus, the object of the Homa is to bring about an effective transfer of the person from his own gotra prior to the adoption to the gotra of the adopter so as to clothe him with ceremonial competency, it would seem that such a ceremony is not necessary in the case of a daughter's son who though belonging to a different gotra has always been recognised as competent to perform obsequial rites for the maternal grandfather. *See* the texts cited in *Panchapakesa Aiyar* v. *Gopalan*[2] and *Narsingh Rao* v. *Maha Lakshmi Bai*[3], where their Lordships of the Privy Council point out that according to Hindu religious ideas, a daughter's son stands in the place of a son and like a son is a liberator from *put*. The respondent's learned Advocate suggested that the special position of a daughter's son in relation to his maternal grandfather might indeed be the reason for Yama's text excepting his adoption from the rule prescribing *datta homa* and other formalities. The suggestion certainly seems plausible but it can only be a speculation, as the text itself does not give the reasons on which it is based. But however that may be, as the Full Bench decision holding that no *datta homa* is necessary where the adopter

1. (1887) I.L.R. 11 Mad. 5 (F.B.). 2. (1938) 48 L.W. 887 at 891.
3. (1928) 55 M.L.J. 42: L.R. 55 I.A. 180: I.L.R. 50 All. 375 at 390 (P.C.).

and the person adopted belong to the same gotra seems to proceed upon the view that the *homa* would be necessary only to ensure the ceremonial competence of the person adopted, it would not be unreasonable to hold that such ceremony is not necessary in the case of the adoption of a daughter's son who according to the Hindu Dharma Sastras is already endowed with such ceremonial competence. On this ground also, the respondent's adoption can be upheld.

It is a matter of satisfaction that our conclusion which is in consonance with modern ideas which tend more and more to favour the disentanglement of civil rights and obligations from the meshes of Hindu ceremonial law could be supported on the authority of an ancient text.

I agree with my Lord that this appeal fails and should be dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

M. S. Ragunatha Thathachariar .. *Appellant* (Plaintiff)*

v.

The Secretary of State for India in Council, represented by the Collector of Trichinopoly .. *Respondent (Defendant).*

Madras Compulsory Labour Act (I of 1858), S. 6—Absentee ryot—Requisition for compulsory labour—Notice served in the ordinary way on tenants—Personal notice, whether necessary—Tenants, agents of the ryot—Provisions of the Act complied with.

Where under the Madras Compulsory Labour Act, S. 6, an absentee ryot who was liable for compulsory labour was demanded the proportionate amount due in respect of the work done, but he paid under protest and followed it up with a suit against the Government alleging that he had no notice of the requisition for labour for which he was asked to pay,

Held, that it would be sufficient compliance with the Act if the requisition were made in such a form as would ordinarily bring the matter to the notice of the persons concerned. In the present case the evidence showed that the tenants of the absentee person who were his agents practically, had received the notice regarding the labour demanded of him and that he had, from the beginning probably, knowledge of the proceedings. Hence he had no right to demand back that which was lawfully recovered from him for execution of works for which he should have paid himself.

Appeal against the decree of the District Court of Trichinopoly in A. S. No. 47 of 1934 preferred against the

* S. A. No. 548 of 1935. 13th March, 1939.

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decree of the Court of the District Munsif of Trichinopoly in O. S. No. 449 of 1932.

S. T. Srinivasagopalachari for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff, an absentee ryot owning a large extent of land, sues to recover a sum of money alleged to have been unlawfully collected from him by the Revenue Department as a contribution in lieu of customary labour for the repair of an irrigation source, leviable under the Madras Compulsory Labour Act I of 1858 S. 6 of that Act says:

> "Whenever by local custom any work for the purpose of irrigation or drainage or connected therewith is usually executed by the joint labour of a village community, any person bound by such custom to contribute labour to such work who neglects or refuses without reasonable cause to comply with a requisition for such customary aid made to him by the head of the village under the orders of the Tahsildar or other superior revenue officer shall be liable to pay a sum equal to twice the value of the labour which he is bound to contribute."

It is established that on 1st June, 1929, a requisition for customary labour was published in the village by beat of tom-tom and by affixture in the village *chavadi* and temple and that signatures in token of knowledge of this requisition were taken from a large number of ryots including the tenants of the plaintiff who himself lives in Srirangam. The work was not done in accordance with the requisition and it was carried out departmentally. On 6th June, 1930, the plaintiff received an unofficial intimation that the proportionate amount due from him in respect of this work was being demanded. He took no action until on 15th June, 1931, the payment was actually demanded from him whereupon he paid under protest and followed his payment with notice of suit.

The Courts below have found that there is a local custom whereby compulsory labour can be exacted in respect of this tank and I do not think that it is open to the appellant in second appeal to go behind that finding which is a finding of fact. It is, however, contended that before any levy under S. 6 can be made it must be proved that there has been a requisition made to the ryot himself and that on the evidence in this case it cannot be held that any such requisition has been made to the plaintiff. There are no provisions under the Madras Compulsory Labour Act for the framing of statutory rules. But the

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Board of Revenue in its Standing Orders (*vide* B. S. O. 86, sub-r. 5) has promulgated the following orders:

"In the case of an absentee ryot it is desirable that he or his local agent should be advised of a requisition for customary labour in some unmistakable way, especially where the holding is a large one. Notice of such requisitions should always be posted at the village *chavadi* in addition to publishing by tom-tom."

It has not been shown that this order has statutory force and in so far as the first sentence of that order is concerned, it certainly cannot be taken to be mandatory. There must obviously arise cases in which it is not practicable to give notice to an absentee ryot or his agent of the demand for labour, but that is certainly not the case with reference to the present demand. Notice could have been given to the plaintiff personally but was not given. The question therefore resolves itself into this. There has been a compliance with the mandatory portion of the Board's Standing Order. There has not been a personal requisition made to the plaintiff himself but there has been wide publication of the requisition and it was served personally upon the plaintiff's tenants. Can it be said under such circumstances that there has been no requisition made to the plaintiff sufficient to render him liable under the penal provisions in S. 6 of the Act?

It is pointed out that though S. 6 provides for the recovery of twice the cost of the labour, the amount demanded from the plaintiff was only the actual cost of the execution of the proportionate share of the work which he himself by custom was bound to do. Seeing that the Act itself does not require that the requisition should be made to the villager concerned personally, I consider that it would be a sufficient compliance with the Act if the requisitions were made in such a form as would ordinarily bring the matter to the notice of the persons concerned. Here it is proved that the plaintiff himself lived in another town and had no resident local agent other than his tenants and that the tenants were the persons who paid the kist to Government. There was also some evidence, that, on a previous occasion when contribution for compulsory labour had been recovered, it was the tenants who brought it to the plaintiff's notice that the amount to his credit in respect of excess contribution recovered had not been taken into consideration in claiming the kist. It seems to me that there was sufficient evidence to justify the findings of the Courts below that the tenants of the

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plaintiff were his agents for matters connected with the liabilities of the plaintiff to Government in respect of the lands in that village. Since they were the persons to whom the Government looked for the payment of its revenue with the approval of the plaintiff, I am of opinion that the officers of Government were entitled to treat the tenants as the persons upon whom this requisition should be served. It was served upon them. There is every probability that the plaintiff knew all about it, he made no protest whatever until the money was actually recovered although he had known the facts certainly for a year and probably from the beginning of the proceedings. I do not consider that he has any right to demand back that which has been lawfully recovered from him for the execution of works for which he himself should have paid. The result therefore is that the appeal is dismissed with costs.

Leave refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Natesa Aiyar .. *Appellant* (Petitioner)*

v.

Venkalakshmi Ammal and others .. *Respondents (Appellant and Respondents 4 and 5).*

Natesa Aiyar v. Venkalakshmi Ammal.

Civil Procedure Code (V of 1908), O. 41, r. 21 and O. 9, r. 13—Absence at hearing of appeal—Grounds for setting aside ex parte *decision against him.*

An applicant under O.41, r. 21, Civil Procedure Code, who admits receipt of notice is obliged like an applicant under O. 9, r. 13 to show that he was 'prevented by sufficient cause from appearing'.

Appeal against the order of the Court of the Subordinate Judge of Tanjore dated 8th October, 1937 and made in I. A. No. 181 of 1937 in A. S. No. 64 of 1936.

R. Krishnaswami Aiyangar for Appellant.

S. Kuppuswami and *P. S. Ramaswami Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—I cannot agree that the omission of the learned Subordinate Judge to give notice to the appellant of the transfer of the appeal from the District Court, was a sufficient cause for him to absent himself when the appeal was heard. He

* A. A. O. No. 444 of 1937. 1st September, 1938.

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was served with a notice in the appeal and he omitted to put in an appearance. If he had done so, he would have known that the case had been transferred to the Subordinate Judge. An applicant under O. 41, r. 21, Civil Procedure Code, who admits receipt of notice is obliged like an applicant under O. 9, r. 13 to show that he was "prevented by sufficient cause from appearing". On the facts in this case, it cannot be said that the appellant was *prevented*; he simply chose to let the appeal be decided *ex parte*. This appeal is dismissed with costs of the first respondent.

K. C. ——— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, LORD PORTER AND SIR GEORGE RANKIN.

Ram Narain Sahu and another .. *Appellants**

v.

Musammat Makhna .. *Respondent.*

P.C. Ram Narain Sahu v. Musammat Makhna.

Hindu Law—Joint family—Partition suit—Preliminary decree granting a joint share to the defendants' two brothers—Application to Court after preliminary decree by one defendant for separation of his share from that of co-defendant - Application granted and final decree passed—Defendants' branches acting as if separated—Decision of High Court on appeal four years after final decree that application made too late—Subsequent suit to determine whether defendants' estates separate—Whether previous decision of High Court a bar.

The period which elapses between a preliminary and a final decree in a partition suit often being of considerable duration, the ordinary right of a coparcener to effect a separation of his estate, interest or title—as distinct from a partition by metes and bounds—by a proper declaration of his desire for severance, is not abrogated by the mere fact that he has not claimed to exercise it before the passing of the preliminary decree.

Two of four brothers of a Hindu joint family sued the other members of the family for partition, asking for allotment and separate possession of a half share of the family property. One half share accordingly fell to two defendant brothers, R. N. and D. N., the latter at all material times a lunatic whose wife was appointed his guardian *ad litem*. Neither R. N. nor D. N. included in his pleadings in the partition suit a demand for partition as between themselves. A few days after the preliminary decree had been passed in that suit, D.N.'s wife petitioned the Court for separation of D. N.'s fourth share. The Court having granted the petition, a final decree was accordingly passed in which a fourth share was allotted in severalty to D. N., despite R. N.'s objection. On appeal, D. N. having meanwhile died, the High Court held that the trial Judge was not competent to entertain after the preliminary decree, the petition for severance of D.N.'s share, the decision of the High Court proceeding on the general consideration that, as the preli-

* P. C. Appeal No. 83 of 1937. 20th April, 1939.
Allahabad Appeal No. 16 of 1935.

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minary decree had not provided for the separation of D. N.'s quarter share, the final decree could not make a separate allotment in respect of it. During the period of some four years which elapsed between the passing of the final decree by the trial Judge and the decision of the High Court reversing it, the two branches of D. N. and R. N. acted as if they were separate. In a suit brought by R.N. and his son to determine whether D. N.'s estate was separate from theirs,

Held (assuming, which *quaere*) that, although D. N. was a lunatic at the time of partition, he was nevertheless entitled to a share on partition, not having been born a lunatic) that the decision of the High Court refusing D. N.'s application for separation did not conclusively determine his status as having a joint estate with R. N., inasmuch as the application was only refused because made too late, and inasmuch as the High Court had expressly reserved the question whether D. N.'s estate was separate from that of R.N., with the result that the Court's decision had no special reference to D.N.'s disability, but would, if a correct decision, (which also *quaere*), have been equally applicable had D. N. been *sui juris* and declared formally, after the preliminary decree, his intention to become separate. The expression of intention to effect separation of D.N.'s estate being sufficiently manifested by the conduct of the parties, including the application for separation made by D. N.'s guardian, even though made too late since that application had the approval of the trial Judge and the High Court in the partition suit, was accordingly effective to bring about a separation of D. N.'s share.

Quaere, doubting, whether, in so far as a decree of partition does not contain something to sever the estate of co-plaintiffs or co-defendants among themselves, they must conclusively be taken to have remained united.

Appeal from a decree of the High Court, Allahabad, dated 2nd April, 1935 (Thom and Ahmad, JJ.) affirming a decision dated 27th May, 1930, of the Additional Subordinate Judge, Benares.

In 1923, two sons, Ram Das and Parsotam, of one, Rameshar Sahu, who died in 1913, sued their two brothers, Ram Narain and Deo Narain, for partition, and the trial Judge passed a preliminary decree separating the estate into two parts accordingly. A few days later, Deo Narain's wife, as his guardian *ad litem* (he being at all material times a lunatic, although not from birth) applied to the judge to have Deo Narain's fourth share made separate from that of Ram Narain. The Judge granted the application and, in August, 1924, passed a final decree in which Deo Narain's share was separated. On appeal against that decree, the High Court held that the application, having been made after the final decree, was too late and accordingly not competent in that suit. In 1929 Ram Narain and his son brought the present action against Deo Narain's widow, Musammat Makhna, to determine whether or not Deo Narain had died divided in estate from themselves. The Additional Subordinate Judge, Benares, held that notwithstanding the High Court's decree in the partition suit, he did, the High

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Court affirmed that decision, and the plaintiffs now appealed to His Majesty in Council.

Wallach for Appellants.—It is submitted that it is the decree passed in the partition suit which shows whether the partition effected was as between the plaintiffs and defendants in the suit only, or also between the co-plaintiffs and co-defendants *inter se.* Applying that principle here, and disregarding, as must now be done, the application made by the defendant widow after the preliminary decree in the partition suit for the separation of her husband's fourth share, it is clear that the decree finally passed by the High Court in that suit says nothing about any separation of Deo Narain's estate from that of Ram Narain, and, that being so, those estates must be taken to have remained joint: See the judgment of Sir John Edge, in *Palani Ammal* v. *Muthuvenkatachala Moniagar*[1].

The respondent cannot now seek to go behind the High Court's decree in the partition suit, and, in any event, as Deo Narain's guardian *ad litem* in the partition suit, she has fulfilled her function, and is not now in a position to establish a separation of estate, more especially since Deo Narain's death. If, however, the conduct of the parties between the dates of the preliminary and the final decrees in the partition suit is to be looked at to see whether a desire for separation was manifested, that conduct, so far as the present plaintiffs are concerned, ought to be disregarded because, in so far as it proceeded on a basis of separated interests, it did so only because such a course was forced on the plaintiffs by that taken by the defendant widow. Any conduct on the part of Ram Narain tending *prima facie* to shew an intention to separate, or an acceptance of Deo Narain's wish to do so, ought to be discounted accordingly.

Dunne, K.C. and *S.P. Khambatta*, for Respondent.—The question whether the decree in a partition suit is the evidence which determines the position of the remaining members of a joint family *inter se* after one or some of them has or have obtained separation of estate does not arise here. The High Court in the partition suit dismissed on technical grounds Deo Narain's application to have his estate separated from that of Ram Narain, his co-defendant in the partition suit, and the Court expressly reserved the question whether or not the estates of Deo Narain's and Ram Narain's were, in the events which had meanwhile happened, separate, Accordingly there was ample evidence in the conduct of the parties of an intention to separate. But apart from such conduct between

1. (1924) 48 M.L.J. 83: L.R. 52 I.A. 83 at 86 & 87: I.L.R, 48 Mad. 254 (P.C.).

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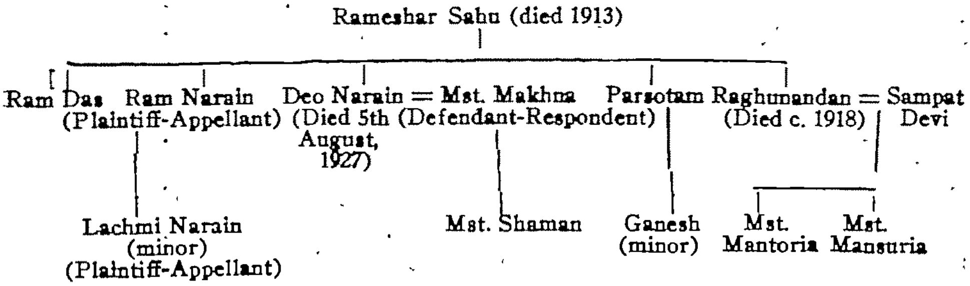
the dates of the preliminary and final decrees in the partition suit, the mere fact of the present respondent's application on behalf of Deo Narain to have his fourth share separated is a definite and sufficient manifestation of a desire for separation to bring it into effect, the trial Judge and the High Court in the partition suit having regarded the application with favour on the merits.

Counsel referred to *Suraj Narain* v. *Iqbal Narain*[1], *Girja Bai* v. *Sadashiv Dhundiraj*[2], *Lalta Prasad* v. *Sri Mahadeoji Birajman Temple*[3], *Ramalinga Annavi* v. *Narayana Annavi*[4] and *Bal Krishna* v. *Ram Krishna*[5].

20th April, 1939. Their Lordships' judgment was delivered by



Sir George Rankin.

SIR GEORGE RANKIN.—The sole question in this case is whether at the date of his death the (5th August, 1927), Deo Narain was separate in estate from all the other members of his family; or whether he was joint with the plaintiffs-appellants, namely, his brother Ram Narain and Lachmi Narain, the latter's son. If he died a separated Hindu, then, as he left no son, his widow, Musammat Makhna (defendant-respondent), became heir to his property; if at the time of his death he was a member of a joint Hindu family, his interest passed by survivorship to his coparceners. Both Courts in India have held in favour of the widow that he died separate.

In 1923 the family was joint. Four sons of Rameshar were alive, and on the 26th March, 1923, two of them, Ram Das and Parsotam (together with the latter's minor son) sued the other members of the family for partition, asking for allotment and separate possession of a one-half share. At that time and at all material times Deo Narain was a lunatic.

1. (1912) 24 M L.J. 345: L.R. 40 I.A. 40: I.L.R. 35 All. 80 (P.C.)
2. (1916) 31 M L.J. 455: L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031 (P.C.).
3. (1920) I.L.R. 42 All. 461 (F.B.).
4. (1922) 43 M.L.J. 428: L.R. 49 I.A. 168: I.L.R. 45 Mad. 489 (P.C.)
5. (1931) 61 M.L.J. 362: L.R. 58 I.A. 220: I.L.R. 53 All. 300 (P.C.)

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His wife (the present respondent) was appointed his *guardian ad litem*. The plaint was in one respect disingenuous: it alleged untruly that there had been a division of cash and furniture among the members of the family. This was an attempt to deprive Deo Narain and Ram Narain's branch of their proper shares, but it was detected and frustrated at the trial. Both Ram Narain and Deo Narain filed written statements but neither pleading contained a demand for partition as between themselves. On the 15th September, 1923, certain accounts were directed, and on the 23rd April, 1924, the trial Judge ordered a partition, directing the amin to divide the immovable properties into two lots and to report by the 14th May, 1924, which lot should be given to the plaintiffs in that suit. This decree does not appear to have been drawn up until October, 1924, but a very few days after it was pronounced Deo Narain's *guardian ad litem* presented a petition to the Court (dated the 3rd May and filed the 10th May, 1924), praying that his share—namely, one-fourth—should be separated by the amin, and stating that "there is an apprehension of loss in future if the said share is allowed to remain joint." His three brothers objected, but the Subordinate Judge on the 27th May, 1924, granted her application, and in the final decree for partition dated the 16th August, 1924, a one-fourth share was allotted in severalty to Deo Narain. From this decree Ram Narain and his son appealed on the 27th July, 1925, to the High Court at Allahabad, mainly on the ground that it was not in conformity with the preliminary decree of the 23rd April, 1924, and before the appeal was heard Deo Narain died (5th August, 1927), leaving him surviving his widow and a daughter. The widow having been brought on the record of the appeal in his stead, the High Court on the 19th July, 1928, allowed the appeal, holding that after the preliminary decree the Subordinate Judge was not competent to entertain an application that Deo Narain's share should be separated:—

"We leave Ram Narain and Musammat Makhna to have their rights adjusted by means of a separate suit, if they so choose. In the meantime we are of opinion that the portion of the property which has not been allotted to the plaintiffs should be considered for the purpose of the present suit to be property held in common. What the legal effect of the application of Musammat Makhna upon the status of the family property or the constitution of the family *qua* Ram Narain and Deo Narain is, has got to be determined in a subsequent suit, if the parties are not agreed as to it, or if one or the other party choose to institute a suit."

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The Board is not now sitting in appeal from this decision nor has the question of its correctness been argued before their Lordships, who express no opinion upon it, nor will they here inquire whether there is anything in the Code to prevent the learned trial Judge, before the preliminay decree had been drawn up and signed, from deciding to include in it a direction for the separation of the one-fourth share of Deo Narain and directing it to be drawn up and completed accordingly.

From May, 1924—when the trial Judge in the partition suit accepted the respondent's demand that Deo Narain's share should be separated—until July, 1928, when this decision was reversed by the High Court, the two branches of Ram Narain and Deo Narain acted as though they were separate in interest and in title. Till 1924, they had messed and lived jointly, but they ceased to do so in about May, 1924. The trial Court has in the present suit found that Ram Narain acted as a divided member in matters connected with marriages and funerals. "Ram Narain himself had acquired and accepted severance by his unambiguous conduct." It is, however, objected by his learned Counsel that the order of the 27th May, 1924, in the partition suit, had left him no option in the matter pending his appeal to the High Court from the final decree.

The widow having on the 1st September, 1928, succeeded before the Revenue Court in obtaining an order for entry of her name in the revenue records, the present suit was brought against her on the 14th May, 1929, to determine whether Deo Narain died divided or undivided from Ram Narain and Lachmi Narain, the plaintiffs. The suit was dismissed by the Subordinate Judge of Benares on the 27th May, 1930, and the High Court has affirmed this decision (the 2nd April, 1935).

The Courts in India have proceeded in this case upon the view that, though Deo Narain was a lunatic at the time of partition, he was nevertheless entitled to a share on partition, not having been born a lunatic. This had been throughout admitted on behalf of the plaintiffs, as it had been admitted by all parties in the partition suit, and in the mutation proceedings which followed thereon in 1928. It seems that this doctrine prevailed in the High Court at Allahabad since *Tirbeni v. Muhammadi*[1], but after the present case was decided by the High

1. (1905) I.L.R. 28 All. 247.

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Court it has been departed from by a Full Bench decision in *Mool Chand* v. *Chahta Devi*[1], which is in agreement with certain decisions of other High Courts. Their Lordships have not been asked to review these decisions, and the important question which they raise has not been argued on this appeal. It is a matter of some embarrassment to their Lordships that they should be called upon to discuss the rights of a lunatic and the guardian *ad litem* of a lunatic to claim separation of estate in a partition suit upon an artificial assumption that a lunatic (if not lunatic from birth) is entitled to a share upon partition, when there exists high authority in India for the view that he has no such right.

The right of a member of a Hindu family who is *sui juris* to separate himself in estate and interest by declaring this intention was thus stated by Sir George Lowndes in *Bal Krishna* v. *Ram Krishna*[2]:—

"It is now settled law that a separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his co-sharers of his desire to sever himself from the joint family. This was laid down in *Suraj Narain* v. *Ikbal Narain*[3]. The question was further examined in *Girja Bai* v. *Sadashiv Dhundiraj*[4] and the principle was reaffirmed, and the last mentioned case was followed in *Kawal Nain* v. *Prabhu Lal*[5], where Lord Haldane says, 'the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate'."

The effect of the exercise of this right upon the rights and status of other members of the family has been considered in a number of cases which have come before the Board.

In *Balabux Ladhuram* v. *Rukhmabai*[6], Lord Davey, delivering the judgment of the Board, said:—

"It appears to their Lordships that there is no presumption, when one coparcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other coparceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact."

In *Bal Krishna* v. *Ram Krishna*[2], Sir George Lowndes said (p. 226):—

"The separation of one member of the family, it is said, necessarily

1. I.L.R. (1937) All. 825 (F.B.).
2. (1931) 61 M.L.J. 362: L.R. 58 I.A. 220 at 224: I.L.R. 53 All. 300 (P.C.).
3. (1912) 24 M.L.J. 345: L.R. 40 I.A. 40: I.L.R. 35 All. 80 (P.C.).
4. (1916) 31 M.L.J. 455: L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031 (P.C.).
5. (1917) 33 M.L.J. 42: L.R. 44 I.A. 159 at 161: I.L.R. 39 All. 496 (P.C.).
6. (1903) L.R. 30 I.A. 130 at 137: I.L.R. 30 Cal. 725 (P.C.).

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causes the separation of all. This problem has been discussed in many cases, the argument usually turning upon a question of presumption. The general principle undoubtedly is that every Hindu family is presumed to be joint unless the contrary is proved. If it is established that one member has separated, does the presumption continue with reference to the others? The decisions of this Board show that it does not: per Lord Davey in *Balabux Ladhuram* v. *Rukkmabai*[1], followed in *Jatti* v. *Banwari Lal*[2]. But it is equally clear on these decisions that the other members of the family may remain joint: it is again their Lordships think, a question of their intention, which must no doubt be proved."

In 1924, Sir John Edge (*Palani Ammal* v. *Muthuvenkatachala Moniagar*[3]), restated the matter and made some observations having reference to cases in which the claim to separate has been made by bringing a partition suit:—

"It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. . . . In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other. It appears to be obvious to their Lordships that in a suit for partition no effective decree can be made for a partition unless all the coparceners whose addresses are known are parties to the suit, and that it is the decree alone which can be evidence of what was decreed."

The appellants rely strongly upon this last-cited passage, and contend that the decree of the High Court in the partition suit refusing the claim made on behalf of the lunatic for a separation of his one-quarter share and confining the partition to a division into two shares conclusively determines that the status of the lunatic continued to be joint with the present appellants. It is difficult, for more than one reason, to accept this contention. The decision of the High Court proceeded upon the general consideration that, the preliminary decree not having provided for the separation of a one-quarter share, the final decree could not make a separate allotment in respect of it. This was not a matter in any way having special reference to the disability of Deo Narain. If it was right it would

1. (1903) L.R. 30 I.A. 130 at 137: I.L.R. 30 Cal. 725 (P.C.).
2. (1923) 45 M.L.J. 355: L.R. 50 I.A. 192: I.L.R. 4 Lah. 350 (P.C.).
3. (1924) 48 M.L.J. 83: L.R. 52 I.A. 83 at 86-7: I.L.R. 48 Mad. 254 (P.C.).

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have been equally right had Deo Narain been *sui juris*, and had he declared in the most solemn and explicit manner after the preliminary and before the final decree his intention to become separate in estate and interest. Yet it could hardly be right in that case to hold that, because he did not get an allotment in severalty by the final decree, he remained joint in status. The gap between preliminary and final decree is not seldom of considerable duration, and the ordinary right of a coparcener to effect a separation of his estate, interest or title—as distinct from a partition by metes and bounds—by a proper declaration of his desire to sever, is not abrogated by the mere fact that he has not claimed to exercise it prior to the preliminary decree.

Again, while the decree in a partition suit is the only evidence of what was decreed, it is not uncommon for the Court, in passing a partition decree, to concern itself only with the division of the property into lots and the allocation of these lots to individual members or groups of members. A division by metes and bounds and allotment in severalty implies a separation of estate or interest; and a decree may contain directions which operate a severance of estate without any corresponding division by metes and bounds. This would result, for example, from a simple direction that the parties should hold in defined shares. But it is another matter altogether to say that, if and in so far as the decree does not contain something to sever the estate, title, and interest of plaintiffs or defendants *inter se*, they must be conclusively taken to have remained united. As a decree is not a necessary condition of separation in interest, the proposition is by no means axiomatic and requires careful examination. In *Ram Pershad Singh* v. *Lakhpati Koeri*,[1] there had been a separation in 1861, and in a suit of 1868 the three plaintiffs were given a decree for possession of their shares of certain property. It was said by Sir Andrew Scoble of that decree:—

"It was contended, on behalf of the appellants in the present suit, that although the decree in the suit of 1868 may have effected a separation *quoad* Tundan and Tukan, it left the plaintiffs united *inter se*; and that this might have been the legal effect of the decree is undeniable. But here, again, the conduct of the parties must be looked at in order to arrive at what constitutes the true test of partition of property according to Hindu law, namely, the intention of the members of the family to become separate owners."

1. (1902) L.R. 30 I A. 1 at 9 and 10: I.L.R. 30 Cal. 231 (P.C.).

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It is not, however, necessary in the present case that their Lordships should decide this general question, and they do no more than guard themselves against being supposed to accept on this point the able argument of the appellants' learned counsel. The High Court's decree of the 18th July, 1928, was made with express reservation of the question whether the estate or interest of the lunatic was divided or undivided, and cannot be regarded as concluding the matter. It decided only that, as Deo Narain's guardian had applied too late, he could not in that suit be given a separate allotment in respect of his one-fourth share.

Upon the footing that a person who became a lunatic after birth has a right to a separate share upon partition, their Lordships are unable to dissent from the view taken by the High Court. It is not shown that the lunatic in this case remained joint in estate. Everything is against that interpretation of the conduct of the parties, except, indeed, the fact that the application of the *guardian ad litem* for a separate allotment was made on the 3rd or the 10th May, 1924, a few days after the preliminary decree the (23rd April, 1924), before anything had been done under it but not before it had been pronounced. Even so, however, the action of the guardian had the approval of the trial Judge in that suit, and, as a demand for separation of the estate and interest of the lunatic, it had apparently the approval of the High Court: it is not shown to have been in any way contrary to the interests of the lunatic. In these circumstances the utmost effect that can be given to the preliminary decree will not, in their Lordships' opinion, avail the appellants.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the respondent's costs.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondent: *Hy. S. L. Polak & Co.*

R.C.C.
K.S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Valia Maliyakkal Sayid Muhammad Jiffiri Attakoya Thangal and others .. *Appellants** (*Defendants 1, 4 and 5*)

v.

Sayid Muhammad Bin Alabi Ayidross Kunhikoya Thangal .. *Respondent* (*Plaintiff*).

Sayid Muhammad Jiffiri Attakoya Thangal *v.* Sayid Muhammad Bin Alabi A. K. Thangal.

Madras Local Boards Act (*XIV of 1920*), *S. 88, proviso* (*2*)—*Inam land—Landholder suing occupier for land revenue paid to Government—Interest on such arrears whether claimable—Limitation—Art. 120, Limitation Act* (*IX of 1908*)—*Land cess, how much of it recoverable—Education tax, whether recoverable—Interest Act* (*XXXII of 1839*), *Ss. 34, 36.*

Where the land in respect of which the respondent held a grant from the Government was in possession of the appellant and the respondent claimed a sum from the appellant made up of land revenue and amounts paid by him in respect of land cess and education tax over a period of 12 years and he claimed also interest with regard to the land cess and education tax, and the questions for decision that arose were:

(1) whether the respondent was entitled to interest in respect of the amount of the arrears of the land revenue;

(2) whether anything was recoverable from the appellant in respect of land cess and education tax; and

(3) if there was such liability in respect of land cess or for education tax, what was the period of limitation,

Held, (1) that since the original grant did not stipulate when the land revenue should be paid to him and all that he got under the instrument was the right to collect the land revenue, the respondent was not entitled to interest.

Subbaroya Goundan v. *Ranganada Mudaliar*, (1915) 30 M.L.J. 387: I.L.R. 40 Mad. 93 and *Kasturi Gopala Aiyangar* v. *Anantaram Thivari*, (1902) 13 M.L.J. 248: I.L.R. 26 Mad. 730, relied on.

(2) That since on the authority of *Alubi* v. *Kunhi Bi*, (1886) I.L.R. 10 Mad. 115, the appellants could only be regarded as tenants of the respondent, the respondent having paid the land cess, he was entitled to recover half of it from the tenants. The only statutory provision is that contained in the second proviso to S. 88, Madras Local Boards Act, which gives him the right to recover half the amount paid by him. This right is subject to the law of limitation and Art. 120 governs it [vide *Rajah of Vizianagaram* v. *China Thammanna*, (1937) 1 M.L.J. 91: I.L.R. (1937) Mad. 498 (F.B.)]. Therefore the respondent was entitled to half of the land cess paid by him in respect of the six years immediately preceding his suit. The claim of interest on it would fail.

(3) That under the Interest Act, as it stood then, there was no provision entitling the landholder to recover the education tax or any portion of it from the tenant and the rule did not and could not supply the deficiency.

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* S. A. No. 712 of 1935. 28th March, 1939.

Sayid Muhammad Jiffri Attakoya Thangal v. Sayid Muhammad Bin Alabi A. K. Thangal.

See *Nagabhushanam* v. *Venkanna*, (1929) 57 M.L.J. 726: I.L.R. 53 Mad. 151.

Appeal against the decree of the District Court of North Malabar in A. S. Nos. 5 and 9 of 1934 preferred against the decree of the Court of the District Munsif of Quilandy in O. S. No. 648 of 1932.

K. Kuttikrishna Menon for Appellants.

B. Pocker for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The respondent's predecessors-in-title obtained an inam grant from Tippu Sultan. The grant was confirmed in 1866 at the time of the Inam Settlement. The validity of the grant had, however, been recognised for many years before that. The land in respect of which the respondent holds the grant is situate in Malabar. In 1932 he filed a suit in the Court of the District Munsif of Quilandy to recover from the appellants, who are in possession, a sum of Rs. 450-4-11 made up of land revenue and amounts paid by him in respect of land cess and education tax over a period of 12 years. He also claimed interest. With regard to the land cess and education tax the respondent's case was that he had been compelled to pay the amounts to Government and therefore was entitled to recover them from the occupiers of the land. The appellants denied that the respondent was entitled to recover anything from them. The District Munsif held that the respondent had the right to recover the amount claimed for land revenue with interest and also to the amount claimed in respect of land cess, but in that case without interest. He rejected the claim so far it related to the education tax. An appeal and a cross-appeal were filed in the Court of the District Judge, North Malabar. The District Judge held in favour of the respondent on all the points and decreed the suit. The appeal before us is from the decree of the District Judge. The learned Advocate for the appellants concedes that the respondent is entitled to recover from them the amount claimed in respect of land revenue, but he challenges the findings of the District Judge on the other points. The questions which the Court is called upon to decide are therefore these:—(1) Whether the respondent is entitled to interest in respect of the amount of the arrears of land revenue; (2) Whether anything is recoverable from the appellants in respect of land cess and education tax; and (3) if they are

Sayid Muhammad Jiffiri Attakoya Thangal v. Sayid Muhammad Bin Alabi A. K. Thangal.

Leach, C.J.

liable in respect of land cess or for education tax what is the period of limitation?

It is clear that the respondent is not entitled to interest in respect of the amount due for land revenue unless the case falls within the proviso contained in the Interest Act. The inam grant does not fix the date when the land revenue is to be paid to the inamdar and no notice in writing was given to the appellants that interest would be claimed in default of payment. The proviso to the Interest Act, however, leaves it open to the Court to award interest where a Court of Equity would recognise the claim. This was the construction placed upon the proviso by the Privy Council in the recent case of the *Bengal Nagpur Railway Co., Ltd.* v. *Ruttanji Ramji*[1]. In delivering the judgment of the Board, Sir Shadi Lal quoted the observations of Lord Tomlin in *Maine and New Brunswick Electrical Power Co.* v. *Hart*[2], where Lord Tomlin said:—

> "In order to invoke a rule of equity it is necessary in the first instance to establish the existence of state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance."

In *Drax*, In re: *Savile* v. *Drax*[3], the Court of Appeal recognised that interest was payable when a settlement or contract contained a provision that a certain sum should be charged on land and be paid at a fixed time. In the case before us neither of these conditions is fulfilled. It is true that the trial Court and the District Court considered that the respondent was entitled to a charge and this finding has not been expressly challenged by the appellants in their memorandum of appeal. I shall state presently what we consider should be the form of the decree, but for the purposes of deciding whether interest is recoverable or not we have to consider whether a Court of Equity would grant it.

In *Subbaroya Goundan* v. *Ranganada Mudaliar*[4], Wallis, C.J., observed that it was well settled that by virtue of an assignment from Government of the right to land revenue the inamdar did not acquire a charge upon the land and that the assignee was left to recover rent from the occupiers under the Madras Rent Recovery Act. Seshagiri Aiyar, J., indicated that had it been open to him to do so he would have

1. (1938) 1 M.L.J. 640: L.R. 65 I.A. 66: I.L.R. (1938) 2 Cal. 72 (P.C.).
2. (1929) A.C. 631.
3. (1903) 1 Ch. 781.
4. (1915) 30 M.L.J. 387: I.L.R. 40 Mad. 93.

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come to a different conclusion, but he recognised that the principle of *stare decisis* applied. The decision in that case was that where *jodi* is payable by an inamdar to Government it is recoverable as revenue and is a first charge on the interest of the inamdar, but where a zamindar has been given the right to collect *jodi* payable by an inamdar to Government he has no charge on the interest of the inamdar for arrears. In the course of his judgment Wallis, C.J., pointed out that in *Kasturi Gopala Aiyangar* v. *Anantaram Thivari*1, it was laid down broadly that assignees of revenue could not proceed under S. 42 of the Madras Revenue Recovery Act and had only a personal claim and referred to the earlier decisions to the same effect. We are bound by those decisions, but assuming we were not and were disposed to hold that in this case there was a charge the respondent would still be disentitled to ask a Court of Equity to award him interest. As I have indicated his grant does not stipulate when the land revenue shall be paid to him. All that he gets under the instrument is the right to collect the land revenue. If it is not paid within the year or by the end of the year he has his remedy by suit. He could by giving notice in accordance with the provisions of the Interest Act make sure of a right to interest in default of payment, but he does not come within the provisions of the Madras Revenue Recovery Act, which only applies to the payment of revenue due to Government. In these circumstances the respondent is not entitled to interest and the decision of the District Judge on this question will be reversed.

The claim in respect of the land cess payments requires a consideration of certain sections of the Madras Local Boards Act, 1920. S. 74-B states that in every District, a land cess being a tax on the annual rent value of lands shall be levied in accordance with the provisions of the Act. S. 81 provides that the cess shall be levied upon a landholder or sub-landholder. S. 88 says that every landholder and sub-landholder shall pay the land cess due in respect of lands held by him, but there are two provisoes. The first allows the landholder or sub-landholder as the case may be to recover the amount paid by him for an intermediate landholder. If there is no intermediate landholder and the land is occupied by a tenant the second

1. (1902) 13 M.L.J. 248: I.L.R. 26 Mad. 730.

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proviso allows the landholder or sub-landholder or an intermediate landholder to recover half the amount of the cess from the tenant. The definition of "landholder" is given in S. 3 (9) and reads as follows:—

"'landholder' includes all persons holding under a sanad-i-milkiat-istimrar, all other zamindars, poligars, shrotriyamdars, jagirdars, and inamdars, all persons registered as proprietors under S. 5 of the Madras Limited Proprietors Act, 1911, and all persons forming the land revenue under Government; all holders of land in the District of Malabar under whatever tenure; and all holders of land under ryotwari settlement, or in any way subject to the payment of land revenue direct to Government, and all registered holders of land in proprietary right."

S. 3 (21) describes a 'sub-landholder' as a peron, not being a landholder, who (*i*) holds a portion of an estate consisting of one or more revenue villages on an under-tenure created, continued or recognised by the proprietor of the estate, or is entitled to collect the rents otherwise than as agent or servant of the landholder, and (*ii*) is registered as a sub-landholder in the office of the Collector. Sub-S. 22 defines "tenant" as including all persons who, whether personally or by an agent, occupy land under a landholder or an intermediate landholder, and whether or not they pay rent to the landholder or intermediate landholder as the case may be.

The appellants and the respondent both come within the definition of 'landholder'. The appellants are the holders of land in the District of Malabar and the respondent is an inamdar. Neither the appellants nor the respondent are within the definition of "sub-landholder" but the appellants come within the definition of "tenant". In *Bhupathi Raju* v. *Subba Rao*1, it was pointed out that a person could not at the same time be a tenant in respect of the land of which he was the intermediate landholder. It is obvious that the appellants cannot be both the landlords and the tenants of the same land. The definition of "landholder" in S. 3 (9) is subject to there being nothing repugnant in the subject or context, and to treat the appellants as landholders and tenants would not only be contrary to the scheme of the Act, but would be impossible. In this case the landholder for the purposes of S. 88 must be taken to be the respondent and the appellants must be taken to be the tenants. This very same grant had to be construed on a previous occasion by this Court. The case was *Alubi* v. *Kunhi*

1. (1931) 62 M.L.J. 472: I.L.R. 55 Mad. 646.

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Bi[1], where a Division Bench held that the respondent was in the position of a landholder and the occupiers of a portion of the land covered by the grant were tenants. There is consequently authority for the statement that the appellants can only be regarded as tenants of the respondents.

This being the position and the respondent having paid the land cess he is entitled to recover half of it from the appellants. The District Judge held that he was entitled to recover the whole under Ss. 69 and 70 of the Contract Act, but this is not so. The respondent could recover the full amount from the appellants only if he were "interested" in making the payments, but not personally liable. If he is liable for the money, and by reason of S. 88 of the Madras Local Boards Act he is, he could only recover the full amount from the appellants by virtue of some statutory provision in that behalf. The only statutory provision is that contained in the second proviso to S. 88 of the Madras Local Boards Act, which gives him the right to recover half the amount paid by him. The right is subject, however, to the Law of Limitation and the Article of the Limitation Act which applies is Art. 120. (*Rajah of Visianagaram* v. *China Thammanna*[2].) The respondent is, therefore, only entitled to half the amount of the land cess paid by him in respect of the six years immediately preceding the suit. The claim for interest fails for the reasons already given.

The remaining question is whether the respondent was entitled to education tax. The District Judge here again erred. The case is governed by the provisions of the Madras Elementary Education Act, 1920, before its amendment by the Madras Elementary Education Amendment Act, 1931. S. 34 of the unamended Act provided for the levy of an education tax and S. 36 stated that the assessment and realisation should be "in accordance with the procedure prescribed." Under the power conferred by S. 36 the following rule was framed:—

> "The tax levied by a local authority under S. 34 of the Act under any head of taxation specified therein, shall be treated as an addition to the tax levied under the heads by the local authority under the law for the time being in force governing it, and shall be assessed and recovered along with the said tax as an integral part of it."

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1. (1886) I.L.R. 10 Mad. 115.
2. (1937) 1 M.L.J. 91: I.L.R. (1937) Mad. 498 (F.B.).

There was no provision in the Act that the landholder should be allowed to recover the tax or any portion of it from the tenant and the rule did not, and could not, supply the deficiency. (See *Nagabushanam* v. *Venkanna*[1].) Under the Act as it now stands the respondent will in future be able to recover half of the education tax, but this was not the position at any time material to the present suit.

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There will be a decree providing for the payment by the appellants to the respondent of (*a*) the amount claimed in respect of land revenue, but without interest, and (*b*) half the land cess paid by the respondent for the six years immediately preceding the suit, also without interest. The claim in respect of the education tax is disallowed *in toto*. As the appellants have not appealed against that part of the decree of the lower Court declaring a charge, the charge will be allowed to stand, but only to the extent of the amount payable under the decree of this Court. As the appeal has succeeded in part and failed in part the parties will pay and receive proportionate costs throughout.

K. C. —— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

A. N. Chockalingam Chettiar .. *Appellant** (*4th Defendant*)

v.

K. M. S. Chinnayya Servai and others .. *Respondents* (*Plaintiffs and Defendants 1, 2, 3 and 5 to 11*).

Hindu Law—Partnership—Representatives of three families as partners—Death of one of them—Effects a dissolution—Continuance of the business by divided sons of the deceased—Undivided sons minors at the time—Undivided sons not admitted to benefits of partnership—Deposits in firm after death of father—The undivided sons if liable for deposits—Right of the undivided sons in the partnership.

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Three partners *N*, *K* and *C* started a firm in 1922. Of these *N* died in October, 1927, leaving behind 5 sons, three by his first wife and two by the second wife. In about 1908 there was a division in *N's* family by which *N* divided himself with the sons by his first wife but continued joint with the sons by the second wife. Yet *N* represented himself and his sons by the first

1. (1929) 57 M.L.J. 726: I.L.R. 53 Mad. 151.

* Appeal No. 262 of 1934. 16th December, 1938.

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wife in the partnership half for himself and half for the sons by the first wife. After the death of *N* the business was continued by *K* and *C* and the sons of *N* by the first wife, who were then majors. The sons by the second wife were then minors and it was found that they did not continue the business nor were they admitted to the benefits of the partnership. Sometime after the death of *N*, the plaintiff deposited two sums of money with the partnership. The plaintiff sought to recover these amounts even from the sons by the second wife from out of their family properties and their assets in the partnership.

Held, this is not a joint family business which will not be dissolved by the death of a member of the family but a partnership between the representatives of three different families and is therefore governed by the ordinary law of partnership and on the death of one of them, the partnership is *ipso facto* dissolved. By the sons of the senior wife continuing the business they became partners thereby but they could not and did not carry on the business on behalf of the sons by the junior wife. The position therefore is that the plaintiff lent the sum to a firm in which the junior branch was not in fact interested as partners either by Hindu Law or by reason of an admission under the contractual law to the benefits of the partnership. Their interest in the partnership consisted merely of the right to have the share in the dissolved business ascertained and paid over to them as at the date of the death of *N* together with interest on a share of the profits if their share of the assets had been utilised in the business subsequently carried on. The junior branch is therefore not liable for the debt and neither their family properties nor their assets in the firm could be made liable for the debt of the firm.

Appeal against the decree dated 27th March, 1934, of the Court of the Subordinate Judge of Devakottai in O. S. No. 28 of 1932.

S. Venkatesa Aiyangar for Appellant.

V. Ramaswami Aiyar for Respondents

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—This appeal arises out of a suit by Chinnayya Servai the first respondent to recover from the appellant and ten other persons who were impleaded as defendants, the principal and interest due in respect of a deposit made with a Nattukottai firm which carried on business at a place called Maubin in Burma. The deposit consisted of two sums placed in deposit on two different occasions, sometime after 1927. The vilasam of the firm in which the deposit was made was known as M. P. N. The firm was started in 1922 or 1923, by three partners, namely, Narayanan Chetty, Kadiresan Chetty and Chockalingam Chetty. Narayanan Chetty was the father of defendants 1 to 5; Kadiresan was the sixth defendant and the father of defendants 7 to 9, and Chockalingam was the tenth defendant and the father of defendant No. 11. At the

date of the deposit Narayanan Chetty had died, but the business was being continued in fact. In the business so continued there is no doubt that Kadiresan and Chockalingam were partners and so far as they and their sons are concerned, the Subordinate Judge has passed a decree, from which no appeal has been preferred. The controversy raised in the appeal relates to the liability of Narayanan Chetty's sons by his junior wife one of whom, namely, the fourth defendant is the appellant in this appeal.

Narayanan Chetty died on 2nd October, 1927. His first wife was Unnamulai by whom he has left three sons, defendants 1 to 3. Even while she was alive he married a second wife Alamelu by whom he had two minor sons, namely, the appellant now a major and the fifth respondent still a minor. Each of these two groups has in its defence in the Court below attempted to shift the liability on to the other. According to the plaintiff, the sons by both the wives formed with their father Narayanan Chetty members of a joint Hindu family, and even after his death they continued joint with this difference only, that instead of the father, the eldest of the sons, namely, the first defendant became the manager of the family. Defendants 1 to 3 were majors at the date of the deposit and were accordingly sought to be made personally liable as partners but as against defendants 4 and 5 who were at that time both minors, the plaintiff only prayed for a decree against their interest in the firm and in the joint family assets. There can be no doubt that the plaintiff rested his case throughout in the lower Court on the allegation that defendants 1 to 5 were always joint in interest, a position which is quite untenable. These defendants belonging to both the groups agreed in their defence to this extent, namely, that they ceased to be joint from and after 1908 as the family became divided in status by the compromise decree in O. S. No. 28 of 1907 on the file of the Sub-Court, Madura, by which defendants 1 to 3 who were the children of his first wife became separated from Narayanan Chetty and his children by the second wife, though as between the members of each group *inter se* the joint status thereafter continued to subsist. Their versions however materially differed as to who in fact carried on the business after Narayanan's death, and on whose behalf it was so carried on. The position taken up by defendants 1 to 3 was that they were at no time partners of the M. P. N. business, either during the

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lifetime of the father or even after his death. The first defendant's undoubted association in the business was explained as being due to his having merely supervised it at the request of his stepmother. The fourth defendant asserted on the contrary that Narayanan Chetty during his life represented himself as well as defendants 1 to 3 in the partnership, that he held his interest in it, half for himself and half for defendants 1 to 3; that the partnership being one in which there were strangers associated, became necessarily dissolved on his death, and could not therefore be continued by the first defendant or by any other and that if it is found to have been in fact continued, neither he nor his younger uterine brother nor their property in the firm or outside, could be held liable as they were neither partners in any sense nor admitted to the benefits of a partnership.

The learned Sub-Judge has accepted the case of the defendants to this extent, namely, that the compromise decree in O. S. No. 28 of 1907 created a division in status between the two groups of Narayanan Chettiar's family the children by his senior wife remaining joint in one group, while Narayanan Chetty himself with his children by the second wife formed the other group which continued in itself joint down to his death. In spite of the criticisms of the respondent's Advocate, we are not disposed to differ from the Subordinate Judge's finding on this point, as there is sufficient material in this case to support it, and the probabilities also point to the same conclusion. The division is in accordance with the patni bhaga rule of custom recognised in *Palaniappa Chettiar* v. *Alagan Chetti*[1]. The notional definition of share according to the custom has been followed in this case by an actual partition evidenced by the compromise, Exhibit I, which we have no reason to doubt was anything but a genuine arrangement. We think we shall not be justified in disturbing a finding duly arrived at in this case, on the ground that in another similar appeal which arose out of a suit by another creditor against the same family this Court has expressed a different opinion on what is but a question of fact. We feel bound to examine the facts and evidence for ourselves and come to our own independent conclusion on the matter. It would indeed be a grave error, were we to take any other course.

1. (1921) L.R. 48 I.A. 539: I.L.R. 44 Mad. 740 (P.C.).

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We must now notice another contention raised by the appellant. It was sought to be made out that at the very inception there was an agreement among the partners of the M. P. N. firm that the death of a partner should not work a dissolution, but that the partnership should continue with the legal representatives taking the place of the deceased partner. The Subordinate Judge has in spite of the absence of direct proof, found this agreement established from the conduct of the parties subsequent to the death of Narayanan Chetty. According to him, the business was continued by the family of defendants 1 to 3 as well as by the family of defendants 4 and 5. His view apparently is that the continuance is explicable only on the footing that there was such an agreement. We cannot agree. This fact by itself is too slender a basis to support an agreement, in the absence of other and more cogent evidence. The agreement is denied by the appellant and on a consideration of the available material we are unable to see sufficient warrant for the conclusion of the Subordinate Judge on the point. Not only is there no direct evidence but there is an utter absence of such circumstances as would warrant a Court in drawing an inference in favour of such an agreement. Defendants 1 to 3 are shown by their conduct to have taken a substantial part in the conduct of the business after their father's death as the learned Judge has found. They no doubt would be subject to all the liabilities consequent on their acts. But being divided brethren not representing and not capable of representing their minor stepbrothers, they cannot affect them to their prejudice or bind them by a fresh contract of partnership; for that is what in law the continuance of the business amounts to. A partnership such as the one in question arising by contract between the representatives of three different families is not governed by those legal incidents which are peculiar to a joint family business in Hindu Law, but is regulated by the ordinary law:

"Where a managing member of a joint family enters into a partnership with a stranger, the other members do not *ipso facto* become partners in the business . . . . His family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger; the partnership will be governed by the Act," *Pichappa Chettiar* v. *Chockalingam Pillai*[1] (Mayne on Hindu Law and Usage, 10th Edn., p. 398).

1. (1934) 67 M.L.J. 366 (P.C.).

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Whatever may be the rights and liabilities as between each individual partner and the members of his own family whose position is more or less akin to that of sub-partners in a partnership *Gangayya* v. *Venkataramiah*1, the principle of Hindu Law which prevents a dissolution of a pure joint family business by the death of a member, is inapplicable to a partnership of this kind. Narayanan Chetty's death must consequently be held to have brought about a dissolution in this case. It has no doubt been, as found by the Subordinate Judge, subsequently carried on by defendants 1 to 3 with the stranger partners, namely, defendants 6 and 10. The crucial question however on which the liability of the appellant turns is whether it was validly continued on behalf of the junior branch so as to involve the members of that branch in the liabilities of the business incurred during its continuation. On this question our answer is decidedly in the negative. The fact of it is that the defendants could not, as they probably did not, carry on the business on behalf of the junior branch, and it is equally clear that the second wife who was the natural guardian of her children did not do so either. There is ample evidence on the record to show, at any rate after Narayanan Chetty's death, that the two branches were in every respect separately living with a separate residence, a separate mess, and with a separate account of their separate expenses. Defendants 1 to 3 cannot therefore, except possibly under the direction of the natural guardian of their stepbrothers, continue the business or enter into any arrangement so as to bind them. There is, however, very little basis for the suggestion that she in fact assented to or concurred in the continuation of the business in this case. It may be observed that there is not even a suggestion that she was aware of or had been consulted before the deposits were accepted from the plaintiff. In fact there is every reason to hold that the money taken from the plaintiff was not remitted to the Maubin firm at all, but was utilised for the personal needs of the first defendant, or probably also of defendants 2 and 3 who were joint with him.

The evidence of the second defendant who did no doubt depose that he acted not for himself but only in pursuance of the instructions of the stepmother in taking part in the conduct of the business and by writing the letter Ex. D is palpably

1. (1917) 34 M.L.J. 271: I.L.R. 41 Mad. 454 (F.B.).

false, and there is ample justification for the observation of the Subordinate Judge that he is a person who has no regard for truth. There is however another piece of evidence which is not open to objection. While alive Narayanan Chetty had sued in O. S. No. 19 of 1926 on a pronote executed in his favour by one Alagappa Chetty, an assistant in the firm, who had been found liable for a sum of Rs. 5,000 on a settlement of accounts. On the death of Narayanan the names of defendants 1 to 6, as well as that of another son of the junior wife who has since been adopted away were substituted on the record of the suit. This must have been done with the knowledge and consent of the junior wife for the obvious reason that she joined in the execution of a vakalat in favour of a pleader to represent her children who were all minors at the time. In support of the application for the substitution of the legal representatives, an affidavit was sworn to by the second defendant in which the sons of Narayanan Chetty by both wives were described as undivided sons and heirs who had obtained the properties of the father by survivorship. This is, as the Subordinate Judge has rightly held, a false affidavit put in merely for the purpose of avoiding the necessity for the production of a succession certificate which would have been insisted on if the divided status had been disclosed. But this apart, a point was sought to be made out of this transaction, in support of the theory that the business was continued by the second wife also on behalf of her sons after the death of her husband. There might be something in it, if the promissory note sued on had been executed in respect of a liability which arose in a transaction of the firm after Narayanan Chetty's death. If that had been the case, the connection of the junior branch in the suit might indicate their association in the subsequent conduct of the business. But it is conceded as indeed it is apparent from the fact that Narayanan Chetty was himself the plaintiff, that the liability evidenced by the promissory note, was one which related to the anterior period, and was therefore one in which as the learned Judge has pointed out both branches were interested.

It seems to us therefore that this transaction is incapable of being founded on either for disproving the partition as the Subordinate Judge has held, or making out as was here attempted a continuance of the business by or on behalf of the junior branch. While we agree with the Sub-Judge that the business

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was continued after the death of Narayanan Chetty, we must, differing from him, hold that it was defendants 1 to 3 alone who continued it, along with defendants 6 and 10, of course. As defendants 4 and 5 were minors at their father's death, they could not, and their mother did not in fact as we have said, continue the M. P. N. business.

The plaintiff's claim has therefore to be judged on the footing that he lent the money to a firm in which the junior branch were not in fact interested as partners either by Hindu Law or by reason of an admission under the contractual law to the benefits of a partnership. Their interests in the business consisted merely of the right to have the share in the assets of the dissolved business ascertained and paid over to them as at the death of their father, together with interest or a share of the profits if their share of the assets had been utilised in the business subsequently carried on.

If their mother had concurred in the continuation of the business, or if the partition of 1908 had been a mere sham, other and more difficult questions would have arisen for decision. We would have had then to consider as we were in fact invited to consider, whether the subsequent business was an ancestral business, and the debts incurred by those in charge of it bound all the members of Narayanan Chetty's family in both the branches. In view of the findings of fact we have arrived at, we are relieved from the necessity of having to express any opinion upon this somewhat difficult branch of the Hindu Law.

The appeal therefore succeeds, and the decree of the lower Court has to be modified by omitting the relief given to the plaintiff against the appellant and the 5th respondent in respect of their family properties. Their interest in the assets of the M. P. N. firm is equally free from liability to the plaintiff's claim. As against the other defendants the decree stands. The appellant is entitled to his costs here and in the lower Court against the first respondent who alone contested the appeal.

S.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Samanthan Karakkattitathil Chandukutty Nambiar, present Karnavan and Manager of the Tarwad .. *Appellant* (1st Defendant's L. R.)*

v.

Chirakkal Kovilakkath Rama Varma Raja Avergal and another .. *Respondents (Plaintiff and 2nd Defendant).*

Chandukutty Nambiar *v.* Rama Varma Raja.

Indian Evidence Act (I of 1872), S. 90—Old document—Not signed—If presumption under S. 90 applicable to such documents—Objection if can be taken in second appeal.

S. 90 of the Evidence Act does not lay down any presumption regarding anonymous documents the writer of whom is not known, so that an old anonymous document must be proved in one or other of the modes known to law. The English rule is not applicable in its full extent in India in view of the precise terms of S. 90.

But an objection on this ground ought not to be permitted to be taken for the first time in second appeal.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A. S. No. 165 of 1933 (A. S. No. 109 of 1933, District Court, Tellicherry) preferred against the decree of the Court of the District Munsif of Taliparamba in O. S. No. 427 of 1931.

P. Govinda Menon for Appellant.

O. T. G. Nambiar and *C. K. Kerala Varma* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for the redemption of a Kanom mortgage. The appellant is the first defendant's legal representative. The contesting respondent is the plaintiff who is the jenmi mortgagor. It is quite clear that this mortgage, which is alleged to be one of the year 1859, has not been properly proved unless Ex. A is treated as good evidence of the terms of the mortgage and is regarded as having been technically proved in evidence in the trial Court. Ex. A, which is part of a book kept in the family of the plaintiff containing details of the terms of a considerable number of Kanom

* S. A. No. 365 of 1934. 1st September, 1938.

demises, was alleged to be a copy of the actual document of mortgage and the trial Court gave a decree on the basis that it was an actual copy. The Subordinate Judge in appeal took the view that Ex. A was not an actual copy but was a memorandum of the terms of the mortgage contained in a book kept in the ordinary course of business and it was therefore admissible to prove the terms of the mortgage.

Now, whether Ex. A be used under S. 63 of the Evidence Act as secondary evidence of the original of which it is a copy or whether it be used under S. 32 as a statement made by a deceased person in a book kept in the ordinary course of business, it is a document which has to be proved in one of the ways known to law. It may be proved by the examination of the person who wrote it or by the examination of somebody who knows the handwriting and can swear that it is the handwriting of the person who wrote it or it may be proved by the use of the presumption regarding ancient documents contained in S. 90 of the Evidence Act. S. 90 lays down that in the case of an ancient document produced from proper custody the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting. S. 90 does not lay down that there is any presumption regarding anonymous documents the writer of whom is not known. Though the corresponding English rule is usually stated in terms that an ancient document proves itself, I doubt very much whether that rule applies to its full extent in India in view of the very precise terms of S. 90. The entry in Ex. A is not signed by the person who wrote it and there are no materials upon which one can say that a particular person purports to have written it, except a general statement that it is kept amongst the family records as a record of the family's mortgage transactions. I am therefore of opinion that had the objection been taken at the proper time, it would have been necessary to require the plaintiff to adduce some evidence as to the writer of Ex. A, seeing that the presumption under S. 90 would not be sufficient to provide proof of the document. At the same time I am constrained to point out that though there appears to have been a rather futile contest regarding the genuineness of Ex. A—a contest which apparently was not pressed in the lower appellate Court—there is no suggestion either in the records of the trial

Court or in the memorandum of appeal or in the memorandum of second appeal that Ex. A should have been rejected for want of formal proof. It seems to me that this is an objection which ought not to be permitted to be taken for the first time in the course of arguments in second appeal. Although Ex. A is a very old document, it is quite possible that somebody may be available amongst the senior members of the plaintiff's family who can remember the handwriting of the person who wrote it. The plaintiff put the document into the Court relying on the presumption under S. 90 and no objection appears to have been taken at the proper time on the ground that an anonymous document cannot be taken to be properly proved by virtue of this presumption. It is suggested that an objection to the genuineness of the document can be taken to include the lesser objection to its technical proof. I cannot accept this contention. An objection based on an allegation of forgery is a totally different thing from an objection based on a purely technical ground such as that which is urged now. Though an allegation of forgery might conceivably have been met by examining some old man to speak to the handwriting of some long-forgotten clerk, the plaintiff had a much more satisfactory reply to this objection, based on the numerous date stamps of Courts going back for many years indicating the undoubted genuineness of the book (Ex. A). I must therefore take it that the objection to the mode of proof of Ex. A, though based on valid grounds, was not raised at the time when it should have been raised and cannot be sustained in second appeal. It therefore follows that the judgment of the learned Subordinate Judge proceeded on materials which were legally available to him and there is no question that on those materials this Court has no power to interfere with the decision reached. The appeal is therefore dismissed with costs.

Leave to appeal is refused.

S.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kannappa Mudali and another .. *Appellants* (Petitioners—Defendants 2 and 6)*

v.

Varadachariar .. *Respondent (Assignee Decree-holder).*

Kannappa Mudali *v.* Varadachariar.

Madras Co-operative Societies Act (VI of 1932), Rules under—R. 15 (7)—Assignment of Registrar's award—Application to Civil Court for execution—Recognition of assignment under O. 21, r. 16, Civil Procedure Code—Objection subsequently—Jurisdiction—Whether Civil Court can recognise assignment.

It is clear that though the Registrar of Co-operative Societies is a Court for certain limited purposes, when the award of the Registrar is transferred to the executing Court, empowered under r. 15 (7) of the rules framed under the Act to enforce it as if it were a final decree of the executing Court itself, in the absence of any explicit provision in the rules for the recognition of assignments by the Registrar, the natural inference is that the executing Court is competent to recognise the assignment. Even if it were not competent, in the circumstances of the present case, where the assignment was recognised after due notice to the judgment-debtor and it was only after sale had been ordered that a stranger purchaser came forward to object to the exercise of jurisdiction to which no objection had been taken at the proper time, the execution should not be stopped at the instance of the transferee from the judgment-debtor.

If there was an irregularity it is nothing more than an irregularity and there is no error of law apparent on the face of the record which would justify the cancellation of the recognition of an assignment of the transferee under O. 21, r. 16, Civil Procedure Code. Nor can it be said that the executing Court acts wholly without jurisdiction. Vide *Jang Bahadur* v. *Bank of Upper India, Ltd., in liquidation*, (1928) 55 M.L.J. 545: L.R. 55 I.A. 227: I.L.R. 3 Luck. 314 (P.C.).

Quaere: In the absence of an express provision in the rules, whether a Registrar can perform the functions which a Civil Court can perform in respect of its own decrees, of recognising an assignment.

Appeal against the order of the District Court of Chingleput dated 5th April, 1938 and made in C. M. A. No. 15 of 1936 preferred against the order of the Court of the District Munsif of Conjeevaram dated 24th February, 1936, in E. A. No. 184 of 1936 in Claim No. 469 of 1934-35.

S. Ramachandra Aiyar for Appellants.

M. E. Rajagopalachariar and *C. Krishnamachariar* for Respondent.

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* A. A. A. O. No. 166 of 1938. 2nd August, 1939.

Kannappa Mudali v. Varadachariar.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the jurisdiction of the Civil Court to which an award by a Registrar under the Madras Co-operative Societies Act has been transmitted for execution, to recognise an assignment under O. 21, r. 16, Civil Procedure Code. In a very recent case (C. M. S. A. No. 188 of 1936) I held that an assignee could apply under O. 21, r. 16 for execution. But that decision was not based on any specific argument regarding the forum in which an application for assignment should be made in the first instance. The argument now put forward is that if there is any power in the assignee to execute an award under the Co-operative Societies Act the assignment must first be recognised by the Court which passed the decree, which is in effect not the Civil Court, but the Court of the Registrar of Co-operative Societies.

The award in the present case was in favour of a co-operative bank and it was transferred to the Civil Court at the instance of the bank and execution was taken out by the bank. While the execution petition was pending, there was an assignment to the present respondent and the execution proceedings instituted by the bank were stopped and the assignee applied to the executing Court for recognition of his assignment and for execution. Notice of this application went to the judgment-debtors. There was no objection and the assignment was recognised. Further notice was issued of the sale application and again there was no objection. After the sale had been ordered the present appellants, one of them claiming to be a transferee from the judgment-debtors of the properties to be sold, applied to the Court by way of review to cancel the order recognising the assignment in favour of the respondent. Both the Courts below have held that the recognition of the assignment was within the powers of the Court.

S. 51 of the Co-operative Societies Act gives the Registrar power to deal with disputes of members and persons claiming under them either *inter se* or with the society, or between the society and its servants touching the business of a registered society. R. 15 (7) of the rules framed under the Act prescribes three ways in which the decision or award of the Registrar in such a dispute can be enforced. One is by invoking the powers of the Registrar himself under r. 22 to execute the award. The second is by a requisition to the Collector or his deputy to recover

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the amounts awarded as if they were arrears of land-revenue. The third, with which we are now concerned, is by an application to the Civil Court having jurisdiction over the subject-matter of the decision or award, which Court shall enforce the decision or award as if it were a final decree of the Court. I would point out that the power of the Civil Court is not merely to execute the decree as if the Registrar were a Court and as if the decree were merely a decree of the Registrar's Court transferred to it for execution; but it is a power to enforce the award, as if it were a final decree of the Court itself. That is to say, the executing Court is to my mind for purposes of execution put in the same position as a Court executing one of its own decrees.

If this view is correct, it disposes of the argument for the appellants. The appellants' contention is that the Registrar is a Court, that an award comes within the definition in the rules of a "decree" and that since O. 21, r. 16 authorises the recognition of an assignment of a decree only by the Court which passes the decree and not by the Court to which it is transferred for execution, the power to recognise an assignment, if it exists at all, can be exercised only by the Registrar. Now with reference to this argument it must be observed that though the Registrar may for certain purposes be a Court, he exercises no powers other than those which have been granted to him under the Act and the rules framed under it. Neither the Act nor the rules under the Act contain any provision whereby the Registrar can permit an assignee of an award to apply to the Registrar for recognition of the assignment and for execution. I am not called upon now to decide whether the Registrar would be acting legally or not if he permitted an assignee to execute an award by application to the Registrar. All I would say is that there is no express provision in the rules whereby the Registrar can perform the function, which a Civil Court can perform in respect of its own decrees, of recognising an assignment. The machinery of the Act seems to contemplate the treatment of an award in different ways for different purposes. It may be enforced by a purely executive machinery such as that constituted under the Revenue Recovery Act. It may be enforced by the semi-judicial machinery constituted by the Registrar under the rules under the Act. Or it may be made material for the purely judicial machinery by its transfer for execution to a Civil Court. When once it is transferred to the Civil Court,

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it is transferred subject to the proviso that it shall be executed as if it were a decree of that Court. It seems to me impossible to read into that provision a reservation that for purposes of assignment of the decree and for the recognition of such assignment in execution, it shall be, not the decree of that Court, but the decree of the Registrar.

There is very little authority on this subject. Cases under the old Co-operative Societies Act have no direct bearing, for under the old rules the award of the Registrar of Co-operative Societies could be executed only by a procedure similar to that applicable to an award of an ordinary arbitrator. It is established that under the old Act when an award was transferred to the Civil Court for execution, that Civil Court had the necessary power to treat the decree as its own decree for purposes incidental to execution including the granting of a certificate transferring the decree to any Court for execution, vide *Krishnaji Shridhar* v. *Mahadeo Sakharam*[1]. There is authority for the view that the award of an arbitrator when it has been filed in Court and has become the decree of the Court can be assigned and the assignment can be recognised by the Court in which that award is filed. *Gladstone Wyllie* v. *Joosub Peer Mahomed*[2]. It is contended for the appellants that the provision of r. 15, sub-r. 8 is significant and that this rule contemplates that the person to be recognised as the decree-holder by the Civil Court must always be the person in whose favour the Registrar has granted an award and cannot be his assignee, for the original holder of the award is given the power to apply to the Court for the return of the award with a certificate of non-satisfaction. It seems to me to be going too far to hold that because the person in whose favour an award has been passed may apply to the Court for its transfer back to the Registrar, the Court has necessarily no power to recognise an assignment. If the Court has recognised such an assignment and in spite thereof the original holder of the award applies for its transfer back to the Registrar, the position is one with which the Court executing the decree can deal by passing appropriate orders on the application for a certificate under O. 21, r. 6.

On a consideration of the contentions of both sides it seems to me clear that though the Registrar is a Court for certain limited purposes, when the award is transferred to the executing Court empowered to enforce it as if it were a final

1. (1921) I.L.R. 46 Bom 128. 2. A.I.R. 1924 Cal 117.

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decree of the executing Court itself, in the absence of any explicit provision in the rules for the recognition of assignments by the Registrar, the natural inference is that the executing Court is competent to recognise the assignment. Even if it were not competent, the present case is to my mind not one in which execution should be stopped at the instance of the transferee from the judgment-debtors, for the assignment was recognised after due notice to the judgment-debtors and it was only after sale had been ordered that a stranger-purchaser comes forward to object to the exercise of a jurisdiction to which no objection was taken at the proper time. It seems to me to follow that if there was an irregularity (in my opinion, there was none) it is nothing more than an irregularity and there is no error of law apparent on the face of the record which would justify the cancellation of the recognition of the assignment in review. Nor can it be said that the executing Court acts wholly without jurisdiction—*vide* the decision of the Privy Council in *Jang Bahadur* v. *Bank of Upper India, Ltd., in liquidation.*[1]

The result therefore is that the appeal is dismissed with costs.

Leave to appeal is refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE NEWSAM.

Budhiraju Seethayamma (deceased) and others .. *Appellants** (*Defendants 1 to 5*)

v.

Vullipalam *alias* Putrevu Jagannadha Rao and others .. *Respondents* (*Plaintiff and Defendants 6 and 7*).

Seethayamma v. Vullipalam.

Will—Construction—Property bequeathed in two shares—Life interest in one share given to one person—Whole property given to other subject to life interest—Vested interest if created—Legatee executing power-of-attorney—Agent authorised to sell entire property—Right to sell property subject to life interest—Construction of grant in favour of grantee.

The testator made a will by which she bequeathed all the properties she was possessed of to *L* who was her brother's son and to one *N* her widowed daughter. By her will she directed *L* to divide the movable and immovable

1. (1928) 55 M.L.J. 545: L.R. 55 I.A. 227: I.L.R. 3 Luck. 314 (P.C.).

*Appeal No. 13 of 1937 and L. P. A. No. 5 of 1938. 21st March, 1939.

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property which she was possessed of into two shares and to enjoy one half share the other half share to be enjoyed during her lifetime by *N*. The testator further directed that after the death of *N*, *L* should take possession of the property in which *N* had a life interest. Subsequently *L* for the purpose of discharging his debts executed a power-of-attorney in favour of *B* his wife and thereby authorised her to sell his movable and immovable properties. The question having been raised whether the interest which *L* possessed in the half share enjoyed by *N* during her lifetime was also included in the expression "immovable property" which *B* was authorised to convey,

Held, that the effect of the will was that the entire property was given over to *L* subject to a life interest in favour of *N*, that *L* possessed a vested interest in the share given to *N* and that the said interest was included in the properties which *B* was authorised by the power-of-attorney to convey.

When a certain property is conveyed it must be taken strongly against the grantor and in favour of the grantee and all the interest which the grantor possessed in the property sold should be deemed to have passed.

Appeal against the decree of the Court of the Subordinate Judge of Chicacole in O. S. No. 17 of 1936 and appeal under cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Lakshmana Rao dated 8th December, 1937 and made in C. M. P. No. 5166 of 1937 in the said Appeal No. 13 of 1937 on the file of the High Court.

The facts were as follows:—The testator provided by her will thus:

"On my death my younger brother's son Vallipalem Venkata Lakshminarayana shall perform my obsequies, recover the outstandings due to me from others divide the movable and immovable properties in my possession into two shares and enjoy one-half share; the other half shall be enjoyed during her lifetime by my widowed daughter Lakshmi Narasamma wife of Putrepu Suryanarayana without rights of gift, sale, etc. Her obsequies alike shall, on her death, be performed by my nephew the said Venkata Lakshminarayana and he shall take possession of the property in her custody. As regards the lands that passed to my daughter from her parent-in-law she is at liberty to deal with them as she pleases."

After the death of the testator the plaintiff's father became involved in debts heavily. He then executed a power-of-attorney in favour of his wife authorising her to sell away his properties and to settle his debts. According to the plaintiff, his mother acting under the said power-of-attorney purported to sell not only the half share of the plaintiff's father but the half share belonging to the other legatee Lakshmi Narasamma. Plaintiff contented that the sale in so far as it comprised the moiety bequeathed to Lakshmi Narasamma was void. The defendant contended that Lakshmi Narasamma was only given a life estate in a moiety of the properties with a remainder over to the plaintiff's father and that the sale was binding on the plaintiff. The trial Court held that the sale did

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not affect Lakshminarayana Rao's interest in the moiety bequeathed to Lakshmi Narasamma. The defendants appealed.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *C. Sambasiva Rao* for Appellants.

B. V. Subramaniyam, P. Somasundaram and *S. Ramamurti* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—The question for determination in this appeal is whether a vested remainder which was vested in one Lakshminarayana Rao was conveyed by his wife Bhramaramba (seventh defendant) under a sale-deed Ex. C in favour of the first defendant. The learned Subordinate Judge answered it in the negative and against this decision of the Subordinate Judge the plaintiff has preferred this appeal.

The relevant facts are not in dispute. One Kanchamma was the last owner of the suit property. She made a will in 1899 in and by which she bequeathed all the properties she was possessed of, including the suit property, to the said Lakshminarayana Rao who was her brother's son and to one Lakshmi Narasamma, her widowed daughter. By her will she directed Lakshminarayana Rao to divide the movable and immovable property which she was possessed of into two shares and to enjoy one half share, the other half share to be enjoyed during her lifetime by Lakshmi Narasamma. The said Kanchamma further directed that after the death of Lakshmi Narasamma, Lakshminarayana Rao should take possession of the property in which Lakshmi Narasamma had a life interest. As we construe this will, the entire property was given over to Lakshminarayana Rao subject to the life interest in favour of Lakshmi Narasamma the widowed daughter of the testatrix. It is immaterial whether his interest in the half share which was being enjoyed by Lakshmi Narasamma during her lifetime is considered as a vested remainder or not. There can be no doubt that Lakshminarayana Rao possessed a vested interest in the said share which was capable of being alienated by him or by anybody purporting to act under his power. In 1908 Lakshminarayana Rao became heavily involved and in order to discharge his debts he executed a power-of-attorney in favour of his wife Bhramaramba. It is dated 14th August, 1908. By it Lakshminarayana Rao authorised his wife to sell his movable and immovable property. The question is, is the vested interest

which Lakshminarayana Rao possessed in the half share of the property which was being enjoyed by Lakshmi Narasamma during her lifetime also included in the expression 'immovable property' which Bhramaramba was authorised to convey? The learned Subordinate Judge seems to be of the opinion that she was not authorised to convey the vested remainder on the ground that it would not be 'immovable property' within the meaning of the expression as used in the power-of-attorney. It seems to us, that the view of the Subordinate Judge is totally unsound. A vested remainder is property and it is immovable property being an interest in land. There can be no doubt therefore that Bhramaramba was authorised to sell all that interest which Lakshminarayana Rao possessed in the suit property on the date of the power-of-attorney. Acting under this power on 28th October, 1908, she sold the suit property to the first defendant for valuable consideration. The question is, as we have said, whether the vested interest which Lakshminarayana Rao possessed in the half share which Lakshmi Narasamma enjoyed during her lifetime passed under the sale-deed. If we come to the conclusion that it passed, the plaintiff has no *locus standi* to maintain the suit and his suit is liable to be dismissed. What was conveyed under the sale-deed was three vrittis of land enclosed within particular boundaries. The suit land was sold with all rights. On a proper construction of the sale-deed it seems to us that Bhramaramba purported to convey the entire interest in the land as if it belonged to her husband. In fact on the date of the sale-deed she could only convey the property *minus* Lakshmi Narasamma's life interest in it. It was contended in the lower Court successfully and the contention was repeated before us that there was no specific conveyance of the vested remainder possessed by Lakshminarayana Rao as such and therefore it did not pass. We think the learned Judge has misread the deed and the contention is fallacious. When a certain property is conveyed, it must be taken strongly against the grantor and in favour of the grantee and all the interest which the grantor possessed in the property sold should be deemed to have passed. Therefore when in this case certain specific lands were described as being conveyed without specifying the extent of the interest possessed by Lakshminarayana Rao, it must be taken that all interest which Lakshminarayana Rao possessed and which the seventh defendant was authorised to convey and which she could convey under the

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power-of-attorney executed by her husband in her favour would pass under the deed Ex. C. *Prima facie* therefore all that interest which Lakshminarayana Rao possessed including the vested interest in the half share in the enjoyment of Lakshmi Narasamma passed under the said deed.

A point was urged by the learned Counsel for the plaintiff-respondent that Bhramaramba purported to deliver possession of the land which she was conveying, that she could not obviously have delivered possession of the half share to which Lakshmi Narasamma was entitled and that this shows that what was sold was only the half share of Lakshminarayana Rao. But the sale-deed makes it clear that she purported to convey not only the entirety of the interest possessed by Lakshminarayana Rao but also to deliver possession of the entirety of the interest. Whether she was right in law in doing so is not the question. What was her intention in conveying the property? There is no doubt that she intended to convey all the interest which her husband possessed on the date of the sale-deed. In this view the plaintiff has no *locus standi* to maintain the suit. The appeal is therefore allowed and the suit is dismissed with costs throughout against the first respondent. The plaintiff will pay the necessary court-fee on the plaint to the Government.

Letters Patent Appeal No. 5 of 1938 is dismissed but without costs.

B. V. V. —— *Appeal No. 13 of 1937 allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mugi Subbayya .. *Appellant* (2nd Defendant)*

v.

Ravulacheruvu Thippa Reddi and another .. *Respondents (Plaintiff and 1st Defendant).*

Subbayya v. Thippa Reddi.

Civil Procedure Code (V of 1908), S. 9—Suit to set aside sale held by Deputy Registrar of Co-operative Societies for failure to follow the procedure laid down in the rules under the Co-operative Societies Act—Remedy by special machinery provided by the Co-operative Societies Act, r. 22—Jurisdiction of Civil Courts if ousted—Exclusion of jurisdiction, if can be by implication.

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* A. A. O. No. 307 of 1938. 17th July, 1939.

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In a suit to set aside a sale in execution of a decree held by the Deputy Registrar, Co-operative Societies as liquidator of a co-operative credit society on the ground of the failure to follow strictly the procedure laid down in the rules under the Co-operative Societies Act.

Held, (*i*) a suit will not lie without the leave of the Registrar under S. 48 of the Co-operative Societies Act.

(*ii*) where by statute powers have been given to any person for a public purpose, by which powers an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the ordinary jurisdiction of the Civil Court is ousted and the exclusion of the Civil Court's jurisdiction by the creation of a special machinery before a special tribunal need not be express but may be by necessary implication.

(*iii*) the plaintiff's remedy is the one indicated in the Co-operative Societies Act, r. 22. He has not chosen to adopt it and he cannot when his legal remedy is barred (by his not taking action within 30 days) try to achieve the same result by invoking the jurisdiction of Civil Courts.

Appeal against the order of the District Court of Anantapur dated 28th March, 1938 and made in A. S. No. 125 of 1937 preferred against the decree of the Court of the District Munsif of Anantapur in O. S. No. 62 of 1937.

Konda Kottayya for Appellant.

Ch. Raghava Rao, S. Rajaraman, S. Kothandarama Nainar and *Kasturi Seshagiri Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit to set aside a sale held by the Deputy Registrar of Co-operative Societies as liquidator of a Co-operative Credit Society. The grounds upon which the sale was sought to be set aside are substantially the failure of the selling officer to follow strictly the procedure laid down in the rules under the Co-operative Societies Act. The suit was dismissed by the trial Court on the grounds that the Civil Court has no jurisdiction to entertain such a suit for a remedy in respect of which a special machinery has been provided by the Act; and also because by reason of S. 48 of the Madras Co-operative Societies Act whereunder the suit would not lie without the leave of the Registrar. The learned District Judge has reversed the trial Court on both these grounds, holding that the jurisdiction of Civil Courts cannot be taken away unless it is expressly excluded by the Statute in question and that S. 48 has no application because the bringing of properties to sale in execution of a decree or an award is not part of the winding up of the Society.

It seems to me that the decision of the learned District Judge is demonstrably wrong on both these grounds. In the first

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place the authorities which the learned District Judge quotes for the view that the jurisdiction of the Civil Court is not ousted unless it is ousted by the express terms of the statute propound precisely the contrary proposition and the fact that jurisdiction may be ousted by necessary implication seems to follow from the words of S. 9 of the Civil Procedure Code, which are to the effect that the Courts shall have jurisdiction to try all suits of a civil nature except suits of which their cognisance is either expressly or impliedly barred. All the cases to which I have been referred recognise that the jurisdiction of the Civil Courts may be ousted by necessary implication when a special statutory machinery has been set up and that the ouster need not be express. As to the reason for not applying the bar under S. 48, the learned District Judge has overlooked the fact that though this suit has been filed nominally against the liquidator, it is in fact against the liquidator as representing the Society and such being the case, the second portion of S. 48 will apply and the suit will not lie without the leave of the Registrar.

This is sufficient to dispose of the appeal, but, as the more important question of the jurisdiction of the Civil Courts has been argued at length, it is desirable that I should say a few words upon it. The facts are that the plaintiff borrowed money from the Society and mortgaged properties as security for the loan. When the Society was in liquidation, the liquidator having got a decree against the plaintiff, in execution of that decree through the agency of the Co-operative Department sold the properties to the present appellant, the second defendant in the suit, on 10th September, 1936. Under the rules framed under the Madras Co-operative Societies Act a special procedure is prescribed whereby a person whose property has been sold can, by taking action within thirty days of the sale, establish before the Registrar his right to have the sale set aside on the ground of irregularity, mistake or fraud by a procedure almost identical with that prescribed under O. 21 of the Civil Procedure Code. The plaintiff took no such action but on 12th March, 1937, that is to say, some five months after his remedy under the statutory rules was barred, he filed the present suit. The plaint is not drafted as if the plaintiff were merely seeking the common law remedy against a trespass by an unauthorised person upon property to which he was entitled. It is drafted just as if the plaintiff had a right by statute to contest in the Civil Courts the regularity of the sale on the ground that the statutory

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formalities had not been complied with; that is to say, the plaintiff seeks to call in aid the Civil Courts to procure a remedy which would have been hopelessly barred if sought in the tribunal specially designated by the statute for that purpose.

The general principle is well established and has been repeatedly laid down by the Courts that where by statute powers have been given to any person for a public purpose, by which powers an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the ordinary jurisdiction of the Civil Court is ousted. Another way of putting the same proposition is that where the statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of a contrary intention, be resorted to. And it is well established that the exclusion of the Civil Courts' jurisdiction by the creation of a special machinery before a special tribunal need not be express but may be by necessary implication. The cases to which I have been referred are *Ramachandra* v. *Secretary of State*[1], *Iswarananda Barathiswami* v. *Commissioners, Hindu Religious Endowments Board*[2], *Bhaishankar* v. *Municipal Corporation of Bombay*[3], *Ramayyar* v. *Vedhachala*[4], *Zamindar of Ettiyapuram* v. *Sankarappa Reddiar*[5], *Municipal Board, Bareilly* v. *Abdul Aziz*[6], *Mohideen Pichai* v. *Tinnevelly Mills Co.*[7], *Nataraja Mudaliar* v. *Municipal Council, Mayavaram*[8] and *Dewa Singh* v. *Fazal Dad*[9], and the Full Bench decision of the Rangoon High Court under the Burma Co-operative Societies Act reported in *Dey* v. *Bengalee Y. M. C. C. Society*[10]. All these rulings follow well-known English cases, the validity of which has never been doubted. On the other hand Mr. Raghava Rao for the respondent quoting Varadachariar, J., in *Kamaraja Pandiya Naicker* v. *Secretary of State for India in Council*[11], relies on the opposite proposition that where a person's liberty of property is interfered with under colour of statutory powers, he has a cause of action which the Civil Courts are bound to

1. (1888) I.L.R. 12 Mad. 105.
2. (1931) 61 M.L.J. 117: I.L.R. 54 Mad. 928.
3. (1907) I.L.R. 31 Bom. 604.
4. (1890) 1 M.L.J. 661: I.L.R. 14 Mad. 441 (F.B.).
5. (1903) I.L.R. 27 Mad. 483 (F.B.).
6. A.I.R. 1934 All. 795.
7. A.I.R. 1928 Mad. 571.
8. (1911) 21 M.L.J. 878: I.L.R. 36 Mad. 120.
9. A.I.R. 1928 Lah. 562.
10. A.I.R. 1938 Rang. 392 (F.B.).
11. (1934) 69 M.L.J. 695 at 700.

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entertain unless a bar to such entertainment has been enacted expressly or at least by necessary implication. It is argued that there is no express exclusion of the Civil Courts' jurisdiction to decide on the validity of a sale by a Co-operative Registrar and that the absence from the rules under the Co-operative Societies Act of a provision similar to that found in O. 21, r. 92 (3) is an indication that no such ouster of the Civil Courts' jurisdiction should be implied. It seems to me that the last argument has very little force, for we are not concerned here with power of the Courts to question the decision of the Registrar on a dispute regarding the validity of a sale. We are concerned rather with the alleged right of the debtor to ignore the machinery provided by the Act and seek to question the sale in the Civil Courts by alleging statutory irregularities at a time when the remedy provided by the Act would be time-barred. In the case just referred to Varadachariar, J., does not question the validity of the proposition that where a quasi judicial machinery is set up by the statute for remedying injuries alleged to have been caused by the exercise of powers conferred under the statute, ordinarily it will be implied that the Civil Courts' jurisdiction to give the same remedy will be ousted. What the learned Judge does in the particular case is to distinguish between an executive machinery and a quasi judicial machinery and to point out that the ouster of the Civil Courts' jurisdiction will not be inferred merely because of the setting up of a right of appeal to a purely executive authority. Under r. 22 framed under the Co-operative Societies Act the machinery which is prescribed for setting aside a sale on grounds of irregularity, fraud, etc., is definitely a machinery of a judicial nature functioning under rules precisely similar to those by which the Courts are bound under O. 21 of the Civil Procedure Code and, apart from the fact that there is some curtailment of the rights of appeal presumably with a view to economy and despatch of business, there is nothing in the procedure before Registrar which can be regarded as less judicial in its character than the procedure before the District Munsif in contesting sales in execution. Quite clearly this is a case in which the plaintiff has, with his eyes open, brought himself within the ambit of the special statute in order to enjoy the special facilities thereby created for borrowing money and has put himself and his property within the reach of the machinery created by that statute for the enforcement of the repayment of loans. If he has a grievance arising out of the way in which

that machinery has worked, the remedy is the one indicated by the rules under the Statute. That remedy he has not chosen to adopt and he cannot, when his legal remedy is barred, try to achieve the same result by filing a suit in the Courts requiring the Courts to exercise a jurisdiction which the statute itself does not contemplate and which is inconsistent with the scheme of the Act.

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In the result therefore I allow the appeal, and dismiss the suit with costs throughout. The costs in appeal will be payable by the first respondent-plaintiff. One set only in appeal.

Leave refused.

K. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Balusu Subbaraidu and others .. *Appellants* (Defendants 1 to 3 and 15).*

Subbaraidu, *In re.*

Madras Agriculturists Relief Act (IV of 1938), S. 19—Application under S. 19 when no execution proceedings pending—Order on—If appealable.

An order passed on an application filed under S. 19 of the Madras Agriculturists Relief Act (IV of 1938) while no proceedings in execution are pending is not appealable.

Appeal against the order of the Sub-Court of Rajahmundry dated 27th September, 1938, in I. A. No. 216 of 1938 in O. S. No. 24 of 1933.

M. S. Ramachandra Rao for Appellants.

The Court delivered the following

JUDGMENT.—This being an order on an application under S. 19 of Madras Act IV of 1938, made while no proceedings in execution were pending, is not appealable. It cannot be considered to be a question under S. 47, Civil Procedure Code, in the absence of any execution proceedings.

Moreover on the merits we think the learned Sub-Judge's decision was correct. This appeal is dismissed under O. 41, r. 11, Civil Procedure Code.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Ramaswami Chettiar .. *Petitioner† (Petitioner—3rd Defendant).*

Ramaswami Chettiar, *In re.*

Madras Agriculturists Relief Act (IV of 1938), S. 8, Explanation—Purchaser of hypotheca executing promissory note to mortgagee decree-holder—If entitled to relief in respect of the debt under S. 8, explanation.

* A. A. O. No. 93 of 1939. 21st July, 1939.

† C. R. P. No. 671 of 1939. 4th September, 1939.

Ramaswami Chettiar, *In re.*

Where the purchaser of a hypotheca, who had executed a promissory note to the mortgagee decree-holder claimed that he was entitled to the relief under the Madras Agriculturists Relief Act, S. 8, explanation,

Held, in a case where *B* takes over a debt due by *A*, the document executed by him is not a "fresh document" so far as he is concerned. He is executing a document for the first time. The old debt is extinguished and a new debt and a new debtor come into existence. The scaling down provisions under S. 8 explanation, do not apply to such a case. It applies only where the debtor merely renews the debt or includes in a fresh document the sum due under the old document.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Karur, dated 13th September, 1938 and made in I. A. No. 584 of 1938 in O. S. No. 461 of 1934.

C. A. Seshagiri Sastri for Petitioner.

The Court delivered the following

JUDGMENT.—There was a mortgage decree against a third party and before the sale of the hypotheca, the petitioner's father and some others purchased the property mortgaged. They then executed the suit promissory note in satisfaction of the mortgage decree.

The petitioner claimed relief under explanation to S. 8 of Madras Act IV of 1938. The lower Court rejected his petition and this C. R. P. is filed against the said order.

The question is whether the case comes within the Explanation to S. 8.

The explanation runs thus:—

" Where a debt is renewed or included in a fresh document in favour of the same creditor."

The explanation speaks first of a renewal which is obviously by the same debtor. Then come the words "or included in a fresh document". This is obviously to provide for a case where a debtor instead of merely executing a new document for the exact sum owing under the previous one, takes a fresh loan, and executes the document both for the sum due under the original document and for the sum taken at the time of the new document. The juxtaposition of the words "renewed"—"included in a fresh document" leaves no room for doubt. Inclusion in a fresh document must be obviously by the same debtor.

In a case where *B* takes over a debt due by *A*, the document executed by him is not a "fresh document", so far as he is concerned. He is executing a document for the first time. The

old debt is extinguished and a new debt and a new debtor come into existence. Advantage is sought to be taken of the absence of the words "by the same debtor" but the obvious meaning of the explanation is that where the debtor merely renews the debt or includes in a fresh document the sum due under the old document, the scaling down provision applies.

This Revision Petition is dismissed.

Petition dismissed.

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Paturi Venkateswara Rao and another .. *Petitioners* (Respondents 1 and 7—Defendants 1 and 7)*

v.

Parvataneni Subrahmanyam .. *Respondent (Petitioner—Plaintiff).*

Civil Procedure Code (V of 1908), O. 9, r. 9 and O. 17, r. 3—Appearance of plaintiff—Pleader unsuccessfully applying for adjournment—Dismissal of suit—Application for restoration—Maintainability—Pleader whether should formally report no instructions.

The mere physical appearance of the plaintiff on the day of the hearing is no appearance in the suit. And the fact that a pleader who had no instructions to conduct the suit asks for an adjournment is not appearance in the suit whether he formally reported no instructions or not, if all that he did at the hearing was to apply for an adjournment and nothing more. In such a case the consequent dismissal of the suit is one for default and not a disposal under O. 17, r. 3, Civil Procedure Code, and an application for restoration is maintainable under O. 9, r. 9 of the Code.

Govindarajulu Naidu v. *Imperial Bank of India, Vellore,* (1934) 68 M.L.J. 123: I.L.R. 58 Mad. 817 and *Balakrishna Aiyar* v. *Muthammal,* A.I.R. 1925 Mad. 316, considered.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Masulipatam dated 6th August, 1937 and made in C. M. P. No. 57 of 1937 in O. S. No. 82 of 1935.

A. Lakshmayya for Petitioners.

Ch. Raghava Rao for Respondent.

The Court delivered the following

JUDGMENT.—Defendants 1 and 7 in the original suit, who were respondents 1 and 7 in the petition in the Court below, are

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* C. R. P. No 1338 of 1937. 9th February, 1939.

Venkateswara Rao v. Subrahmanyam.

the petitioners in this Court. They seek to revise the order of the Subordinate Judge of Masulipatam dated the 6th August, 1937. By that order the Subordinate Judge restored a suit which had been dismissed for default on 14th January, 1937. The plaintiff's application for restoration was opposed by defendants 1 and 7 on two grounds: (1) that the decision in the suit was not one dismissing the suit for default but that it was a disposal under O. 17, r. 3, Civil Procedure Code and (2) that there were no sufficient grounds to set aside the default order. The Subordinate Judge held on both points against the defendants and restored the suit on terms. This revision petition is directed against the said order and it is urged before me by Mr. Lakshmayya the learned counsel for the petitioners that the disposal was not under O. 17, r. 2 but was one under O. 17, r. 3 and that there is no finding by the Subordinate Judge that the plaintiff had sufficient cause for not appearing on 14th January, 1937, on which date the suit was dismissed.

As regards the first point it is contended that time had been granted to the plaintiff on the day of the previous hearing for production of his witnesses and that therefore the dismissal of the suit on 14th January, 1937, was one made under O. 17, r. 3. What happened on that day was that Mr. P. Lingayya who was appearing for the plaintiff was away from town, that another gentleman Mr. Sitaramayya applied for an adjournment and that being refused he took no further part in the proceedings. He was apparently not instructed to conduct the suit. The plaintiff was then asked to go into the witness-box and give evidence. But he evidently felt that he could not go on with the suit in the absence of any pleader duly instructed to conduct the case on his behalf. On these facts I am satisfied that the case falls under O. 9, r. 9. The mere physical presence of the party has been held not to take the case out of O. 9, r. 9. Similarly, the mere fact that a pleader who had no instructions to conduct the suit asks for an adjournment is not appearance in the suit whether he formally reported no instructions or not, if all that he did that day was to apply for an adjournment and nothing more. This is not a case in which any act was done by the pleader on the date of the hearing in the conduct of the suit. The decision relied upon by Mr. Lakshmayya in *Govindarajulu Naidu v. Imperial Bank of India, Vellore*[1] does not

1. (1934) 68 M.L.J. 123: I.L.R. 58 Mad. 817.

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therefore apply. The other decision relied on by him, namely, *Balakrishna Aiyar* v. *Muthammal*[1] is one in which on the facts of that case the learned Judges held that the pleader did actually appear. I am not prepared to take the decision as laying down any general proposition of law applicable to all cases. In this case, Mr. Sitaramayya was not the Advocate originally engaged by the plaintiff and was apparently instructed only to apply for an adjournment and not to conduct the suit. Adjournment having been refused, it is clear that he took no further part in the proceedings and whether he actually stated that he withdrew or not is immaterial. I hold that there was no appearance so as to preclude an application for restoration of the suit.

On the second question whether the plaintiff had sufficient cause for not appearing or for not being ready on 14th January, 1937, it is no doubt true that there is no clear finding by the Subordinate Judge in the order under revision. He ought to have definitely found whether the plaintiff had sufficient cause for not appearing on 14th January, 1937. But I do not think that any useful purpose will be served by sending the case back for a finding on that point. I have myself gone into the evidence and I find that the plaintiff had sufficient cause for not appearing on 14th January, 1937, in the sense of being ready to go on with the trial of the suit. The mere physical appearance of the plaintiff on the day of the hearing, as already observed, is no appearance in the suit. (Vide *Gopal Rao* v. *Maria Susayya Pillai*[2], and *Mittadar Venkoba Rayar* v. *Mittadar Kadiriappa Goundar*[3].)

The lower Court has given costs to the defendants and that is enough panacea for them. I accordingly dismiss this revision petition but in the circumstances I make no order as to costs.

B. V. V. —— *Petition dismissed.*

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1. A.I.R. 1925 Mad. 316.
2. (1906) 17 M.L.J. 225: I.L.R. 30 Mad. 274.
3. (1914) M.W.N. 344.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

Parimi Sundarasivudu and others.. *Appellants** (*Plaintiffs*)

v.

Balajipalli Adinarayana Sastri .. *Respondent* (*9th Defendant*).

Sundarasivudu v. Adinarayana Sastri.

Hindu Law—Adoption—Authority to adopt—Strict instructions—Exercise in excess of power—Construction of such power—General intention not to be inferred,

Where special instructions are given by a husband, they must be the paramount consideration in testing the validity of an adoption by his widow.

In a case where the terms of the power to adopt contained the sentence 'my wife shall adopt a suitable boy from our family or a boy belonging to the same *gotra* as myself', but the widow adopted a boy who did not satisfy the above qualifications,

Held, (1) that the power to adopt should be strictly pursued.

Rajendra Prasad Bose v. *Gopal Prasad Sen,* (1930) 59 M.L.J. 615: L.R. 57 I.A. 296: I.L.R. 10 Pat. 187 (P.C.), followed.

(2) That the terms of the power did not, in this case, warrant an inference of a general intention to adopt nor were the instructions carried out. Therefore the adoption was invalid.

Case-law reviewed and discussed.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in O. S. No. 13 of 1933.

P. Somasundaram for Appellants.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondent.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This is an appeal from the judgment of the learned District Judge of Rajahmundry dismissing the plaintiffs' suit for possession of a house which is item 2 of Sch. A to the plaint. The plaintiffs claimed title to the property through one Surayya who was alleged to be the adopted son of one Subbarayadu. The adoption was said to have been made by the widow of Subbarayadu in pursuance of an authority given to her by her husband by his last will and testament dated 7th July, 1882. Both the factum and the validity of the adoption were denied in the lower Court, but during the trial the factum was not seriously disputed, but only the validity of the adoption was put in issue. The learned Judge came to the conclusion that the adoption was invalid on the ground that it did not

* Appeal No. 118 of 1936. 17th July, 1939.

conform to the authority given by the husband. The substantial question for decision in this appeal is whether the view taken by the learned Judge is sound and this turns on the construction of the said authority.

It is contained in one sentence which runs thus:

"My wife shall adopt a suitable boy from our family or a boy belonging to the same *gotra* as myself."

The said Surayya was no other than the brother of the widow of Subbarayadu and it is conceded that he did not belong to the family of Subbarayadu nor had the same *gotra* as Subbarayadu. As observed by the Privy Council in *Rajendra Prasad Bose* v. *Gopal Prasad Sen*1, it is well-established law that the power to adopt given to a wife must be strictly pursued. There is no doubt that the power in this case has not been strictly pursued, but it is contended by Mr. Somasundaram that, from the fact of Subbarayadu having given a power to adopt, it must be inferred that there was a general intention on the part of Subbarayadu to be represented by an adopted son, that the direction given to his wife to adopt a boy from the family or a boy belonging to the same *gotra* as the testator was only indicative of a preference, and that if it was not possible for the widow to comply with the said direction, it would be open to her to adopt any other suitable boy of her own choice. It seems to us that this contention is untenable. It may be open to a Court to infer a general intention to adopt and construe that general intention rather liberally where there are no special instructions given by the husband or, possibly in cases where such instructions were carried out and an adoption made in accordance therewith but the adopted boy died and another adoption was made. In *Suryanarayana* v. *Venkataramana*2, the Judicial Committee observe thus:

"Their Lordships agree with the learned Judges of the High Court in the opinion that the main facts for consideration in these cases is the intention of the husband. Any special instructions which he may give for the guidance of his widow must be strictly followed; where no such instructions have been given, but a general intention has been expressed to be represented by a son, their Lordships are of opinion that effect should, if possible, be given to that intention. This more liberal rule has been followed by the High Court of Bombay, as well as in Madras, and is not without support in Bengal."

It is clear from this judgment that where there are special instructions given by the husband, they must be the paramount

1. (1930) 59 M.L.J. 615: L.R. 57 I.A. 296: I.L.R. 10 Pat. 187 (P.C.).
2. (1906) 16 M.L.J. 276: L.R. 33 I.A. 145: I.L.R. 29 Mad. 382 at 388 (P.C.).

Sundara-sivudu v. Adinarayana Sastri.
——
Venkata-ramana Rao, J.

consideration in testing the validity of the adoption. In this case the terms of the power do not warrant an inference of a general intention to adopt nor were the instructions carried out.

A number of cases were relied on by Mr. Somasundaram, but it will be found in most of them the widow carried out the instructions and did adopt a boy in accordance therewith but the adopted boy died and the question arose whether her power was exhausted by the first adoption or whether it was open to her to make a second adoption. The Courts took a liberal view that the testator must be taken to have expressed a general intention that he should be represented by an adopted son. The cases in *Suryanarayana* v. *Venkataramana*[1], *Chenga Reddi* v. *Vasudeva Reddi*[2], *Sindigi Lingappa* alias *Sidda Lingappa* v. *Sindigi Sidda Basappa*[3] and *Yadeo* v. *Namdeo*[4], are all of that category. Some of the Privy Council cases on which Mr. Somasundaram relied are all distinguishable on the facts of those cases. In *Mustaddi Lal* v. *Kundan Lal*[5], the testator directed that one of the sons of one Hardeodas should be adopted. The boy that was adopted was not a boy living at the date of the authority given to adopt. It was contended that the testator meant that the boy who was then living was the boy intended to be adopted and not a boy born thereafter. Their Lordships were of the opinion that the special instructions which the testator gave were that one of the family of Hardeodas should be adopted and they were complied with. Therefore it was a case in which the instruction given by the testator was strictly pursued. The observation in *Bhagwat Koer* v. *Dhanukdhari Prasad Singh*[6], to the effect that the Courts must not be astute to defeat an adoption but should uphold it as far as possible where it is not in excess of the power was relied on but, where it is in excess of the power, Courts have no option but to declare an adoption invalid. In this case it is our opinion that the adoption was in excess of the power. On a construction of the will it is clear that the instruction of the testator was not to adopt any boy of the widow's choice but that the widow should adopt a boy possessing certain qualifications; namely, that he should belong to his family or failing which he ought to belong to the same *gotra* as himself. The power, as already observed

1. (1903) 13 M.L.J. 318: I.L.R. 26 Mad. 681.
2. (1915) 29 M.L.J 144. 3. (1916) 32 M.L.J. 47.
4. (1921) 42 M.L.J. 219: L.R. 48 I.A. 513: I.L.R 49 Cal. 1 (P.C.).
5. (1906) 16 M.L.J. 174: L.R. 33 I.A. 55: I.L.R. 28 All 377 (P.C.).
6. (1919) 37 M.L.J. 513: L.R. 46 I.A. 259: I.L.R. 47 Cal. 466 at 479 (P.C.).

Sundara-sivudu v. Adinarayana Sastri. — Venkata-ramana Rao, J.

by us, was contained in one sentence and the qualification laid down by the testator is part of the power given to his wife. It is a condition annexed to the power. As observed by the Privy Council in more than one decision, a condition annexed to such a power should be strictly complied with, or else the adoption would be invalid. The case in *Rajendra Prasad Bose* v. *Gopal Prasad Sen*[1] is a case in point. In that case the testator directed a particular boy to be adopted and, if that boy was not available, another boy should be adopted with the permission of his father. He also expressed his general intention that his estate should be inherited by the adopted son. The father of the testator died and twelve years after the father's death the widow made an adoption and the question was whether the adoption was valid. Their Lordships of the Privy Council held that the adoption not having been made with the permission of the father, the adoption was invalid because that was a condition annexed by the testator to the authority given to his widow. It will be seen from the terms of the will that there was an intention that his estate should be represented by an adopted son, but still their Lordships held that the condition annexed to the power not having been complied with the adoption cannot be upheld. Therefore the adoption in this case cannot be held to be valid as the condition imposed by the testator was not complied with. In this view we do not think it necessary to examine the other contention of Mr. Somasundaram that the widow made every possible attempt to make the adoption but failed to secure a boy of the qualifications required by the testator and therefore the adoption must be upheld. The contention is that we must so read the will as to hold that, if the conditions imposed by the testator were not possible, of fulfilment, the widow was permitted to adopt a boy of her own choice by adding the words 'if possible' to the power conferred. A contention of this nature was negatived by their Lordships of the Privy Council in *Rajendra Prasad Bose* v. *Gopal Prasad Sen*[1], on the ground that a Court ought not to add words where the intention of the testator is clearly expressed. We are therefore unable to uphold the contention of Mr. Somasundaram.

In the result the appeal fails and is dismissed with costs. The memorandum of cross-objections is also dismissed with costs.

Appeal dismissed. Memo. of cross-objection dismissed.

K. C.

1. (1930) 59 M.L.J. 615: L.R. 57 I.A. 296: I.L.R. 10 Pat. 187 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

C. Kanniah Maistry and others .. *Petitioners* (Accused).*

Kanniah Maistry, *In re.*

Madras Gaming Act (III of 1930), Ss. 4 (2) and 6—'Gaming' definition of—Difference between being present at a place of gaming and actually betting—Grounds necessary to invoke S. 6.

The definition of 'gaming' in S. 3 of the Madras Gaming Act (III of 1930) has included only the actual wagering or betting on a horse race, and payment in fulfilment of such agreement cannot be regarded as part of such betting. [Vide *Bradford* v. *Dawson*, (1897) 1 Q.B. 307.]

There is wide difference between a person being present at a particular place for the purpose of gaming and his gaming at the place. It is only the latter act that is constituted an offence under S. 4 (*ii*) of the Act and not the former. Therefore S. 6 of the Act cannot be invoked to sustain a conviction under S 109, Indian Penal Code, read with S. 4 (2) of the Gaming Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Saidapet dated 10th September, 1938, and made in Crl. Ap. No. 15 of 1938 preferred against the order of the Court of the Stationary Sub-Magistrate of Saidapet in C. C. Nos. 845 to 847 of 1938.

K. S. Jayarama Aiyar, G. Gopalaswamy and *M. C. Rajagopalan* for Petitioners.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The petitioners were prosecuted in this case for an alleged offence under S. 4 (2) of the Madras Gaming Act, 1930. The learned Appellate Magistrate however observed that there was no betting at the time of the night when the instruments of betting were seized by P.W. 1 under S. 5 of the Act and that the petitioners were there only for the purposes of payment or sharing of profits. But he has held that the petitioners must be regarded as accessories either before or after the betting and found them guilty under S. 109, Indian Penal Code, read with S. 4 (2) of the Gaming Act. This is clearly wrong as no particular person is found to have committed the offence under S. 4 (2) of the Act, which the petitioners in this case could be said to have abetted. The learned Public Prosecutor has not attempted to support the conviction on this ground.

He urged however that the conviction could be upheld on two other grounds. First, he contended that payment of money

* Crl. R.C. No. 54 of 1939. (Crl. R. P. No. 50 of 1939). 25th August, 1939.

or sharing of profits in pursuance of betting on a horse race is also gaming as such distribution of prizes and dividends to winners is a fulfilment of the betting or wagering agreements. But the definition of 'gaming' in S. 3 of the Act has included only the actual wagering or betting on a horse race, and payments in fulfilment of such agreement cannot be regarded as part of such betting. (See *Bradford* v. *Dawson*[1].) Kanniah Maistry, *In re.*

The learned Public Prosecutor next contended, that having regard to the statutory rule of evidence enacted in S. 6 of the Act, the conviction of the petitioners can be sustained as supported by evidence. S. 6 only enacts, so far as it is material for the purposes of the case, that gaming instruments found in any place entered or searched under the provisions of S. 5 shall be evidence that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the police officer. But, as I understand this section it does not take the prosecution in this case far enough, for it does not say that the mere finding of *gaming* instruments in such a place shall be evidence of *gaming*. There is obviously a wide difference between a person being present at a particular place *for the purpose* of gaming and his *gaming* at the place. It is only the latter act that is constituted an offence under S. 4 (*ii*) of the Act and not the former. I am therefore of opinion that S. 6 of the Act cannot be invoked to sustain the conviction in the circumstances of this case. I set aside the conviction and sentence as well as the order of confiscation. The fine paid by the petitioners as well as the amount seized from them will be refunded.

K.C. —— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE STODART.

Aryakkandi Kunhi Kannan .. *Appellant** (*Plaintiff*)

v.

Kottiath Vazhayil Devaki and others .. *Respondents* (*Defendants Nos. 2 to 5, 1, 6 to 13, 17 to 21, 15, 16 and 22 to 25*).

Malabar tarwad—Suit by member within three years of his attaining majority—Gift by predecessor senior member—Twelve years elapsing before Kunhi Kannan *v.* Kottiath Vazhayil Devaki.

1. (1897) 1 Q.B. 307.

* S. A. No. 599 of 1935. 26th January, 1939.

Kunhi Kannan v. Kottiath Vazhayil Devaki.

suit filed to set aside the gift—Limitation to present suit—Limitation Act (IX of 1908), Ss. 6 and 7.

Where a plaintiff member of a Malabar tarwad within three years of his obtaining majority filed a suit to recover certain property gifted away and where his aunt Kunhimani, the senior member of the tarwad, had allowed twelve years to elapse without filing a suit to set aside the gift.

Held, (i) that, during the period of limitation, Kunhimani and the plaintiff were not persons, within the meaning of S. 7, jointly entitled to institute a suit because Kunhimani herself was party to the gift and would have had to plead that she was induced to execute it by fraud or mistake, and

(ii) that in any case, Kunhimani and plaintiff being joint owners, Kunhimani could not give a discharge without the concurrence of the plaintiff. Her failure to take steps to cancel the gift was not sufficient to perfect the title of the donee.

Ganga Dayal v. *Mani Ram*, (1908) I.L.R. 31 All. 156, followed.

Parameswaran Nambudripad v. *Sankaran Nambudripad*, (1914) M.W.N. 689, doubted and distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Tellicherry in Appeal Suit No. 40 of 1933 (A.S. No. 141 of 193?—District Court) preferred against the decree of the Court of the District Munsif of Cannanore in Original Suit No. 562 of 1930.

P. V. Raghavan for Appellant.

V. Ramaswami Aiyar and *N. G. Krishna Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal involves the decision of an interesting question of law. The appeal arises out of a suit to set aside alienations of property belonging to a Malabar tarwad and to recover property. There were three such alienations, but at the hearing of this appeal only one remains in controversy, namely, a gift to certain persons evidenced by a registered gift deed Ex. A in the suit. The persons who executed that deed were Arayakandy Kottiah Kannan executing it as karnavan of the tavazhi, secondly his niece Arayakandi Kunhimani and lastly Kannan purports to execute it on behalf of Kunhi Kannan the present plaintiff who was then a child of 4 years. That gift in form is a gift by all the existing members of the tarwad or tavazhi. Kannan described in this document as the karnavan died in 1919 and his niece Kunhimani was left in sole management of the tarwad property. The plaintiff came of age in 1927 and he filed the suit now under appeal in 1930 within three years of his attaining majority. He files the suit in the capacity of karnavan of the tarwad and he impleads

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as the first defendant his aunt Kunhimani as being the only other member of it and the suit is, as I have said, to recover the property on behalf of the tarwad. Both the Courts have held that the gift as such could not be supported, but in the lower appellate Court the learned Subordinate Judge, differing from the trial Courts, held that the plaintiff's suit was barred by time. This second appeal is that the lower appellate Court was wrong.

The gift was taken as having been effected on the date of Ex. A, namely, on the 14th January, 1913, and the time for filing a suit was taken as being 12 years in accordance with the provisions of Art. 142 of the Limitation Act; the suit therefore should have been brought before the 14th January, 1925. But on that date the plaintiff was, as I have explained, a minor and under S. 6 of the Indian Limitation Act he was entitled to bring the suit within three years of his attaining majority. There is no dispute about that. Other things being equal the provisions of S. 6 of the Limitation Act certainly apply to the plaintiff. But the learned Subordinate Judge has held that the plaintiff's case is governed by S. 7. In other words, this was a case where there was a person entitled to institute the suit jointly with the plaintiff who could give a discharge without the concurrence of the plaintiff. That person according to the learned Subordinate Judge is no other than Kunhimani, the aunt of the plaintiff who was a party to the gift deed, and who admittedly took no steps to set it aside.

The ground of this appeal is twofold. First, Kunhimani having herself executed the gift deed could not bring the suit on the same title as the plaintiff. She could not file a suit as a junior member of the tarwad to set aside an alienation made by the karnavan without her consent. She would have had to plead in addition that her consent had been obtained by force or fraud or in some other way sufficient to avoid the contract so far as she was concerned. The second argument is that Kunhimani could not give a discharge within the meaning of S. 7 of the Limitation Act without the concurrence of the plaintiff.

I agree with the learned Counsel for the appellant in respect of the first ground. I do not see how Kunhimani and the plaintiff can be held to be jointly entitled to file a suit when the position of Kunhimani relative to this gift is entirely

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different from that of the plaintiff. That to my mind is the fundamental difficulty with which the respondent is faced in endeavouring to apply to the case the provisions of S. 7. Learned Counsel for the respondent contends however, that in 1919 Kunhimani became the karnavathi herself and in that capacity, ignoring all together the fact that she had joined in the gift, she could have filed a suit to set it aside. No case is cited in support of this interesting contention. There are cases in which it has been held that the position of a karnavan in a Malabar tarwad is not analogous to that of a trustee and I should hesitate to say that the karnavan in all cases has the power which a trustee has under the common law of suing to prevent injury to the trust property even when that injury has been caused by his own act. But taking the proposition as it stands, namely, that when a person comes into the position of a karnavan he can sue to set aside his contract made before he attained that position, without pleading that his consent was obtained by illegal means, there is, as I have said no authority, and I think that such authority would be available if the point had ever been decided in the sense contended for by the learned Counsel for the respondent. After all, much property is held in this country by senior members of Hindu families representing not only themselves but the junior members who have a joint interest in the property. If a suit had ever been filed by a family manager to set aside his own act done before he became the manager and if that suit had been decided in his favour otherwise than on the ground that he had been illegally induced to do the act the case I think would have reached one or other of the High Courts and would have been available in the law reports. On this first point therefore I hold that the plaintiff and Kunhimani were not jointly entitled to file a suit of this nature because Kunhimani, in addition to pleading that she was a junior member of the tarwad, would have had to plead that her consent to the gift was not voluntary but had been obtained by illegal means. The learned Subordinate Judge thought that because a suit of this nature could be filed by Kunhimani, therefore she was jointly entitled within the meaning of S. 7 along with the plaintiff to file a suit to set aside this gift. My finding on that point is that I am in entire agreement with the learned Counsel for the appellant that so far as the capacity to file a suit is concerned, the title of Kunhi-

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mani who executed the document and the title of the plaintiff who was not a party to it are not joint but separate and distinct.

The second ground is I think even more cogent. It is contended by learned Counsel for the appellant that Kunhimani could not, within the meaning of S. 7, have given a discharge without the concurrence of the plaintiff. The expression "giving a discharge" must I think mean with reference to the facts of this case "remaining silent until the time to question the gift by suit had expired." There is no doubt that Kunhimani did this but, as contended by the learned Counsel for the appellant, in doing so she cannot be held to have acted with the concurrence of the plaintiff nor can her failure to take the necessary action be regarded by itself as sufficient to perfect the title of the donees. In the case reported in *Ganga Dayal* v. *Mani Ram*[1], it was held that as between two brothers in a joint Hindu family the elder by failing to file a suit to set aside an alienation had not thereby given a discharge which was binding on his younger brother. It was held on the contrary that the latter was entitled to sue under S. 6 of the Indian Limitation Act within three years of his attaining majority. The learned Judges in that case (Mr. Justice Richards and Mr. Justice Griffin) held that the elder brother was not capable of giving a discharge without the concurrence of the younger and if I may say so with great respect, I agree with those Judges. Where there are joint owners of property each being entitled to the whole equally with the others, I do not see how the negligence of one can take away the statutory rights of the rest. The Privy Council to which the case just cited was appealed have not discussed the point in any detail. The respondent did not appear in the Privy Council and the decision was "on the question of limitation their Lordships concur with the High Court." A case has been cited of a Bench of this Court consisting of Mr. Justice Sadasiva Aiyar as he then was and Mr. Justice Napier in which the former construed S. 7 of the Limitation Act in the same sense as the learned Subordinate Judge has done here. That case was even stronger than the present case. The first defendant in that case had executed the document as the karnavan of the tarwad and Mr. Justice Sadasiva Aiyar held that provided that he alleged that his consent was fraudulently obtained he could have filed the suit to set aside the

1. (1908) I.L.R. 31 All. 156.

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alienation and on that account must be deemed to be a person jointly entitled with the plaintiff who was a junior member of the tarwad. Mr. Justice Napier did not agree with that opinion and it is not apparent how the question under S. 7 of the Limitation Act came to be discussed by Mr. Justice Sadasiva Aiyar, for it was not necessary to the decision of the case. With great respect I find it impossible to concur in that opinion. S. 7 of the Limitation Act is a disabling section. S. 6 confers on persons who are entitled to property or interests in property and who are incapacitated from suing out their rights in Court, the right to file suits within a reasonable period after the incapacity has disappeared. S. 7 so far as it takes away that right must I think be strictly construed and before dismissing the suit of a minor which is in time within the meaning of S. 6 the Court should be quite certain that the disabling provisions of S. 7 apply to his case.

The second appeal in respect of the gift evidenced by Ex. A is allowed. In other respects the appeal has not been pressed and it is dismissed. Each party will bear his or her own costs throughout.

Leave to appeal is granted.

K. C. —— *Appeal in part allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

K. Sundaresa Aiyar .. *Appellant** (*Plaintiff*)

v.

The Sarvajana Sowkiabivirdhi Nidhi, Limited, by Secretary P.S. Manikkam Chettiar .. *Respondent* (*Defendant*).

Sundaresa Aiyar v. Sarvajana Sowkiabivirdhi Nidhi, Ltd.

Specific Relief Act (I of 1877), S. 42—Suit for declaration of title—Consequential relief omitted in the prayer portion—Suit whether maintainable.

Where certain jewels, belonging to the appellant, as the result of certain other legal proceedings between him and the respondent company were in *custodia legis*, that is, were deposited in the lower Court and the appellant claiming them as his own prayed for a declaration of his title, but did not include a prayer in the plaint for any consequential relief,

Held, that since the Court should have delivered them to whomsoever showing in himself a title to them, it was not necessary for the appellant to ask for anything more than a mere declaration in the plaint.

* L. P. A. No. 80 of 1937. 15th March, 1939.

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Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura v. *The Managing Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura,* (1938) 1 M.L.J. 359: L.R. 65 I.A. 106: I.L.R. 1938 Lah. 63 (P.C.), followed.

Vedanayaga Mudaliar v. *Vedammal,* (1904) 14 M.L.J. 297: I.L.R. 27 Mad. 591 and *Malaiyya Pillai* v. *Perumal Pillai,* (1911) 21 M.L.J. 1022: I.L.R. 36 Mad. 62, approved.

Appeal preferred under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Horwill dated 10th September, 1937 and passed in S.A. No. 1144 of 1936 preferred against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 128 of 1936 (O. S. No. 507 of 1934, District Munsif's Court, Coimbatore).

K. Rajah Aiyar and *C. S. Krishnamurthi Aiyar* for Appellant.

K. V. Ramachandra Aiyar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant filed a suit in the Court of the District Munsif of Coimbatore for a declaration that he was the absolute owner of certain jewels. At the time of the suit the jewels were in possession of the Court of the Sub-Divisional First Class Magistrate of Coimbatore. No consequential relief was asked for, and the question which we are called upon to decide is whether the suit could be maintained in view of the proviso to S. 42 of the Specific Relief Act, which says that no Court shall make a declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. In 1932 the appellant was desirous of selling the jewels and he was approached by one Subba Rao who represented that he knew of a prospective purchaser. On the representation that he desired to show the jewels to the prospective purchaser the appellant handed them over to him. This was on the 3rd July, 1932. Having obtained possession of the jewels Subba Rao pledged them for a total sum of Rs. 1,000 with the respondent company, which carries on a banking business in Coimbatore. When the appellant came to hear of this, he complained to the police and as the result Subba Rao was charged with criminal breach of trust under S. 409 of the Indian Penal Code. On the 26th of October, 1932, Subba Rao was convicted and sentenced to two years' rigorous imprisonment by the Sub-Divisional Magistrate, who directed that the jewels should be returned to the respondent company on security being furnished. The appellant appealed to the Additional Sessions Judge of Coimbatore

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against the order of the Sub-Divisional Magistrate. The appeal was allowed and the Additional Sessions Judge directed that the jewels should be delivered to the appellant unconditionally. In accordance with this order the appellant obtained possession of the jewels from the Sub-Divisional Magistrate on the 21st December, 1932. In the meantime the respondent company had filed an application to this Court for the revision of the order of the Additional Sessions Judge. The application was heard on the 10th August, 1933 and was successful. This Court directed that the jewels should be delivered to the respondent company. The appellant did not obey the order and the respondent company was compelled to apply to the Sub-Divisional Magistrate to enforce it. The Sub-Divisional Magistrate accordingly issued a summons to the appellant calling upon him to produce and surrender the jewels. This the appellant did on the 11th June, 1934, but on the same day filed the suit out of which this Letters Patent Appeal arises, and obtained an interim order from the District Munsif directing the Sub-Divisional Magistrate to deposit the jewels in the District Munsif's Court pending the decision of the suit. The Sub-Divisional Magistrate complied with this order and the jewels have since remained in the District Munsif's Court.

In the written statement the respondent company pleaded that it was a pledgee of the jewels in good faith and was entitled to the benefit of the pledge by reason of the provisions of Ss. 178 and 178-A of the Contract Act. The respondent company also pleaded that the suit was bad because the appellant had omitted to include in his plaint a prayer for possession of the jewels. The District Munsif found that the respondent company had accepted the pledge of the jewels in good faith and that it was protected by Ss. 178 and 178-A of the Contract Act, but dismissed the suit on the ground that the appellant was not entitled to maintain it without a prayer for consequential relief. The appellant appealed to the Subordinate Judge of Coimbatore who considered that the respondent company had not acted in good faith and therefore was not entitled to the benefit of the pledge, but he agreed with the District Munsif that the suit was not maintainable in view of the proviso to S. 42 of the Specific Relief Act. The result was that he affirmed the decree dismissing the suit. The appellant then filed an appeal to this Court. This

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was heard by Horwill, J., who also held that the suit was not maintainable without a prayer for consequential relief.

The learned Judge discussed the decisions of this Court in *Vedanayaga Mudaliar* v. *Vedammal*[1], *Malaiyya Pillai* v. *Perumal Pillai*[2] and *Natesa Aiyar* v. *Mangalathammal*[3] and came to the conclusion that the law was correctly stated in the case last mentioned. We do not share this opinion, but before examining the cases cited there is an earlier decision of this Court, which calls for mention, namely, the decision of Turner, C. J. and Muttuswami Aiyar, J., in *Ramanuja* v. *Devanayaka*[4]. In that case Turner, C. J., observed:

> "Possession, whether it is of property or of an office may be regarded either as a physical fact, or in contemplation of the legal right to it, and it is in the former sense it should be understood in coming to a finding under S. 42 of the Specific Relief Act as to whether the plaintiff is, or is not, able to seek further relief. It may be observed that the term relief pre-supposes the actual withholding of the fruit of the right of which a declaration is sought, and not its mere denial. A declaratory decree is all that a plaintiff requires when he has no need of the assistance of the Court to replace him in possession."

In our opinion the law is here correctly stated.

In *Vedanayaga Mudaliar* v. *Vedammal*[1], the facts were these. A minor was entitled to a certain property which was in the possession of his mother. The plaintiff filed an application under the Guardian and Wards Act for an order appointing him guardian of the property of the minor. Pending the hearing of this application he was appointed the receiver of the property and in this capacity he took possession of it from the mother. The validity of the order appointing the plaintiff receiver was challenged in an appeal to this Court, which held that the order had been wrongly passed and directed that the mother should be replaced in possession of the property. The minor was murdered and the receiver filed a suit for a declaration that he was entitled to the property of the minor as the nearest reversioner. The mother pleaded that the suit could not be maintained without a prayer for possession, but the Court held that the suit was maintainable. At the time the suit was filed the possession of the property was neither with the plaintiff nor with the mother, but was in *custodia legis*. The fact

1. (1904) 14 M.L.J. 297: I.L.R. 27 Mad. 591.
2. (1911) 21 M.L.J. 1022: I.L.R. 36 Mad 62.
3. (1933) 38 L.W. 194.
4. (1885) I.L.R. 8 Mad. 361.

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that it was in the possession of the plaintiff as receiver made no difference. That was a mere accident. As the possession was the possession of a Court all that was necessary was a declaration of title. That seems to us to be exactly the position here.

In *Malayiya Pillai* v. *Perumal Pillai*[1], it was held that before the proviso to S. 42 of the Specific Relief Act applied it must be shown that the defendant was in possession, and that as against him the plaintiff could obtain an order for delivery of possession. In that case proceedings were taken under Ss. 145 and 146 of the Code of Criminal Procedure and a receiver was appointed to hold possession of the property in dispute. The order was subsequently cancelled by this Court and the receiver was directed to deliver possession to the defendant. At the time the suit was filed the property was still in the possession of the receiver. It was held that in such circumstances there was no necessity to claim consequential relief. This decision is in complete accord with the decision in *Vedanayaga Mudaliar* v. *Vedammal*[2]. These appeals were heard by Division Benches and are binding on us. But there is also a decision of the Privy Council to the same effect: *Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura* v. *The Managing Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura*[3]. The suit there had reference to a school. At the time the suit was filed the school was in the possession of the founder, who was merely holding it until certain disputes had been decided by the Court. He was willing to hand the property over to those declared to be entitled to it. The plaintiffs merely asked for a declaratory decree. The Subordinate Judge considered that it was necessary to ask for possession his reason being that the plaintiffs were neither in possession nor in control of the management of the school. As a decree for possession was not sought he dismissed the suit. On appeal the High Court held that the Subordinate Judge was wrong. The defendants were not in possession or in a position to deliver possession of the properties and there was no further relief available to the plaintiffs against the defendants. The Judicial Committee agreed with the High Court.

I will now state the facts in *Natesa Aiyar* v. *Mangalathammal*[4]. There the plaintiff was the widow of one Viswanatha

1. (1911) 21 M.L.J. 1022: I.L.R. 36 Mad. 62.
2. (1904) 14 M.L.J. 297: I.L.R. 27 Mad. 591.
3. (1938) 1 M.L.J. 359: L.R. 65 I.A. 106: I.L.R. 1938 Lah. 63 (P.C.)
4. (1933) 38 L.W. 194.

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Aiyar, who was also survived by his father and a brother. A mortgage had been executed in favour of the plaintiff's husband and on his death his father brought a suit on the mortgage and obtained a decree, as a result of which certain moneys were brought into Court towards the satisfaction of the decree. The father instituted a suit as manager of the joint family and claimed that the mortgage formed part of the joint estate. The father died without withdrawing the moneys from Court and the surviving son then applied for payment out to him of the moneys as the legal representative of his father. The plaintiff objected to this and claimed that the mortgage was the separate property of her husband. She then filed a suit to obtain a declaration of her right to the monies. Pakenham Walsh, J., held that a prayer for consequential relief was essential. He considered that the case was distinguishable from *Vedanayaga Mudaliar* v. *Vedammal*[1] and *Malaiyya Pillai* v. *Perumal Pillai*[2]. It is true that the decision in *Natesa Aiyar* v. *Mangalathammal*[3] was accepted as being correct in a Letters Patent Appeal which followed, but no reasons were given in the judgment. We do not agree that *Natesa Aiyar* v. *Mangalathammal*[3] was distinguishable. The question which arose there was really the same question which arose in *Vedanayaga Mudaliar* v. *Vedammal*[1] and in *Malaiyya Pillai* v. *Perumal Pillai*[2] and if they were rightly decided, *Natesa Aiyar* v. *Mangalathammal*[3] was wrongly decided. Inasmuch as the judgment of Pakenham Walsh, J., was approved of on appeal we have been asked to refer the present appeal to a Full Bench. It is not necessary to do so as the judgment of the Privy Council in *Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura* v. *The Managing Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura*[4] shows that *Vedanayaga Mudaliar* v. *Vedammal*[1] and *Malaiyya Pillai* v. *Perumal Pillai*[2] were rightly decided.

The fact that when the present suit was filed the jewels were in the possession of the Sub-Divisional Magistrate, who as the result of the decision of this Court in the revision application was bound to hand them to the respondent company unless otherwise directed, makes no difference. All the Court has to consider is who has possession. The jewels have not been in

1. (1904) 14 M.L.J. 297: I.L.R. 27 Mad. 591.
2. (1911) 21 M.L.J. 1022: I.L.R. 36 Mad. 62.
3. (1933) 38 L.W 194.
4. (1938) 1 M.L.J. 359: L.R. 65 I.A. 106: I.L.R. 1938 Lah. 63 (P.C.).

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the possession of the respondent company since 21st December, 1932. At the time of the institution of the suit the jewels were in *custodia legis* and have remained in *custodia legis*. The Court must deliver them to the person who shows a title. Therefore it was not necessary for the appellant to ask for anything more than a mere declaration. The appeal will be allowed and a decree passed in terms of the prayer with costs throughout.

K. C. —— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

A. Sundaram .. *Petitioner.**

F.B.

Sundaram, *In re.*

Advocate—Struck off rolls—Application for readmission—Grounds for—Mere opinion certificates about his fitness insufficient.

Before readmitting an advocate, who has been ordered to be struck off the rolls of advocates for misappropriation, to the legal profession, the Court must be fully satisfied that the petitioner has fully regained his character and is fitted for readmission into the ranks of an honourable profession. Mere opinions expressed by gentleman who have given the petitioner certificates that he is a fit and proper person for readmission without stating the grounds on which the opinions are based are not sufficient.

Petition praying that in the circumstances stated therein the High Court will be pleased to reconsider the orders of the High Court dated 9th February, 1931, 29th September, 1933, 3rd May, 1937 and 21st October, 1938 and readmit him to the roll of Advocates.

The petitioner in person.

The Court made the following

Leach, C.J.

ORDER. *The Chief Justice.*—The petitioner applies to be readmitted as an advocate of this Court. In August, 1930, he was suspended from practice for misappropriation of moneys belonging to a client. On the 9th February, 1931, his name was struck off the rolls as the result of further misappropriation of client's money. He was adjudicated an insolvent on the 29th October, 1925. His liabilities were Rs. 90,000 and he had no assets. On the 11th April, 1938, my learned brother, Mockett, J., granted him his discharge on the grounds that he

* C.M. P. No. 3207 of 1939. 21st August, 1939.

would be condemned to insolvency for life if it were not granted. The petitioner had no prospects of being able to pay anything to his creditors and the discharge was unopposed. In 1933 the petitioner applied to the Court to review its order striking his name off the roll of advocates, but the application was dismissed on the 29th September, 1933, by a Full Bench composed of Beasley, C.J. and Sundaram Chetti and Stone, JJ. In support of that application the petitioner filed three certificates of character two of them being signed by individual members of the Bar and the third being a joint certificate signed by 46 members of the Bar. The Bench refused the petition for two reasons. The first was that the Court required, before re-admitting a person to the profession, solid facts and cogent reasons, not merely the opinions expressed by gentlemen who had given the petitioner certificates. It was not enough to say that the petitioner was a fit and proper person for re-admission without stating the grounds on which the opinion was based. The second reason was that the petitioner was still an insolvent.

The petitioner has now obtained his discharge, but the first ground of the Full Bench for refusing to re-admit the petitioner still exists. The petitioner has filed three further certificates, but these do not carry the matter further. Since he was suspended from practice in 1930 the petitioner has had no employment. According to his statement in Court, he has throughout been supported by his daughter. Before the Court could re-admit an advocate who has been struck off the rolls for misappropriation the Court must be fully satisfied that the petitioner has fully regained his character and is fitted for re-admission into the ranks of an honourable profession. Mere opinion is not sufficient.

Here there are no cogent reasons for the Court holding that the petitioner has become fitted to be re-admitted as an advocate. He has not attempted to obtain any employment. In fact he has stated that he refused two offers of employment made to him. One offer was employment as manager of an estate and the other was employment in an insurance company. The re-admission of an advocate who has been struck off the rolls for misappropriation does not depend on the fact that he has been suspended or struck off the rolls for several years. He can only be re-admitted if he can show that he has become worthy to act as an advocate. In deciding such matters the Court has a duty to the public and where an

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Sundaram, *In re.*

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advocate has been guilty of misappropriation it must be shown that there is no likelihood of such an offence being committed again. In view of the previous decision and the fact that the position is now the same as it was then except that the petitioner has obtained his discharge, I consider that the Court would not be justified in allowing this petition.

Mockett, J.—I agree.

Krishnaswami Aiyangar, J.—I agree.

S. V. V.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

In the matter of K. Jagannatha Aiyar, a Vakil of the High Court, Madras.

K. Jagannatha Aiyar .. *Petitioner.**

F.B.

Jagannatha Aiyar, *In re.*

Advocate—Struck off for misconduct—If Court can reinstate him.

Though an advocate has once been struck off the rolls for an act done by him amounting to professional misconduct, it does not preclude the Court from reinstating him when adequate punishment has been imposed and he has shown by subsequent conduct that he has rehabilitated himself in such a manner that he is fitted to be admitted into the profession again.

Petition praying that in the circumstances stated therein the High Court will be pleased to review the order dated 15th October, 1931, disbarring him and reinstate him to the roll of the Advocates.

T. R. Venkatarama Sastri and *K. S. Sankara Aiyar* for Petitioner.

The Court made the following

Leach, C.J.

ORDER. *The Chief Justice.*—The name of the petitioner was struck off the roll of advocates of this Court on the 15th October, 1931, as it had been shown that he had misappropriated a sum of Rs. 4,800 belonging to a client. The petitioner, who had considerable property, got into financial difficulties in 1927 and on the 14th February of that year he was adjudicated an insolvent. On the 25th April, 1927, he was suspended from practice. The delay in the passing of the order striking the petitioner's name off the rolls was due to the fact that the Court desired to

* C. M. P. No. 3117 of 1939. 21st August, 1939.

F.B.

Jagannatha Aiyar, *In re.*

Leach, C.J.

know the position disclosed by the insolvent's public examination before arriving at a decision. The justice of the order of this Court striking the petitioner's name off the roll of advocates is not and could not be questioned. It is said, however, that during the twelve years that have elapsed since the petitioner was first suspended he has worked hard to rehabilitate himself and has succeeded in establishing an honourable reputation. The petitioner rendered all assistance that he could to the Official Assignee and secured his discharge on the 8th December, 1930. After his suspension from practice he obtained a clerkship in the office of Mr. Shamanna, a well-known solicitor of Madras, and retained this post until 1934 when he obtained a clerkship with Messrs. King and Partridge, also well-known solicitors of this city. He has continued in their service ever since. Mr. Shamanna and Messrs. H. Maitland Jones and Leslie D. Miller of Messrs. King and Partridge have given the petitioner certificates of character. Mr. Shamanna says that while he was employed by him the petitioner was dealing with his cases and with his clients and that he found his conduct and dealings both with his clients and the other members of his establishment to be satisfactory, and guided by a high sense of probity. Mr. Maitland Jones says that while in the employment of his firm the petitioner has been entrusted with important work. Mr. Maitland Jones had many opportunities of observing his conduct which he says was excellent and in addition his probity was above suspicion. Mr. Miller says:

"From my knowledge of him, in spite of what happened in the past, I personally would place every confidence in his integrity."

The petitioner has also filed a certificate given to him by Mr. Nugent Grant in April of this year. Mr. Grant says that the petitioner has throughout the period of his exclusion from the profession exhibited a consciousness of the injury he has done to himself and the profession of which he was once an honourable member. Mr. Grant believes that he had made every endeavour to atone for his lapse from morality.

The act of professional misconduct committed by the petitioner was a very grave one and it was not possible to allow him to continue practising in an honourable profession. But that does not mean that the Court is precluded from reinstating him when adequate punishment has been imposed and he has shown that he has rehabilitated himself in such a manner that he is fitted to be admitted into his profession again. I consider

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that there is here ground for the Court holding that the petitioner has been fully punished and that he has regained his character to an extent that justifies his readmission as an advocate of this Court. For these reasons I would allow the petition.

Mockett, J.—I agree.

Krishnaswami Aiyangar, J.—I agree.

S. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor, Madras .. *Petitioner**

v.

M. S. Menoki of Calicut .. *6th Accused.*

Public Prosecutor, Madras v. Menoki of Calicut.

Criminal Procedure Code (V of 1898), S. 94 (3)—Scope—Letters written by one accused to another—Custody with lawyer—Application for production—Refusal to issue summons—Propriety—Evidence Act (I of 1872), S. 162.

S. 94 (3) of the Code of Criminal Procedure does not exempt documents protected under S. 126 of the Evidence Act, and the production of such documents is incumbent under S. 162 of the Evidence Act notwithstanding any objection which there may be to the production or admissibility. The validity of the objection has to be decided by the Court after production.

Where an application was made under S. 94 for the issue of summons to the lawyer for the sixth accused for producing certain letters written by the first accused to the sixth accused alleged to be in his possession,

Held, that the Court was bound to issue summons for letters and deal with the documents according to law when produced.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated 10th February, 1939, and made in C. C. No. 92 of 1937 on the file of the Court of the Sub-Divisional Magistrate of Vizagapatam.

Petitioner in person.

Kasturi Seshagiri Rao for Accused.

The Court made the following

ORDER.—The application was for issue of summons to the lawyer for the 6th accused under S. 94 of the Code of Criminal Procedure to produce certain letters written by the first accused to the sixth accused alleged to be in his possession and *prima facie* those letters are not privileged communications by the sixth accused to his lawyer under S. 126 of the Indian Evidence Act. Further as held in *Ganga Ram* v. *Habib-*

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* Crl. R.C. No. 228 of 1939. 26th April, 1939.
(Crl. R.P. No. 209 of 1939).

Ullah[1], cl. 3 of S. 94 of the Code of Criminal Procedure does not exempt documents protected under S. 126 of the Indian Evidence Act, and the production of such documents is incumbent under S. 162 of the Indian Evidence Act notwithstanding any objection which there may be to the production or admissibility. The validity of the objection has to be decided by the Court after production and the dismissal of the application for issue of summons for production of the letters is unsustainable. The order of dismissal is therefore set aside and the Magistrate is directed to issue the summons under S. 94 of the Code of Criminal Procedure for production of the letters and deal with the documents according to law when produced.

Public Prosecutor, Madras v. Menoki of Calicut.

B.V.V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Kapa Morranna and another .. *Prisoners* (Accused).*

Morranna, *In re.*

Criminal Procedure Code (V of 1898), S. 162—Statement of accused to Police Inspector after arrest—Discovery of articles connected with crime—Admissibility in evidence—Evidence Act (I of 1872), S. 27.

After the accused was taken into police custody he made a statement to the Police Inspector in the presence of respectable persons whice was reduced to writing. He said: "The billhook with which I murdered the deceased has been left by stone slab projection from the wall which is on the northern side of the strong room. If you follow me, I shall pick it up and produce it." He then went with the Panchayatdars to the said house and took and handed over to the Inspector a billhook which had blood stains on it. Subsequently other incriminating articles were also found in the same house.

Held, that the statement made by the accused to the Police Inspector *after his arrest* was admissible in evidence against him.

Statements made by the accused persons while in the custody of the police and apparently admissible under S. 27, Evidence Act are not shut out by S. 162, Criminal Procedure Code.

Thimmappa v. *Thimmappa*, (1928) 55 M.L.J. 351: I.L.R. 51 Mad. 967 (F.B.) and *Syamo Maha Patro*, In re, (1932) 62 M.L.J. 742: I.L.R. 55 Mad. 903 (F.B.), relied on.

Narayanasami v. *King-Emperor*, (1939) 1 M.L.J. 756: L.R. 66 I.A. 66: I.L.R. 18 Pat. 234 (P.C.), considered.

Trial referred by the Court of Session of the Kurnool Division for confirmation of the sentence of death passed upon the said prisoner Accused No. 1 in C. C. No. 1 of 1939 on the 15th February, 1939 and appeals by the said prisoner against the said sentence of death passed upon him in the said case.

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1. (1935) I.L.R. 58 All. 364.

*R. T. No. 36 of 1939. 17th April, 1939
(Crl. Appeal Nos. 127 and 197 of 1939).

Morranna, *In re.*

P. Basi Reddy for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The judgment of the Court was delivered by

Stodart, J.

Stodart, J.—The two accused in this case have been convicted of the murder of Boya Baligadu. The first accused has been sentenced to death and the second accused has been sentenced to transportation for life. The accused file separate petitions of appeal. In the referred trial, the question for decision is whether the sentence of death passed upon the first accused should, if his appeal fails, be confirmed.

There is no doubt on the night of the 25th of October, 1938, the deceased was murdered while he lay asleep in the pial of a temple near his house. The cause of death were four great wounds in the neck which must have been caused by a heavy cutting weapon. The Inspector of Police arrived at the village at 5-30 P.M. on the 26th. Suspicion was directed towards the first accused and search was made for him but he was not found till the 28th. On the 28th he was taken into custody and he made a statement to the Inspector in the presence of respectable persons which was reduced to writing. He then went with the Inspector and the Panchayatdars to his maternal uncle's house where he lives. From a loft in this house, he took and handed over to the Inspector a billhook which had blood stains on it. That house was immediately searched and in a box in one of the rooms, two blood-stained articles were found, namely, a banian and an upper cloth. These three articles were examined by the Chemical Examiner and the Imperial Serologist and were found to be stained with human blood. It was conclusively proved that the first accused was carrying on an intrigue with the younger daughter of the deceased and that the deceased had very strongly objected to such conduct. It was also satisfactorily proved that the second accused, a washerman, was affording the first accused opportunities and facilities to carry on this intrigue and that the deceased was equally angry with him for that reason. The evidence on this point has not been challenged on appeal. P. W. 10, the uncle of the first accused, deposed that on the night of the crime, the first accused went to sleep on the pial outside his house and in the early morning he found that the accused had shifted his position and was sleeping outside the house. He also deposed that the first accused absconded in the morning when the crime was discovered. P. W. 7, who is

the concubine of the second accused, says that on the night of the crime at midnight, the first accused came to the house where she and second accused were sleeping and woke up the second accused and took him away for some purpose.

Thus, there is evidence that the first accused had a motive to murder the deceased, that the first accused was abroad on the night of the crime and that two days after the crime, the first accused knew the hiding place of a weapon of the kind which must have been used to commit the crime and which was proved to be stained with human blood; also that a banian belonging to the accused—*see* the evidence of P. W. 10—was stained with human blood and was found in the house where the first accused lived. In addition to that evidence, the statement made to the Inspector in the presence of several respectable persons has been put in evidence against the first accused under S. 27 of the Indian Evidence Act. That statement certainly complies with the provisions of S. 27. It was a statement which led to the discovery of the weapon with which the crime was committed. The accused said:

> "The billhook with which I murdered the deceased has been kept by me in the house in which I am living on a stone slab projection from the wall which is on the northern side of the strong room. If you follow me, I shall pick it up and produce it."

In the record of this statement Ex. K which was made at the time and which is signed by three of the Panchayatdars, the opening words of the accused are, "The *yatakodavali* which I used in this case", but obviously the accused would not use an expression like that. The Inspector says that what the accused actually did say was:

> "I shall show the billhook with which I murdered the deceased and which I have kept in Bandarlapalli in my house."

The expression " used in this case" is clearly a paraphrase of these words.

It is argued by learned Counsel that statements made by accused persons while in the custody of the police and apparently admissible under S. 27 of the Indian Evidence Act are shut out by S. 162, Criminal Procedure Code. Learned Counsel relies on a very recent case decided by the Judicial Committee of the Privy Council on the 20th of January last, namely, *Narayanaswami* v. *King-Emperor*[1]. That was a case relating not to a statement made under S. 27 of the Evidence Act,

1. (1939) 1 M.L.J. 756: L.R. 66 I.A. 66: I.L.R. 18 Pat. 234 (P.C.).

Morramma, In re.

Stodart, J.

but to a statement made by an accused person *before he was taken into custody* and the Judicial Committee has held that under S. 162 of the Criminal Procedure Code, it could not be put in evidence. There are however certain observations in the judgment of the Judicial Committee relating to S. 27 of the Evidence Act and to the question now raised by the learned Counsel whether statements admissible under S. 27 are barred by S. 162 of the Criminal Procedure Code. But there is no ruling on the point. What the Privy Council says in this judgment, is:

"The words of S. 162 are in their Lordships' view plainly wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not. They may therefore *pro tanto* repeal the provisions of the section which would otherwise apply. If they do not, presumably it would be on the ground that S. 27 of the Evidence Act is a 'special law' within the meaning of S. 1 (2) of the Criminal Procedure Code, and that S. 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic."

It has been the opinion of several learned Judges of this Court that the provisions of S. 27 have not been repealed by S. 162, Criminal Procedure Code—*see* the case in *Thimmappa* v. *Thimmappa*[1] and the case in *Syamo Maha Patro*, In re[2]. The ground on which the opinion has been based is that S. 27 embodies the special rule while S. 162, Criminal Procedure Code, is the general rule and the latter according to the principle referred to by the Judicial Committee does not derogate from the former. We do not think that the aforesaid judgment in *Narayanasami* v. *King-Emperor*[3] prevents us from following the decisions and precedents of this Court. We therefore think the statement made by the accused in this case to the Inspector *after his arrest*, about the authenticity of which there can hardly be any doubt, was admissible in evidence against him.

We think that the evidence in this case apart from the statement aforesaid was sufficient to warrant the conviction of the first accused for murder of the deceased and the statement being, in our opinion, admissible makes the case against him doubly strong. We reject his appeal and in the circumstances no other sentence but the death sentence is appropriate. We confirm that sentence.

As regards the appeal of the second accused, we think, it must succeed. The only evidence against him is that he produced a stick and made a certain statement about that stick. But the

1. (1928) 55 M.L.J. 351: I.L.R. 51 Mad. 967 (F.B.).
2. (1932) 62 M.L.J. 742: I.L.R. 55 Mad 903 (F.B.).
3. (1939) 1 M.L.J. 756: L.R. 66 I.A. 66: I.L.R. 18 Pat. 234 (P.C.).

relevancy of that evidence is not apparent. All that the discovery of the stick amounted to was that the second accused had a stick; it did not mean that anything was discovered relating to the commission of the crime. There was other evidence against this accused, namely, that of P. W. 7, his concubine, but it was very contradictory and learned Public Prosecutor concedes that no reliance can be placed upon it. In these circumstances, the appeal of the second accused is allowed and the second accused is directed to be set at liberty forthwith.

B. V. V. — *Second accused acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Ramayya Goundan .. *Appellant** (*Plaintiff*)

v.

Kolanda Goundan and others .. *Respondents* (*Defendants*).

Hindu Law—Joint family properties—Partition of properties, outstandings of business and ancestral lands—Consciousness of partition only to that extent and not to include income acquired individually—Income of individual member not joint family property liable to be partitioned—Analogy between income of widow and income of individual male member.

If a member of a joint Hindu family has been entrusted with a block of joint family property for the purpose of mere management on behalf of the family and not for exclusive enjoyment or if he, against the will of the manager, takes and retains possession of it and derives income out of it, it may well be that that income will partake of the joint family character. But where the joint family acting through the manager has made an allotment of property to a member in order that he may maintain himself out of it without having to bring its yield into the family granary for common consumption, it is not possible in such a case to make the member accountable for the income of the property so allotted. The idea undoubtedly when an arrangement of this kind is made, is that while the corpus of the property should continue to remain joint, the income should exclusively belong to and be at the disposal of the member concerned.

Where a family of *Goundans* became admittedly divided in status and the brothers executed *muchilikas* to the arbitrators with a view to obtaining division of the family, but it was remarkable that the brothers wanted only a division of the family outstandings belonging to the moneylending business of their father and of the ancestral lands and did not put forward a claim for partition of the acquisitions of individual members,

Held, that the consciousness would undoubtedly seem to be that the income which each brother derived out of the portion of property cultivated by him was to be his entirely.

There is no difference in principle between a maintenance arrangement in favour of a female member of the family and that made almost in similar circumstances to a junior male member of a joint Hindu family.

* Appeal No. 136 of 1936. 7th August, 1939.

Ramayya Goundan v. Kolanda Goundan.

Bengal Insurance and Real Property Co, Ltd. v. *Velayammal*, I.L.R. (1937) Mad. 990 at 1001, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Salem dated 23rd December, 1935 in O. S. No. 46 of 1934.

K. V. Sesha Aiyangar and *C. M. J. Ernest* for Appellant.

C. S. Venkatachariar and *K. S. Sundaram* for Respondents.

The Court delivered the following

Krishnaswami Aiyangar, J.

JUDGMENTS. *Krishnaswami Aiyangar, J.*—This is an appeal by the plaintiff in a suit for partition which was tried and decided by the Subordinate Judge of Salem. The appellant is one of four brothers and was admittedly entitled to a fourth share of the joint family properties. The only question in appeal is, what are the common properties movable and immovable which belonged to the joint family and liable to be divided between the appellant and his three brothers who are respondents 1 to 3 in the appeal? A decree for partition has been passed by the Subordinate Judge in respect of such only of the immovable properties as according to his finding formed the ancestral estate. The plaintiff's claim, however, extended further and covered items of properties standing in the names of the individual defendants as also monies outstanding in their names. As regards these items of properties and outstandings the learned Subordinate Judge held against the appellant and to that extent negatived his claim. Before us, the arguments advanced on behalf of the appellant were confined to these disallowed items.

The admitted facts are these: The appellant and the three respondents are the sons of one Kali Goundan who died in 1926. The family admittedly became divided in status on the 22nd August, 1925, on which date the brothers executed a muchilika in favour of certain arbitrators with a view to obtain a division of the family properties. The execution of the muchilika without more was effective enough to bring about a disruption. Whether a severance in status had taken place at an earlier date is a matter in controversy, but it is not necessary for the purpose of this appeal to decide it. The parties belong to the caste of Goundans and, according to the undisputed evidence in the case, it would seem that in this community as soon as a son marries he leaves the family residence, sets up for himself and begins to live separately with his wife in a

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separate house or a portion of a house allotted to him by the father or manager of the family. Commensality ceases but no separation in estate follows. It often happens that a portion of the family lands is allotted to him in order that he may cultivate it and maintain himself, his wife and children out of its income. Such an arrangement makes for convenience and harmony and tends to promote the continuance of goodwill while avoiding at the same time the kind of friction that often occurs in a growing family living together under a common roof with a common mess. The custom appears to have been acted upon in the family of the parties to this litigation. Each one of the brothers as soon as he married was allowed to set up separately for himself being given a portion of the family property approximating roughly to his share for his own exclusive enjoyment. The first and the second defendants must have begun to live separately a long time back and cultivate and enjoy for themselves the lands that were allotted to them by the father. At the date of the suit it would appear that the first defendant was about 55 years old or thereabouts and he must have started to live separately years before. The plaintiff was himself about 40 years at the time and his marriage appears to have taken place about 15 years prior. The allotments made to the brothers of what, I have no reason to doubt, were but reasonable portions of the family lands by way of a fair provision for their maintenance have never in fact been challenged at any time.

I think it is perfectly within the competence of the manager of a Hindu family to allot to individual members a sufficient portion of the family property having regard to its status and circumstances in order to enable them to maintain themselves out of its income. So long as the provision is fair and reasonable and the manager acts in good faith without making the occasion a pretext for favouritism or injustice the arrangement would be upheld by the Court as within the powers of the managing member. For it cannot be denied that every member of the family while it remains joint has a right to be maintained out of the common assets. When the manager proceeds *bona fide* to satisfy such a claim which is plainly the inherent right of every member, he is merely discharging a duty incumbent upon him under the law. In fact, the propriety of his act in this behalf cannot be questioned. For when the manager acts in

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such circumstances, it must be regarded as the act of the entire family not capable of being impeached at the instance of a single dissentient member. His consent will be presumed for every dealing with the family estate by the manager dictated by the necessities of the family or of the individuals composing it.

Mr. Sesha Aiyangar, the learned counsel for the appellant, has not argued that the provision made for each one of the brothers in this case as and when he married and began to live apart, was either extravagant in itself or incommensurate with the size of the family estate. But what he did urge was that, irrespective of these considerations, the Hindu Law stamps the savings derived from every portion of the joint property with the character of joint family property so as to make them as much divisible among the members as the family property itself. It is not necessary for the purpose of this appeal to go into the larger question as to the character of the income in general derived from a portion of the joint family property when it happens to be in the hands of an individual member. If a member of the family has been entrusted with a block of joint family property for the purpose of mere management on behalf of the family and not for exclusive enjoyment or if he, against the will of the manager takes and retains possession of it and derives income out of it, it may well be that that income will partake of the joint family character. That however is not the kind of question that confronts me in the present case. As I have said, the joint family acting through the manager has made an allotment of property to the member concerned in order that he may maintain himself out of it without having to bring its yield into the family granary for common consumption. In such a case it is impossible to argue that the family could have intended to make the member accountable for the income of the property so allotted. The idea, undoubtedly when an arrangement of this kind is made, is that while the corpus of the property should continue to remain joint the income should exclusively belong to and be at the disposal of the member concerned.

In this case there is every reason for thinking that the acquisitions by the brothers were as much the result of their own industry, labour and thrift as they were the natural product of the land itself. The acquisitions claimed represent savings extending over a fairly long period. Years after the

allotment and years after the acquisition it is scarcely just or equitable that the acquirer should be forced to share the product of his thrift and industry with, it may be, an indolent or ease-loving coparcener. I do not think that there is any principle of Hindu Law which tends to the perpetuation of such gross injustice and in the absence of definite authority, I am not prepared to accede to such a proposition. In fact there is authority to the contrary in a decision of a Bench of this Court reported in *Bengal Insurance and Real Property Co., Ltd.* v. *Velayammal*[1]. At the bottom of page 1001, the learned Judges observe as follows:

> "The question then is, whether any profit made out of money paid to a member of a joint family by the manager for his personal use, which he is free to spend as soon as he receives it, must because he chooses to invest it for some purpose which is clearly not intended to be for the benefit of the family, be deemed to be a family acquisition. A profit made by the member of a joint family from the enjoyment of joint property without detriment to it is his separate self-acquired property; *Lackmeswar Singh* v. *Manowar Hossein*[2]. When money is given to a member of a family by the manager from family funds to be spent by him for his personal use, it seems to us that any profit made by him can hardly be said to be in detriment of the joint property."

This decision does support the conclusion that I have myself reached though it seems to proceed on a somewhat different principle. I may observe that in this case emphasis is laid on the fact that the acquisition was made without, as it was termed, detriment to the family property. It seems to me that it would be more appropriate to look at this question from the point of view of the right of each individual member of the family to be maintained out of the common assets and the duty of the manager to maintain or make a reasonable provision for the maintenance of, the junior members. A provision so made must be held to be binding upon the family and every member of it. I may in this connection perhaps refer to the analogical case of a widow to whom property is often handed over for her enjoyment in lieu of maintenance. It cannot be suggested that any savings for the income of such property can be called back by the family which made the provision. The corpus of the property would no doubt in the absence of an express provision

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1. I.L.R. (1937) Mad. 990.
2. (1891) L.R. 19 I.A. 48: I.L.R. 19 Cal. 253 (P.C.).

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to the contrary, revert back to the family, but the savings out of the income will not; not even at her death unless incorporated with the property itself by a consentient act of hers. I am unable to see any difference in principle between a maintenance arrangement in favour of a female member of the family and that made almost in similar circumstances to a junior male member of the family. I am therefore of opinion that there is no substance in the appellant's contention, and I must accordingly negative it.

I may also point out that the plaintiff and the other members of the family seem all along to have proceeded upon the footing that the income derived by each member from out of the lands allotted to him was his own and not that of the family. In 1925 the four brothers executed a ***panchayat muchilika*** in favour of certain arbitrators with a view as I have already mentioned to get the family properties partitioned between them. It is remarkable that in this document the brothers wanted a division only of the family outstandings belonging to the moneylending business carried on by the father and of the ancestral lands and did not put forward a claim for the division of the acquisitions of the individual members. It is conceded that on this date there were individual acquisitions in the shape of both outstandings and immovable properties standing in the names of each of the brothers, and yet nobody ever thought of advancing a claim to divide them. To my mind this is a striking piece of evidence against the present contention of the appellant. The consciousness of the members of this family therefore would undoubtedly seem to be that the income which each brother derived out of the portion of the property cultivated by him was to be his entirely. I am accordingly of opinion that the appeal fails and must be dismissed with costs of respondents 1 and 3.

Mockett, J.—I agree.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

P. V. Karuppanan Ambalam .. *Appellant* (1st Defendant)*

v.

Pandari Sundara Raja Aiyar .. *Respondent (Plaintiff).*

Karuppanan Ambalam *v.* Sundara Raja Aiyar.

Suit for recovery of property—Suit based on title—When relief can be granted on the strength of possession of plaintiff.

Though a plaintiff bases his suit on title, relief can be given on the strength of his possession alone. In certain circumstances a decree can be passed on the strength of plaintiff's possession though it is not specifically made a ground of relief.

Case-law reviewed.

Appeal against the decree of the District Court of Madura in A. S. No. 95 of 1934 preferred against the decree of the Court of the District Munsif, Melur, in O. S. No. 157 of 1933.

K. Rajah Aiyar for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit brought by the respondent for a permanent injunction restraining the appellant from interfering with his enjoyment of the suit property and, in case it was found that the respondent was not in possession, for delivery of possession free from the obstruction of the appellant. The respondent claimed title under an Inam grant alleged to have been made to his predecessors-in-title by the Carnatic rulers for the supply of *Tulasi* to the Kallalagar Devasthanam in the Madura District. The respondent also alleged that in or about the year 1918 the trustees of Ramalingaswami Mutt falsely set up title to the suit properties and at the instance of some mediators, the dispute with them was settled by the trustees giving what is described as a release sale deed relinquishing all their interest in the suit properties, and recognising the respondent's title thereto. Since then, the respondent claimed to have been in possession and enjoyment of the suit properties down to the year 1933 when the appellant disturbed his possession under colour of a sale deed obtained by him from one Singaram Pillai. The appellant denied the title as well as the possession put forward by the respondent and

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* S. A. No. 674 of 1936. 8th August, 1939.

Karuppanan Ambalam v. Sundara Raja Aiyar.

pleaded that the property originally belonged to one Narayana Paradesi from whose successor-in-title he obtained the property by sale deed dated 14th February, 1933.

The trial Court found that the Inam grant put forward by the respondent related only to the Melwaram interest in the land but that he acquired the right to the land itself by virtue of the release deed executed by the trustees of Ramalingaswami Mutt and thus became the full owner of the suit property. As regards the respondent's possession, he held that the evidence on record was not sufficient to establish an acquisition of title by the respondent by adverse possession if the respondent was held to have no title otherwise.

On appeal the learned District Judge confirmed the finding of the District Munsif that the Inam grant was only of the Melwaram but disagreed with him on the question of the respondent's title. He held that the release deed Ex. B could not confer a valid title on the respondent because only two out of the four trustees of the Mutt executed it, and besides it was not shown to have been executed for any necessary purpose binding on the Mutt. He, however, held that the respondent got possession of the properties under Ex. B and continued in possession till he was disturbed in such possession by the appellant in 1933 and that the respondent was entitled to a decree on the basis of his possession irrespective of any question of title. As the Mutt was not a party to the suit, the learned Judge thought it was unnecessary to decide whether the respondent had acquired title by adverse possession against the Mutt.

The learned Counsel for the appellant raised two contentions before me. First he urged that when a plaintiff bases his suit on title, he cannot claim relief on the strength of his mere anterior possession even alternatively; he could rely upon possession only as evidence of the title put forward by him but not as an independent ground of claim by itself. For this somewhat startling proposition, he relied upon a decision of the Bombay High Court, *Govindbhai* v. *Dahyabhai*[1]. There the trial Court found that the plaintiff in that case had more or less a precarious possession for a short period and it was with reference to that finding which the learned Judges described as tentative that they made their observations at page 208 of the

1. (1935) 38 Bom.L.R. 175: A.I.R. 1936 Bom. 201.

report. I do not understand that decision as laying down what in effect would be a new rule of misjoinder not warranted by the provisions of the Code of Civil Procedure.

The learned Counsel next contended that even if it is permissible to put forward mere previous possession as a ground of claim, in the alternative, in a suit based primarily upon title, no such case having been expressly set up by the respondent in this case in his plaint, the learned District Judge erred in law in granting the respondent a decree on the basis of his prior possession after negativing the title that was specifically set up. The learned Counsel cited in support of his proposition *Maikal Servai* v. *Thambuswamy Servai*[1], *Somasundaram Chetty* v. *Vadivelu Pillai*[2], *Venkatasami Naick* v. *Kali Samatan*[3], *Ramalinga Pandaram* v. *Anthonimuthu Vathiar*[4] and certain other decisions more or less to the same effect. In some of these cases, the suits were no doubt dismissed on the ground that the title set up by the plaintiff was not established, and that no decree could be granted on the strength of mere possession as no possessory title had been put forward in the plaint. But I do not regard these decisions as laying down an inflexible rule that under no circumstances can a decree be passed on the strength of plaintiff's possession unless such possession is specifically made the ground of relief in the plaint. I regard them merely as illustrations of the salutary principle that parties should ordinarily be confined to the case raised by them in their pleadings and that no relief should be awarded on the basis of a new case not disclosed in the pleadings. The underlying principle is, of course, that no party should be taken by surprise but should have a fair and adequate opportunity to meet the case of his opponent. Judged by this principle, it cannot be said in this case that the appellant was prejudiced to any extent by any new case being sprung upon him without any previous indication thereof in the plaint. In paragraphs 7 and 8 of the plaint, after referring to the release deed by the trustees of the Mutt and delivery of possession by them, the respondent definitely and clearly alleged :—

"From that time till this day, the plaintiff himself is enjoying the suit land and is paying the *kist*, etc., due thereon. The patta also has been regis-

1. (1914) M.W.N. 784.
2. (1908) I.L.R. 31 Mad. 531.
3. (1916) M.W.N. 110.
4. (1933) 66 M.L.J. 358.

Karuppanan Ambalam v. Sundara Raja Aiyar.

tered in his name. Nobody else had, at any time, any right to, or enjoyment of, the said land."

And the appellant, in paragraph 8 of his written statement, traversed these allegations and Issue 5 and the additional Issue, relating to the respondent's acquisition of title by adverse possession and his having been in possession within 12 years before the suit, also clearly raised the question of the respondent's possession of the suit property. Evidence was let in by both the parties on these issues and the matter also was elaborately considered by both the Courts below. In these circumstances, I am unable to see any ground for complaint that the appellant was prejudiced by the decree having been passed on a new case which the appellant had no sufficient opportunity to meet.

The respondent's learned counsel has drawn my attention to a decision of the Privy Council in *Ismail Ariff* v. *Mahomed Ghous*[1], where also, as far as could be seen from the summary of the plaintiff's case in their Lordships' judgment, the suit had been based upon the plaintiff's title and no mere possessory title had been specifically put forward as such. But allegations of possession by the plaintiff and his predecessors-in interest had, of course, been made. The High Court refused to declare the plaintiff's title under S. 42 of the Specific Relief Act, though they found that the plaintiff was actually in possession for over six years prior to the suit. But their Lordships reversed the decision of the High Court and granted a declaration of the plaintiff's title on the strength of his possession alone, leaving the question of the plaintiff's title undecided.

I am therefore of opinion that the decree of the lower Court was rightly made and this appeal should be dismissed with costs.

Leave refused.

K. S. —— *Appeal dismissed.*

1. (1893) L.R. 20 I.A, 99: I.L.R. 20 Cal. 834 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Alasyam Ramappa .. *Appellant** (*1st Defendant*)

v.

Panyam Thirumalappa and others .. *Respondents* (*Plaintiff and Defendants 2 to 8 and 10 to 16*).

Registration Act (XVI of 1908), Ss. 17 and 49—Declaration on dissolution of a partnership—Terms in writing entered in the daybook of firm—Whether an instrument creating a title or a mere recital—Registration necessary—Whether permissible in evidence. Ramappa v. Thirumalappa.

S. 17 of the Registration Act requires non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, any right, title or interest in immovable property to be registered. If such an instrument is not registered it cannot be given in evidence by reason of the provisions of S. 49 of the Act.

Where a declaration, made on dissolution of a partnership, that the three persons who had constituted the partnership had equal rights in the properties which had been purchased out of the profits, the fact that the agreement embodying the terms of the dissolution was entered in the daybook of the firm and not drawn up separately makes no difference. The words written in the book constitute the agreement in writing. The agreement is an instrument which creates a title and not a mere recital of fact, as pointed out by Lord Dunedin in *Bageshwari Charan Singh* v. *Jagarnath Kuari*, (1931) 62 M.L.J. 296: L.R. 59 I.A. 130: I.L.R. 11 Pat. 272 (P.C.).

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Varadachariar in S.A. No. 722 of 1933 preferred to the High Court against the decree of the District Court of Anantapur in A.S. No. 28 of 1930 preferred against the decree of the Court of the District Munsif of Gooty in O.S. No. 353 of 1928.

K. Someswara Rao for Appellant.

Ch. Raghava Rao for Respondents.

The judgment of the Court was delivered by

The Chief Justice.—The appellant's father, one Nattekalappa, the first respondent's brother Yarikalappa, and the second respondent carried on business in partnership from 1892 until 3rd May, 1904, when a dissolution took place. During the existence of the partnership certain immovable properties were purchased out of the profits of the business. One lot comprising Leach, C.J.

* L. P. A. No. 81 of 1937. 14th March, 1939.

Ramappa v. Thirumalappa.

Leach, C.J.

four items was purchased in the name of the appellant's father and another lot comprising three items was purchased in the names of the appellant's father and the first respondent's brother. On the dissolution it was agreed that the immovable properties should not be divided among the partners, but should be held by them as joint tenants with equal rights. The terms of the dissolution were set out in full in the firm's daybook and the statement (Ex. A) was signed by all the partners. The appellant's father died in 1921 and the first respondent's brother in 1918. The immovable properties eventually came into the possession of the appellant. In 1928 the first respondent filed a suit in the Court of the District Munsif of Gooty for partition of the properties and delivery to him of the one-third share which he claimed therein. The appellant resisted the claim. He contended that the properties did not belong to the partnership, but to his father; that the suit was barred by the provisions of Art. 106 of the Limitation Act not having been brought within three years of the dissolution of the partnership, and that Ex. A could not be admitted in evidence by reason of non-registration, which precluded any claim being made under it. The District Munsif rejected the appellant's contentions and decreed the suit. On appeal the District Judge of Anantapur held that the properties in suit were not partnership properties, but properties which belonged exclusively to the appellant's father. He also held that the suit was barred by limitation and that Ex. A required registration. The appeal was therefore allowed and the suit dismissed. The first respondent then filed a second appeal which was heard by Varadachariar, J. The learned Judge restored the decree of the District Munsif. He held that the District Judge had entirely failed to appreciate the evidence which showed conclusively that the properties belonged to the partnership, that the suit did not fall within Art. 106 of the Limitation Act and that the law did not require Ex. A to be registered. The learned Judge having granted a certificate under cl. 15 of the Letters Patent the appellant has filed the present appeal.

It is not necessary to decide whether Varadachariar, J., was justified in reversing the decision of the District Judge on the question of the ownership of the properties because we consider that the appellant is entitled to succeed on his contention that Ex. A required to be registered.

Ex. A, after describing the immovable properties purchased by the firm out of the partnership assets proceeds:—

"Panyam Yerakalanna, Alasyam Nettakalappa and Voruganti Basappa, these three individuals; have rights for equal shares in the amount of Rs. 1,106-3-1 mentioned in the balance sheet from Nos. 1 to 9, and to the lands mentioned in pages 232-233.

Particulars of the amount of debts to the extent of Rs. 2,597-8-9 mentioned in pages 10 to 13 which have to be paid by us three, mentioned in numbers 14 to 16—particulars thereof:—

		Rs. A P.	
No. 14 Panyam Yerakalanna	..	700 11 9	with interest thereon.
No. 15 Voruganti Nagappa	..	649 10 5	"
No. 16 Alasyam Nettakalappa	..	1,247 2 7	"

We the three aforesaid individuals have agreed thereto and settled the accounts."

There is here a declaration, made on the dissolution of the partnership, that the three persons who had constituted the partnership had equal rights in the properties which had been purchased out of the profits. The fact that the agreement embodying the terms of the dissolution was entered in the day-book and not drawn up separately makes no difference. The words written in the book constitute an agreement in writing. Varadachariar, J., held that Ex. A did not require registration because it did not operate to transfer property from the partnership to its members. He referred to the provisions of S. 253 of the Contract Act which states that partners are joint owners of the properties purchased out of partnership funds, and to the decision in *Samuvier* v. *Ramasubbier*[1], which deals with this section. The learned Judge treated Ex. A as being merely a statement of existing facts.

S. 17 of the Registration Act requires non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, any right, title, or interest, in immovable property to be registered. In our opinion Ex. A is an instrument which declares the rights in the properties from the date of dissolution of the partnership and therefore should have been registered. As it is not registered it cannot be given in evidence by reason of the provisions of S. 49 of the Act. In *Bageshwari Charan Singh* v. *Jagarnath Kuari*[2], the Privy Council accepted the interpretation of the word "declare" given by West, J., in *Sakharam Krishnaji* v. *Madan Krishnaji*[3], where he said that

1. (1931) 60 M.L.J. 527: I.L.R. 55 Mad. 72.
2. (1931) 62 M.L.J. 296: L.R. 59 I.A. 130: I.L.R. 11 Pat. 272 (P.C).
3. (1881) I.L.R. 5 Bom. 232.

Ramappa v. Thirumalappa.

Leach, C.J.

the word implies a declaration of will and not a mere statement of fact. Lord Dunedin who delivered the judgment of the Board pointed out that the distinction is between a mere recital of a fact and something which itself creates a title. We regard Ex. A as being within the latter category.

As I have already indicated part of the properties were purchased in the name of the appellant's father and part in the names of the first respondent's brother and the appellant's father. Up to the time of the dissolution the partners must be regarded as joint owners of the properties within the meaning of S. 253, but they were not entitled to specific shares and the rights they possessed were subject to the liabilities of the partnership on dissolution. Until an account had been taken and provision had been made for the discharge of the liabilities no partner could claim to be entitled to have a definite share in a particular asset. When allotting on a dissolution what remains after making provision for the firm's debts and the remaining assets include immovable properties, it does not follow that the partners will take the immovable properties in equal shares, even if they had equal rights in the partnership. What each partner receives will depend on the circumstances and the nature of the assets which remain for division. A partner, for instance, may have overdrawn his account and disentitled himself to equal division. It so happened in this case that it was possible to arrange that the immovable properties should be held by the persons who had formed the partnership as joint tenants with equal rights, but it might have been otherwise. Ex. A was drawn up and signed in order that the post dissolution rights should be declared and placed beyond dispute. In our opinion the declaration clearly falls within S. 17 of the Registration Act, which means that the document cannot now be admitted in evidence. This being the case the Court can only regard the properties as being partnership assets and the suit is consequently hopelessly time barred. The appeal will therefore be allowed with costs throughout.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

A. L. Meenakshi Achi and another .. *Appellants** (*Defendants 4 and 5*)

v.

S. T. L. R. M. *alias* L. R. M. Ramaswami Chettiar and others .. *Respondents* (*Plaintiff and Defendants 1, 2, 6 to 20 and L.R. of 3rd Defendant*).

Meenakshi Achi *v.* Ramaswam Chettiar.

Administration suit—Mitakshara joint family—Death of father—Son taking by survivorship—Father not leaving any separate property—Suit filed by creditor for administration—Maintainability.

Under the Mitakshara Law the father's interest in the family estate devolves by survivorship on his son or sons as the case may be. If the father dies leaving no property apart from his interest in the joint estate he dies leaving no estate. Consequently a creditor has not got the right to bring a suit for the administration of the estate of a deceased Hindu who was joint with his son and died leaving no property apart from his interest in the family estate

Kavuri Anjayya v. *Alapati Ankamma*, (1937) 44 L W. 836, overruled.

In the matter of *Desu Manavala Chetty*, (1909) 19 M. L. J. 591: I.L.R. 33 Mad. 93 (F.B.), considered.

Letters Patent Appeal preferred under S. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Lakshmana Rao, dated 23rd March, 1937 and passed in S. A. No. 515 of 1935 preferred against the decree of the Court of the Subordinate Judge of Devakottai in A. S. No. 58 of 1934 (O. S. No. 397 of 1932, District Munsif's Court, Devakottai).

V. Ramaswami Aiyar and *N. G. Krishna Aiyangar* for Appellants.

M. Patanjali Sastri and *T. M. Ramaswami Aiyar* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question which is raised in this appeal is whether a creditor has the right to bring a suit for the administration of the estate of a deceased Hindu who was joint with his son and died leaving no property apart from his interest in the family estate. One Arunachalam Chettiar, a member of the Nattukottai Chettiar community, died in February, 1930,

* L. P. A. No. 67 of 1937. 23rd February, 1939.

Meenakshi Achi v. Ramaswami Chettiar.

Leach, C.J.

being survived by a widow and a son (the second respondent). The first respondent, who claims to be a creditor of the deceased, filed a suit in the Court of the District Munsif of Devakottai for the administration of his estate. The widow and the son and 18 creditors were made defendants. The appellants who were the fourth and fifth defendants challenged the right claimed by the first respondent to bring a suit for administration. In addition to denying that the plaintiff-respondent was a creditor of the father they averred that a suit for administration would not lie because the family estate had devolved upon the son by survivorship under the Mitakshara law and consequently there was no separate estate to administer. The case of the plaintiff-respondent was that the property in the possession of the son was the self-acquired property of the father and he had ample estate. The District Munsif found that the property was the self-acquired property of the father and granted a decree for administration. The appellants appealed to the Subordinate Judge of Devakottai, who reversed the finding of the District Munsif, holding that the property was family property and that it had passed by survivorship to the son. It is not open to the plaintiff-respondent to challenge this finding. The Subordinate Judge, however, was of opinion that despite the fact that the father left no separate estate the plaintiff-respondent was entitled to maintain the suit. The appellants then appealed to this Court. The appeal was heard by Lakshmana Rao, J., who upheld the decision of the Subordinate Judge, but gave leave to appeal under cl. 15 of the Letters Patent. The learned Judge in holding that the administration suit could be maintained relied on the provisions of Ss. 50, 52 and 53 of the Code of Civil Procedure and on the decision of Horwill, J., in *Kavuri Anjayya* v. *Alapati Ankamma*[1].

S. 50 of the Code of Civil Procedure allows a decree-holder to execute his decree against the legal representative of a deceased judgment-debtor, and provides that the legal representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. S. 52 relates to the position where a decree has been obtained after the death of the judgment-debtor and has been passed against his legal representative. Where the decree is for the

1. (1937) 44 L.W. 836.

payment of money out of the property of the deceased, it may be executed by the attachment and sale of his property. S. 53 says that for the purposes of S. 50 and S. 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative. S. 50 was S. 234 of the Code of 1882 and S. 52 was S. 252. S. 53 is new. It was inserted in the present Code because there was a conflict of judicial opinion in India on the question whether it was necessary for the holder of a decree against a Hindu father to bring a suit to realise his decree after the death of the judgment-debtor or whether he could proceed to execute against the family property in the hands of the son without filing a suit. There is nothing in these sections which justifies the conclusion that a suit for administration will lie where a Hindu father dies leaving no property of his own.

Under the Mitakshara law the father's interest in the family estate devolves by survivorship on his son or sons as the case may be. If the father dies leaving no property apart from his interest in the joint estate he dies leaving no estate. If there is only one son the son becomes entitled to the whole of the family property in his own right, subject to any lawful charges which may have been created and to the conditions imposed by his personal law. Under his personal law he has to satisfy out of the family property coming into his hands debts incurred for a family necessity. By reason of the pious objection rule he can also be called upon to pay the debts of his father if they have not been incurred for immoral or unlawful purposes. These conditions do not, however, derogate from the nature of the son's estate on his father's death. If he is the only son the family estate becomes his entirely, subject to the conditions which I have indicated. This being the position a suit for the administration of father's estate cannot be maintained unless the father leaves separate property. It does not mean that a suit may not be filed. A creditor cannot be prevented from filing a suit for the administration of the father's estate and may get a preliminary decree for account, but if it appears on the taking of accounts and the making of the usual inquiries that there is no property apart from what was before the father's death the joint family estate the proceedings cannot be carried further.

Meenakshi Achi v. Ramaswami Chettiar.

Leach, C.J.

There is considerable authority in support of the view which I have just expressed. In *Gangaram Keval* v. *Nagindas Kushaldas*[1], a joint Hindu family consisted of a father and two sons. The father died having incurred certain debts. Later, the elder of the two sons died. A creditor of the father then filed a suit for the administration of the father's estate. It was shown that the father had left no separate estate. The Court treated the suit as a suit for the administration of the estate of a living person and therefore did not lie. The Calcutta, Allahabad, Patna, Rangoon and Lahore High Courts have all held that a surviving member of a Hindu family is not entitled to letters of administration in respect of the estate of a deceased member of the family when he has left no separate property: Vide *Durgaprasad Barhai* v. *Jewdhari Singh*[2], *Balmukund Dube, In re*[3], *Kali Kumar* v. *Nunabali Kumari*[4], *Gopalaswami Pillay* v. *Meenakshi Ammal*[5] and *Uttam Devi* v. *Dina Nath*[6]. The same principle is involved here. To quote from the judgment in *Gopalaswami Pillay* v. *Meenakshi Ammal*[5]:

> "A member of an undivided Hindu family during his life is entitled to the beneficial interest in the family estate, but on his death that interest immediately ceases and the whole beneficial interests in the estate belong to the other members of the family. There is no succession to the deceased's estate because he has left nothing to succeed to. No part of the joint family estate is therefore the deceased's estate within the meaning of S. 218 of the Succession Act."

In *Kavuri Anjayya* v. *Alapati Ankamma*[7], Horwill, J., held that a creditor of a Hindu father dying undivided from his son is entitled to bring a suit for administration against the son. The learned Judge considered that the obligations of the son are precisely those of an heir, for he is liable for the lawful debts of his father to the extent of the assets of the joint family property which come into his hands. He also expressed the opinion that the very reason that would make it equitable and desirable to enable a creditor to file an administration suit would make it equitable and desirable that a creditor should be allowed to bring an administration suit against an undivided son of the debtor. We must express our dissent. The son is not the father's heir so far as the family property is concerned and "equitable consideration" cannot turn his property into his

1. (1908) I.L.R. 32 Bom. 381.
2. (1935) I.L.R. 62 Cal. 733.
3. A.I.R. 1930 All. 82.
4. A.I.R. 1923 Pat. 96 (1).
5. (1929) I.L.R. 7 Rang. 39.
6. A.I.R. 1919 Lah. 235.
7. (1937) 44 L.W. 836.

Meenakshi Achi *v.* Ramaswami Chettiar. — Leach, C.J.

father's estate. The decision in *Kavuri Anjayya* v. *Alapati Ankamma*[1] will therefore be overruled.

In the course of the argument our attention has been drawn to the Full Bench decision of this Court in In the matter of *Desu Manavala Chetty*[2]. In that case the family property consisted in part of shares standing in the name of the father. On the father's death these shares devolved upon the son under the rule of survivorship, but the company which had issued the shares refused to recognise the son's right to them unless he obtained letters of administration. In these circumstances he applied for letters of administration of his father's estate and the question which the Court was called upon to decide was what amount he should be called upon to pay as stamp fee. It was held that as he wanted letters of administration the letters would only be issued to him on paying the stamp fee based on the full value of the shares. The Court consisted of Benson, Miller and Sankaran Nair, JJ. Benson, J., made no reference to the right of the son to apply for letters of administration nor did Sankaran Nair, J. They regarded the question involved as relating merely to the amount of stamp fee the applicant should pay. Miller, J., did say that the son was a person to whom letters could be issued, but in spite of this we cannot regard this case as being an authority in support of the contention of the plaintiff-respondent that the present suit can be maintained. The decision was merely concerned with the amount of stamp duty to be paid for letters of administration which were required to enable the son to get possession of the shares which were his by right.

Mr. Patanjali Sastri on behalf of the plaintiff-respondent has asked us to regard the family estate in a case of this nature as representing a fund from which a father's debts can be paid, and he says that in these circumstances the family estate should be looked upon as being his estate. This argument cannot be accepted in the face of the very definite rule of the Mitakshara law that on the death of the father the son takes the father's interest in the joint estate not as his heir but by the right of survivorship.

The appeal succeeds and the suit will be dismissed with costs in favour of the appellants both here and below.

B.V.V. ——— *Appeal allowed.*

1. (1937) 44 L.W. 836.
2. (1909) 19 M.L.J. 591: I.L.R. 33 Mad. 93 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Anandam minor by guardian, the Official Trustee of Madras .. *Petitioner** (*Defendant*)

v.

T. S. Muthukumaraswami Mudali., *Respondent* (*Plaintiff*).

Anandam v. Muthukumaraswami Mudali.

Madras Agriculturists Relief Act (IV of 1938), S. 8—Promissory note of 1930 in favour of A*—Renewal in name of* B *for* A *in 1933—Suit by* B*'s indorsee—Decree thereon—Application to scale down as a debt of 1930 under S. 8—Debtor if precluded from proving that renewal was benami for* A*—Ss. 120 and 121 of Negotiable Instruments Act—Scope of—If bars proof of renewal.*

On the strength of a promissory note executed on 19th February, 1933, a decree was obtained on 2nd May, 1936. The judgment-debtor sought to prove that the note was in renewal of a note of 1930 and that therefore the debt must be deemed to be one incurred prior to 1st October, 1932, and accordingly liable to be scaled down under S. 8 of the Act. The renewal was in the name of the wife of the payee under the earlier note of 1930 and it was therefore contended that it was not permissible to prove that it was a renewal benami in the name of the wife.

Held, that Ss. 120 and 121 of the Negotiable Instruments Act make it clear that the exclusion or estoppel is only in suits or proceedings to enforce a claim on the negotiable instrument and not a general exclusion or estoppel applicable to all proceedings, whether based on the negotiable instrument or not. It does not apply to applications the object of which is not to recover the amount due on the instrument, but to get relief from debt under the Agriculturists Relief Act.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Tiruvannamalai dated 4th October, 1938 and made in I. A. No. 447 of 1938 in O. S. No. 65 of 1936.

V. T. Rangaswami Aiyangar and *S. Krishnaswami* for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition by the Official Trustee of Madras on behalf of a minor who is the judgment-debtor in the decree in O. S. No. 65 of 1936 on the file of the District Munsif of Tiruvannamalai. That decree was obtained by the respondent on the strength of a promissory note executed on 19th February, 1933 and the decree itself is dated 2nd May, 1936. The petition is to revise the order of the District Munsif

* C. R. P. No. 596 of 1939. 10th August, 1939.

Anandam v. Muthukumaraswami Mudali.

on an application under S. 19 of the Madras Agriculturists Relief Act, IV of 1938, praying to amend the decree after scaling down the debt. It is not disputed that the petitioner is an agriculturist entitled to the benefits conferred upon agriculturist debtors by the new Act, and the Court below has actually amended the decree by scaling down the debt in accordance with the provisions of S. 8 of the Act treating the debt as one incurred after the 1st October, 1932, the suit promissory note being itself subsequent in date to the 1st of October, 1932.

The petitioner's contention was, and is, that the suit promissory note was merely a renewal of a former promissory note of the year 1930 and that therefore the debt must be deemed to be one which was incurred prior to 1st October, 1932, and that the scaling down should be in accordance with the provisions of S. 8 of the Act. The point, therefore, for decision in this petition is whether the petitioner is entitled to claim to have the debt scaled down in accordance with the provisions of S. 8; in other words, whether the debt which ripened into a decree in 1936, to use the language in S. 8 of the Act, was a debt incurred before 1st of October, 1932. On the facts the petitioner succeeded in the Court below in showing that the subsequent promissory note of 1933 was really a renewal of the original promissory note of 1930, but, though the truth of the case was on the side of the petitioner, the lower Court did not give him the benefit of the truth of his case on the ground that he was really precluded from establishing the truth of the case by reason of a special rule of law applicable to promissory notes which precluded him from contending that the renewal was taken in the name of the respondent's indorser by her husband who was the payee under the original note. The arguments therefore before me have more or less been confined to this aspect of the case, namely, whether there is this estoppel standing in the way of the petitioner which prevents him from establishing that as a matter of fact the note of 1933 was a renewal of the note of 1930. On the side of the respondent reliance is placed on the Full Bench decision in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*[1] and on the petitioner's side reliance is placed on certain observations including comments on the decision in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*[1] in the later Full Bench decision in *Venkatarama*

1. (1906) 16 M.L.J. 508: I.L.R. 30 Mad. 88 (F.B.).

Ananda v. Muthukumaraswami Mudali.

Reddiar v. *Valli Akkal*[1]. Apart from these decisions, the sections which are relied upon on behalf of the respondent, namely, Ss. 120 and 121 of the Negotiable Instruments Act, make it clear that the exclusion or estoppel is only in suits on the negotiable instrument, the material words being:

> "No maker of the promissory note shall in a suit thereon be permitted to deny."

It is not a general exclusion or estoppel applicable to all proceedings, whether based on the negotiable instrument or not. The provisions of the English Act do not contain these qualifying words, "in a suit thereon" which are found in the Indian enactment and it does not seem useful to examine the English decisions in order to find out what these words which are found in the Indian enactment actually mean. It seems to me that, the words being themselves simple and clear, there ought not to be any difficulty in ascertaining their meaning. The meaning of the words "suit thereon" is fairly clear to my mind. They mean some legal proceeding or other the object of which is to enforce the claim on the basis of the negotiable instrument. The proceeding need not be actually registered in the Court as an original suit or any other kind of suit, but it is clear that it must be some legal proceeding based on a negotiable instrument the object of which proceeding is to recover the money due thereon, and these words cannot, in my judgment, be extended so as to cover applications the object of which is not to recover the amount due on the instrument, but to get relief which the Legislature has thought fit to grant to debtors of a particular description who were considered to be deserving of such relief for reasons which obviously have nothing to do with the peculiar character of negotiable instruments. The object of the new Act was to give relief to agriculturist debtors and it did not matter for the purpose of granting that relief whether the original debt was incurred under a negotiable instrument or otherwise. There is no reason to suppose that it was the intention of the new Act to make a difference in the matter of scaling down of debts in cases where the original debt was, as it were, borrowed on a negotiable instrument. It is thus clear that so far as the new Act is concerned, there is no justification for regarding a debt incurred under a promissory note in a

1. (1934) 68 M.L.J. 81; I.L.R. 58 Mad. 693 (F.B.).

different way from other debts, and so far as the Negotiable Instruments Act is concerned, the provisions therein do not, in my opinion, apply to applications under S. 19 of the new Act for relief of debtors. The words "suit thereon" clearly show that the proceeding intended to be denoted by these words was a proceeding initiated by some one who was entitled to sue or take legal steps to recover the money due on a negotiable instrument, that is to say, by the promisee or payee, and they cannot, in my opinion, apply to proceedings initiated by the maker or promisor for relief under a special enactment like the Madras Agriculturists' Relief Act. I am therefore of opinion that the view of the learned District Munsif on this point is wrong and that there is no estoppel in the way of the petitioner which prevents him from establishing that, as a matter of fact, the debt in this case was incurred in 1930; that is to say, before 1st October, 1932.

It follows from this that the petition must be allowed to this extent, namely, that the debt should be scaled down in accordance with the provisions of S. 8 of Madras Act IV of 1938 and not under S. 9 thereof. The order of the Court below is amended accordingly and the lower Court is directed to amend its decree accordingly. The petitioner is entitled to have his costs in this Court and his costs of the application in the Court below from the respondent.

Petition allowed and remanded.

S. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

K. Chinnaswami Udayar and others .. *Appellants* (Respondents 1, 3, 4 and 5 and Nil)*

v.

Narasimha Bhattar and another.. *Respondents (Petitioner and 2nd Respondent).*

Madras Hindu Religious Endowments Act (II of 1927), Ss. 43 and 79—Decree declaring right of control over paricharaka *in the* archaka*—Effect of the Act—Such declaration inconsistent with S. 43—S. 43 is to prevail—Control in trustee after the Act—Decree to that extent not in force—S. 79, if saves such decrees.*

S. 43 of the Hindu Religious Endowments Act, 1927, now vests the power of disciplinary control over office holders and servants in a temple in the trustee of the temple and therefore a declaration in a decree passed prior to

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* C. M. S. A. No. 49 of 1936. 24th July, 1939.

Chinna-swami Udayar v. Narasimha Bhattar.

the Act that such right of control over a *paricharaka* was vested in the holder of the *archaka* office is inconsistent with the statutory provision in S. 43 and must therefore be treated as abrogated and of no effect to that extent. S. 79 does not save such a decree from the operation of the Act. A trustee is therefore entitled to eject a *paricharaka* from his office notwithstanding that before the Act, the right of appointment, dismissal and control were solely declared to be in the *archaka*.

Appeal against the order of the District Court of Trichinopoly dated 5th October, 1935 and made in A. S. No. 90 of 1935 (E. P. No. 645 of 1933, District Munsif's Court, Trichinopoly in O. S. No. 482 of 1896, District Munsif's Court, Srirangam).

A. Srirangachari for Appellants.

R. Gopalaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal involves a consideration of the effect of a decree in a suit of 1896 wherein the holder of the *archaka* office in the suit temple obtained a declaration that he was entitled both to the office of *archaka* and *paricharaka* and to appoint fit and proper persons to the office of *paricharaka*, and to dismiss them and generally control the *paricharaka* so appointed in the temple during his term. By virtue of this decree the first respondent (the *archaka*) appointed an individual as *paricharaka*. The appellants, trustees, were dissatisfied with the conduct of this *paricharaka* and ejected him from office. Thereupon the first respondent brought an application, claiming that the appellants should be punished for disobedience to the decree of 1896. When the application was actually heard, the only relief claimed actually was a recognition of the first respondent's right under the decree and costs. Both the Courts below have held that by virtue of the decree of 1896 the *archaka* is solely entitled to appoint, control and dismiss the person who performs the functions of *paricharaka*.

In appeal it was contended that even under the terms of the decree this sole right was not vested in the *archaka* but that the general powers of the trustee enabled the trustee also to exercise disciplinary control. I cannot accept this contention. The decree seems to me to be perfectly plain as conferring the right of appointment, dismissal and control solely on the *archaka*.

It remains, however, to consider whether this decree is in full force and effect, having regard to subsequent judicial and

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statutory changes. In a suit of 1912 there was a scheme framed for the temple whereunder powers of appointment of *non-mirasi* servants and punishment of *mirasi* servants were vested in the additional trustee. This scheme appears to have been referred to in the proceedings in the Court below but the actual instrument was not exhibited. It is not, however, necessary to go in detail into the effect of the scheme decree, for there has been a subsequent statutory enactment which has substantially the same effect. S. 43 of the Madras Hindu Religious Endowments Act provides that:

"All office-holders and servants attached to a temple or in receipt of any emolument or perquisite from the temple shall be under the orders and control of the trustee; and the trustee may fine, suspend, remove or dismiss any of them for breach of trust, etc."

S. 79 of the same Act provides that:

"Save as otherwise expressly provided in or under this Act, nothing herein contained shall affect any established usage of a mutt or temple, etc."

It is argued that S. 79 has the effect of saving this decree of 1896 which is not expressly affected by any provision of the Act. I cannot accept this contention. It seems to me that the terms of S. 43 contain an express provision vesting solely in the trustee a power of disciplinary control which is entirely inconsistent with, and abrogatory of, the power given under the decree. It is argued that the *paricharaka* is not an office-holder but a mere deputy for the *archaka* in whom the *paricharaka* office is vested. This argument seems to me to ignore the facts. The person who actually performs the functions of the *paricharaka* office is the person who has been ejected from office by the appellants. It is true that he was admitted into the office owing to the appointment by the first respondent. But having been so appointed, so long as he performs the functions of the *paricharaka* office, it being certainly an office attached to the temple, he is an office-holder attached to the temple and by virtue of S. 43 of the Act the power of punishment and dismissal in respect of that office-holder vests in the trustee. It cannot, I think, be contended that the inconsistent power of control based on the decree of 1896 can any longer have force in view of the express statutory provision under S. 43 of the Hindu Religious Endowments Act. In this view I allow the appeal and dismiss the execution petition with costs throughout as against the first respondent here.

S. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

Kesavamattam Koda Nayakamma.. *Appellant** (*1st Defendant*)

v.

Edara Venkayya and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

Koda Nayakamma *v.* Venkayya.

Mortgage—Want of due proof of execution—Unsustainability of decree on mortgage—If money decree can be passed on the personal covenant in the document.

Where a mortgage-deed has not been proved to be duly executed and a decree on the mortgage cannot be sustained it is open to the Court to pass a money decree on the strength of a personal covenant contained in the document.

Kunhu Moidin v. *Madhava Menon*, (1908) 19 M.L.J. 584: I.L.R. 32 Mad. 410 (F.B.), followed.

Appeal against the decree of the District Court of West Godavari at Ellore in O. S. No. 59 of 1933 and petitions praying that in the circumstances stated therein the High Court will be pleased to scale down the debt in the above appeal in accordance with the provisions of the Madras Act IV of 1938.

Y. Satyanarayana for Appellant.

M. S. Ramachandra Rao, D. R. Krishna Rao and *C. V. Dikshitulu* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This is an appeal from the decree of the learned District Judge of West Godavari in a suit instituted on a mortgage executed by defendants 1 and 2 in favour of the plaintiff. The second defendant is the son-in-law of the first defendant. The property mortgaged is a house in Ellore. It is the case of the plaintiff that the property solely belongs to the first defendant. It is the case of the first defendant that the property belonged to her husband. It is not necessary to determine that question. The second defendant admitted the claim. The main defence of the first defendant was that the mortgage was not executed by her, that she was an ignorant and illiterate woman and the second defendant was in a position to dominate her and the suit document was vitiated by fraud and undue influence. The learned Judge on a consideration of the evidence came to the conclusion that the first defendant had not

* Appeal No. 11 of 1936 and C. M. P. Nos. 3101 and 3116 of 1939. 8th August, 1939.

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made out the case of fraud and undue influence. He found in favour of the plaintiff in regard to the execution of the mortgage and gave a decree for the amount claimed. This appeal is by the first defendant.

In appeal the main point urged before us is that the mortgage is unenforceable because the plaintiff failed to prove due execution of the suit document. The contention is that under S. 59 of the Transfer of Property Act a mortgage of the description sued on must be signed not only by the mortgagor but must be attested by two attesting witnesses in the presence of the executant and there is no proof of such a valid attestation. When a defendant denies execution of the mortgage alleged to have been executed by him, it is incumbent on the mortgagee, to prove due execution of the same, that is, execution in accordance with law. He must prove that the mortgagor signed the document in the presence of two attesting witnesses who must have seen the executant sign the document or received an acknowledgment from him of his having signed the document and each one of the attestors must have signed the document in the presence of the executant. The mortgage-deed in this case purports to be attested by two witnesses, P. W. 1 and one Perimella Venkatasubba Rao. Only one attesting witness has been called, that is, P. W. 1. He has deposed that he saw the first defendant put her thumb impression on the document but he does not depose that he signed it in her presence. He did not say anything about the other attesting witness signing it. In order to supply this lacuna Mr. Ramachandra Rao on behalf of the mortgagee sought in aid the deposition of P. W. 2, the writer of the document, one Turimella Suryanarayana. He contends that a writer can be an attesting witness. Whether a writer can be an attesting witness depends on the circumstances of each case. Assuming the writer can be treated as an attesting witness, the one essential element of attestation is wanting in this case. The writer does not depose that he signed the document in the presence of the executant. Mr. Ramachandra Rao submits that, having regard to the circumstances of this case, it is open to us to presume that P. W. 1 and the writer must have affixed their signatures in the presence of the executant. So far as P. W. 1 is concerned it seems to us to be very doubtful whether he was actually present at the time when the first defendant put her

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—
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thumb impression. A suggestion was made in the cross-examination of P. W. 1 that he did not attest the document in the residence of the plaintiff but elsewhere. In the cross-examination of P. W. 2 it was elicited that when the document was being written P. W. 1 was not there but the second defendant brought P. W. 1 as he was going along the road to attest the document. The evidence as to the presence of P. W. 1 at the time of execution is unsatisfactory. With regard to P. W. 2, on an examination of the document it will be seen that he does not sign the document as a writer but there is a statement that the writing of the document is of Turimella Suryanarayana. It cannot be said that that statement amounts to attestation within the meaning of the law. The statement indicates that it was not intended that he should sign as an attesting witness. But even assuming as we have said that he intended to sign that document as an attesting witness, he does not depose that he wrote the said statement in the presence of the first defendant and all that he says is that the first defendant was present when he was writing Ex. A. On the evidence we are not inclined to presume that all the attesting witnesses including the writer were present at the time when the first defendant put her thumb impression and that all persons being at the same place it would have been possible for the first defendant to witness the signature by the attesting witnesses and the writer. We are therefore reluctantly forced to come to the conclusion that the mortgage-deed has not been duly proved to be executed by the first defendant and a decree on the mortgage cannot be sustained and must be set aside. But Mr. Ramachandra Rao contends that there is a personal covenant in the document and on the strength of that personal covenant it is open to us to pass a money decree in favour of the plaintiff for the amount claimed. This can be done. (Vide *Kunhu Moidin* v. *Madhava Menon*[1].) Therefore, while we set aside the mortgage decree as passed by the lower Court, we pass a decree against the defendants for the amount claimed in the plaint with interest at the contract rate up to date of plaint and at 6 per cent. from date of plaint.

As far as costs are concerned as this point was not specifically raised in the Court below the proper order we should pass

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1. (1908) 19 M.L.J. 584: I.L.R. 32 Mad. 410 (F.B.).

Koda Nayakamma v. Venkayya. — Venkataramana Rao, J.

is to direct the parties to bear their costs in this appeal but the plaintiff will have his costs in the Court below as decreed.

Both the defendants claim they are agriculturists and they are entitled to get relief under the Agriculturists Relief Act. The petitions filed by them will be sent down to the lower Court for an enquiry into the question whether the defendants are agriculturists; and if they are found to be agriculturists, the lower Court will give them relief under the Act and the decree we have passed against them will be subject to the relief they will get on the said petitions. It is open to the plaintiff to oppose the said petitions and raise all objections which are open to him.

K. S. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE SOMAYYA.

F.B. — Commissioner of Income-tax, Madras v. Sreeramulu Chetty.

The Commissioner of Income-tax, Madras .. *Applicant** (*Respondent*)

v.

Voora Sreeramulu Chetty .. *Respondent* (*Petitioner*).

Income-tax Act (XI of 1922), S. 66-A (2)—Application under S. 66 (3) on refusal by Commissioner of application under S. 66 (2) read with S. 33—Reference to Full Bench—Latter holding order prejudicial—Order under S. 66 (3) directing reference—Appeal to Privy Council—Application for leave—Competency—Jurisdiction of High Court to grant certificate—Letters Patent (Madras), cls. 39 and 40.

The Commissioner of Income-tax having refused to state a case under S. 66 (2) of the Income-tax Act read with S. 33, on a question arising under S. 25 (3), the assessee applied to the High Court under S. 66 (3). The High Court, feeling some doubt as to the correctness of a prior decision relied on by the Commissioner, made a reference to a Full Bench of five Judges, who held that the prior decision was wrong, and that an order refusing to interfere with a prejudicial order was itself prejudicial. The High Court, on receipt of this answer of the Full Bench, directed the Commissioner of Income-tax to state a case on the point of law involved. The Commissioner then applied for a certificate permitting an appeal to the Privy Council.

Held, (1) that High Court had no jurisdiction to grant a certificate of appeal under S. 66-A (2) of the Income-tax Act;

(2) that an appeal did not lie under cl. 39 of the Letters Patent from a decision of the High Court upon a case stated and referred to the Court under the Act, since the decision was merely advisory, and, therefore, was not a final judgment, decree or order within the meaning of the clause;

*Application for leave to appeal to His Majesty in Council in O. P. No. 146 of 1938. 7th March, 1939.

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Commissioner of Income-tax, Madras v. Sreeramulu Chetty.

(3) that the direction given to the Commissioner to state a case being an interlocutory order in a matter in which the Court was required to act in an advisory capacity and the reference to the Full Bench forming part of the interlocutory proceedings, there was no appeal, and the High Court had no jurisdiction to grant a certificate under cl. 40 of the Letters Patent.

Tata Iron and Steel Co., Ltd. v. *Chief Revenue Authority, Bombay*, (1923) 45 M.L.J. 295: L.R. 50 I.A. 212: I.L.R 47 Bom. 724 (P C.), followed.

Application for leave to appeal to His Majesty in Council in Original Petition No. 146 of 1938, the judgment in which is reported as *Sreeramulu Chetty* v. *Commissioner of Income-tax, Madras*[1].

M. Patanjali Sastri for Commissioner of Income-tax.

K. Bhimasankaran for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This is an application for a certificate permitting an appeal to His Majesty in Council from an order of this Court in an income-tax matter. The respondent has taken the preliminary objection that this Court has no power to grant a certificate in this case.

The respondent applied to the Commissioner of Income-tax to state a case on a question arising under S. 25 (3) of the Income-tax Act. The Commissioner, relying on the decision of this Court in *Venkatachalam* v. *Commissioner of Income-tax, Madras*[2], refused to state a case on the ground that the order was not prejudicial within the meaning of S. 66 (2) read with S. 33. In *Venkatachalam* v. *Commissioner of Income-tax, Madras*[2], an application was filed in the office of the Income-tax Officer for a refund of income-tax under the provisions of S. 48 of the Act. The application was rejected and the Commissioner refused to interfere by an order under S. 33. The applicant then applied to this Court under S. 66 (3). As the order of the Commissioner was not one enhancing the assessment and as it was considered that it was not "prejudicial" to the petitioner the Court held that the application by him to the Commissioner under S. 66 (2) was incompetent. As some doubt was felt as to the correctness of this decision when the case out of which the present application arises came before the Court a reference was made to a Full Bench of five Judges, and the answer given to the reference was that an order refusing to interfere with a prejudicial order was itself prejudicial.

1. (1939) 2 M.L.J. 68: I.L.R. 1939 Mad. 358 (F.B.).
2. (1934) 68 M.L.J. 227: I.L.R. 58 Mad. 367 (F.B.).

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Consequently it was held that *Venkatachalam* v. *Commissioner of Income-tax, Madras*[1], had been wrongly decided. On receipt of the answer given by the Full Bench to the question referred the Bench dealing with the petition directed the Commissioner of Income-tax to state a case on the point of law involved. The Commissioner of Income-tax desires to challenge the correctness of the decision of the Full Bench in an appeal to His Majesty in Council.

S. 66-A (2) provides that an appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under S. 66 in a case which the High Court certifies to be a fit one for appeal. Mr. Patanjali Sastri, on behalf of the Commissioner of Income-tax, concedes that the Court has no jurisdiction to grant a certificate under S. 66-A (2), but says that it has power to do so under cl. 40 of the Letters Patent. Cl. 40 has to be read in conjunction with cl. 39. Cl. 39 gives a right of appeal to the Privy Council in a matter not being of criminal jurisdiction, from a final judgment, decree or order made on appeal and from a final judgment, decree or order made in the exercise of original jurisdiction by Judges of the High Court or of a Division Court from which an appeal does not lie to the High Court under cl. 15 of the Letters Patent. Then follows a proviso to the same effect as the provisions of Ss. 109 and 110 of the Code of Civil Procedure. Cl. 40 provides that the Court, at its discretion, may grant leave to appeal from a preliminary or interlocutory judgment, decree or order, in a proceeding contemplated by cl. 39, subject to the same rules, regulations and limitations which apply to appeals from final judgments, decrees or orders.

In the case of *Tata Iron and Steel Company, Limited* v. *Chief Revenue Authority of Bombay*[2], the Judicial Committee held that an appeal did not lie under cl. 39 of the Letters Patent of the Bombay High Court (which corresponds to cl. 39 of the Letters Patent of this Court) from a decision of the High Court upon a case stated and referred to the Court by the Income-tax Act, 1918, since the decision was merely advisory and therefore was not a final judgment, decree or order within the meaning of the clause. In that case it was not argued that the decision was an interlocutory judgment, order or decree

1. (1934) 68 M.L.J. 227: I.L.R. 58 Mad. 367 (F.B.).
2. (1923) 45 M.L.J. 295: L.R. 50 I.A. 212: I.L.R. 47 Bom. 724 (P.C.).

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within the meaning of cl. 40, but the argument is advanced here. It is said that the judgment of this Court in the Full Bench reference constitutes an interlocutory judgment within the meaning of that clause and that the order directing the Commissioner of Income-tax to state a case based on the judgment of the Full Bench is also within the clause. In my opinion these contentions cannot be maintained. If there is no appeal from a final order in an income-tax matter, apart, of course, from the appeal now given under S. 66-A (2), it is difficult to understand how there can be an appeal from an interlocutory order in such a matter. I regard the direction which was given to the Commissioner of Income-tax to state a case as being an interlocutory order in a matter in which the Court was required to act in an advisory capacity and the reference to the Full Bench formed part of the interlocutory proceedings. *Tata Iron and Steel Company, Limited* v. *Chief Revenue Authority of Bombay*[1] is final on the question whether there is an appeal when the Court is acting merely in an advisory capacity under the Income-tax Act and it covers the present case.

The opinion which I have expressed receives support from the decisions in *E. M. Chettyar Firm* v. *Commissioner of Income-tax*[2] and *Delhi Cloth and General Mills Co.* v. *Income-tax Commissioner, Delhi*[3] and Mr. Patanjali Sastri admits that this Court has followed the decision in *E. M. Chettyar Firm* v. *Commissioner of Income-tax*[2] in an unreported case. There is a decision of the Lahore High Court—*Feroze Shah* v. *Commissioner of Income-tax*[4]—which conflicts with the decisions I have just mentioned, but it is not necessary to discuss it because we are bound by the decision of this Court.

For these reasons I would hold that the objection taken by the respondent is well-founded and that as the case now stands this Court has no jurisdiction to grant a certificate. The respondent is entitled to the usual costs, Rs. 100.

Gentle, J.

Gentle, J.—I agree and wish to add a few words. It is conceded that under S. 66-A (2) of the Income tax Act there is no authority for this Court to grant a certificate in this matter

1. (1923) 45 M.L.J. 295: L.R. 50 I.A. 212: I.L.R. 47 Bom. 724 (P.C.).
2. (1930) I.L.R. 8 Rang. 435.
3. (1927) 2 I.T.R. 439.
4. (1931) I.L.R. 12 Lah. 166 (F.B.).

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permitting an appeal to His Majesty in Council, and the application is really based upon the provisions of cl. 40 of the Letters Patent. This clause does provide an appeal from a preliminary or interlocutory decision "as aforesaid." "As aforesaid", it is conceded by Mr. Patanjali Sastri refers to the proceedings contemplated by cl. 39 of the Letters Patent. In my opinion this matter is not a final judgment, decree or order within the contemplation of cl. 39. Since it has been held by their Lordships of the Judicial Committee in *Tata Iron and Steel Company, Limited* v. *Chief Revenue Authority of Bombay*[1], that there is no appeal under cl. 39 of the Letters Patent from a decision of the High Court in an income-tax matter it must follow that there can be no appeal and no authority for this Court to grant a certificate permitting an appeal to His Majesty in Council under the provisions of cl. 40 of the Letters Patent. For these reasons I agree with the views expressed by my Lord the Chief Justice that this application should be dismissed.

Somayya, J.

Somayya, J.—I agree.

K. C. —— *Certificate refused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

T. S. P. L. P. Chidambaram Chettiar .. *Appellant** (*Petitioner*)

v.

Murugesam Pillai minor and others .. *Respondents* (*Respondents Nos. 2 to 4*).

Chidambaram Chettiar v. Murugesam Pillai.

Limitation Act (IX of 1908), Art. 182 (5)—Final order—Meaning of—Order to remedy defect—Whether 'step in aid' of execution.

The wording in Art. 182 (5) of the Limitation Act 'the date of the final order, passed on an application made in accordance with law to the proper Court' means the last final order. It cannot mean merely last in point of time. That article does not seem to provide for the case where an order is passed by the Court on a defective application. An application which does not conform to the requirements of O. 21, rr. 11 to 14 and which for that reason has to be kept in abeyance, if the Judge so wishes, to permit the defect to be remedied, is not an application made in accordance with law. Even, therefore, if the direction allowing time for the remedy of the defect is regarded as an 'order' of the Court, it would not be an order passed on an application made in accordance with law.

Judgment of Stodart, J., in C. R. P. No. 682 of 1933 and *Mottaya Padayachi* v. *Rajagopalan*, (1936) M.W.N. 547, disapproved.

1. (1923) 45 M.L.J. 295: L.R. 50 I.A. 212: I.L.R. 47 Bom. 724 (P.C.).

* A. A. O. No. 157 of 1938. 28th April, 1939.

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Kesavuloo v. *Official Receiver, West Tanjore,* (1936) 71 M.L.J. 336; *Muthu Rama Reddi* v. *Motilal Daga,* I.L.R. 1938 Mad. 326 and *Municipal Council, Tanjore* v. *Sundaresan,* (1939) 1 M.L.J. 87, relied on.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly dated 11th October, 1937 and made in E. P. No. 216 of 1936 in O. S. No. 157 of 1924.

S. T. Srinivasagopalachariar, K. Rangaswami Aiyangar, T. R. Srinivasa Aiyangar and *E. A. Viswanathan* for Appellant.

K. G. Srinivasa Aiyar for Respondents.

The Court delivered the following

Burn, J.

JUDGMENTS. *Burn, J.*—The only point in this appeal is one of limitation. The appellant's father got a decree in O. S. No. 157 of 1924 on the file of the Subordinate Judge of Trichinopoly on the 29th of June, 1925. The appellant is his adopted son. He presented his petition in execution (E. P. No. 216 of 1936) on the 27th of June, 1936, and the learned Subordinate Judge has held that it was barred by limitation on the ground that it was not presented within three years after the final order passed on a previous application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution—Art. 182 (5) of the Limitation Act.

The execution petition presented on the 27th of June, 1936, is the fifth of the execution petitions presented by this decree-holder. The first was filed on the 3rd of November, 1927, praying for arrest of the defendant; it was dismissed on the 7th of January, 1928, as the judgment-debtor was not found for arrest. The second execution petition was presented on the 3rd of November, 1930. This was returned on the 4th of November, 1930, with an endorsement requesting the petitioner to show how he was entitled to attach a sum of money in deposit in O. S. No. 6 of 1925. After two extensions of time had been given, learned Counsel for the petitioner re-presented this petition on the 24th November, 1930, with an explanation. The petition was then returned on the 26th of November, 1930, with an endorsement that the permission of the Court must be obtained to proceed against the properties in the hands of the Receiver appointed by the Court. Two weeks' time was allowed for this. This endorsement was not complied with. The next

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application was filed on the 3rd of March, 1931 and the second E. P. was 'filed' along with it with the remark:

" On 3rd November, 1930, petition was put in, but it was returned. It was not re-presented, it is filed herewith."

On this petition, on the 5th of March, the lower Court again required the petitioner to obtain the permission of the Court to proceed against the properties in the hands of the receiver appointed by the Court in O. S. No. 6 of 1925 and allowed two weeks' time for complying with this. After two extensions, this was re-presented on the 6th of April with an application for permission to proceed against the receiver. It was again returned by the lower Court on the 7th of April with a requisition that the description of property sought to be attached should be amplified and that the extent and Survey Numbers should be given. One week's time was allowed for this. On the 15th of April, the petitioner's pleader prayed for 15 days' time to obtain the necessary extracts from the Survey registers. On the 25th of June, 15 days' further time was prayed for and granted by the Subordinate Judge in his order dated the 30th of June, 1931. The requisition was however not complied with and this petition did not come back to the Court until the 30th of June, 1934, when the fourth E. P. was filed. In that, as in the third, the petitioner stated that he had put in previous execution petitions on the 3rd of November, 1930, and the 3rd of March, 1931, but they had been returned to him and therefore he said, they were presented along with the fourth. This was returned on the 3rd of July, 1934, with an endorsement requiring the petitioner firstly to file an affidavit with regard to the legal representatives of the decree-holder (this petition was presented by the present appellant the adopted son of the original decree-holder); secondly, to obtain the consent of the vakil who had appeared in the prior execution proceedings; thirdly, to put in a guardian petition for the minor legal representatives of the judgment-debtor; and fourthly, to produce the Revenue extracts which had already been called for on the previous two execution petitions. The petitioner did not comply with these requisitions but appears to have applied for further time, for, on the 18th July, 1934, the lower Court has endorsed, "Time granted till 9th August, 1934." The petitioner having taken this petition back, nothing more was heard of it until the 27th of June, 1936, when he presented E. P. No. 216 of 1936. He then produced

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the second, third and fourth petitions with an endorsement on each of them in these words:

"As a fresh petition is filed herewith, this petition may be dismissed."

Now, the learned Subordinate Judge has held that none of the orders passed on the second, third and fourth execution petitions can be considered to be a "final" order within the meaning of Art. 182 (5) of the Limitation Act. The last final order on an execution petition is dated the 7th of January, 1928, and the execution petition presented on 27th of June, 1936, is long out of time.

Hence this appeal by the decree-holder. His contention is that his E. P. No. 216 of 1936 is not barred by limitation because it was presented within three years from the 30th of June, 1934, when the fourth E. P. was finally returned to him; the fourth E. P. was presented within three years of the 30th June, 1931, when the third E.P. was returned to him, and the third E.P. was presented within three years of the 26th of November, 1930, when the second E.P. was finally returned to him. The second E.P. was presented on the 3rd of November, 1930, within three years of the 7th of January, 1928, on which date the first E.P. had been dismissed.

The question is: what is the meaning of the words "final order" in Art. 182 (5) of the Limitation Act? Learned Counsel for the appellant contends that it means simply the last order in point of time. He relies on the decision of Mr. Justice Pandrang Row in *Mottaya Padayachi* v. *Rajagopalam*[1] and the decision of Mr. Justice Stodart in C. R. P. No. 682 of 1933 reported in the same page. On the other hand, learned Counsel for the appellant recognises that there are two decisions of Division Benches of this Court subsequent to these decisions of single judges in which it has been held that 'final' does not mean merely last in point of time. These are the cases of *Kesavuloo* v. *Official Receiver, West Tanjore*[2] and *Muthu Rama Reddi* v. *Motilal Daga*[3]. There is also a decision of my own sitting singly, reported in *Municipal Council, Tanjore* v. *Sundaresan*[4]. In the case of *Kesavuloo* v. *Official Receiver, West Tanjore*[2], Venkatasubba Rao and Cornish, JJ., have shown that 'final' in

1. (1936) M.W.N. 547.
2. (1936) 71 M.L.J. 336.
3. I L.R. 1938 Mad. 326.
4. (1939) 1 M.L.J. 87.

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Art. 182 (5) cannot be taken as meaning merely last in point of time. Mr. Justice Venkatasubba Rao points out that the word 'final' occurs not only in cl. (5) of Art. 182 but also in cls. (2) and (6) and the meaning of the word 'final' in cl. (2) has been considered by their Lordships of the Privy Council in *Batuk Nath* v. *Munni Dei*[1] and *Abdul Majid* v. *Jawahir Lal*[2]. The latter case, in my opinion, is very much in point. Art. 182 (2) provides that the three year period of limitation for execution of a decree shall run, when there has been an appeal, from:

"The date of the final decree or order of the appellate Court. . . . ."

In the first of the cases before the Privy Council, an appeal was preferred to the Privy Council and it was dismissed for want of prosecution under r. 5 of the Order in Council of 1853. It was contended on behalf of the assignee-decree-holder that the date on which the appeal had been dismissed by the Privy Council was the date of the final decree or order of the appellate Court, and that the decree could be executed within three years from that date. This contention was disallowed by their Lordships. They held that in such case, there was no final order of the Privy Council within the meaning of Art. 179 (2) as it was then, corresponding now to Art. 182 (2). In the latter case again it was contended that the date of the dismissal by the Privy Council was the date of the final order or decree. Lord Moulton observed that:

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all."

In my opinion, this is the test to be applied in cases like the present. If an execution petition is returned to the decree-holder for some amendment, it is his duty to re-present it within the time allowed, or to get an extension of the time allowed, or to show cause why he should not comply with the requisition, or to pursue the matter in some way until he gets what can be properly described as a final order upon it. If having received back his execution petition, he takes no further action upon it, then he should be treated in my opinion as if he had never put in his petition at all. This is what I said in my judgment in *Municipal Council,*

1. (1914) 27 M.L.J. 1: L.R. 41 I.A. 104: I.L.R. 36 All. 284 (P.C.).
2. (1914) 27 M.L.J. 17: I.L.R. 36 All. 350 (P.C.).

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Tanjore v. *Sundaresan*[1]. It is not, in my opinion, permissible for a decree-holder to extend the period of limitation by simply failing to re-present an execution petition returned for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all. In the present case, the first execution petition, as I have already said, was dismissed on the 7th of January, 1928; the second execution petition was filed on the 3rd of November, 1930, and was last returned to the petitioner on the 26th of November, 1930, requiring him to get the Court's permission to proceed against the properties in the hands of the receiver and giving him two weeks' time to do so. Now he did not bring this back until the 3rd of March, 1931, and when he brought it back, he did not comply with the requisitions; he did not pray for excusing the delay in complying with the requisitions; he did not ask that anything whatever should be done with the second execution petition; he merely filed it with the third execution petition presented on the 3rd of March, 1931. Now, on the 3rd of March, 1931, execution was barred because that was already more than three years after the 7th January, 1928, when the first execution petition had been dismissed. As I have already said, the third execution petition was dealt with in the same way as the second and therefore no judicial determination of it has been made but it is quite conceivable that if the third execution petition had been re-presented in proper time, it would have been dismissed as barred by limitation. Certainly it would have been necessary to dismiss the second execution petition as barred by limitation when it was re-presented on the 3rd March, 1931, unless the petitioner had been able to persuade the Court to excuse the delay in re-presentation. If the delay were not excused, then this petition would have had to be treated as if it had been presented for the first time on the 3rd March, 1931, and that was beyond the period of limitation. Learned Counsel has suggested that we should refer this matter to a Full Bench because Mr. Justice Pandrang Row, in spite of the decision of a Bench of this Court in *Kesavuloo* v. *Official Receiver, West Tanjore*[2], in 1936, still adhered in 1937 to his former opinion—vide *Chidambara Nadar* v. *Rama Nadar*[3] and again in *A. K. Narasimha Aiyar* v. *Veerappa Chettiar*[4]. I regret I do not consider that this is a

1. (1939) M.W.N. 426.
2. (1936) 71 M.L.J. 336.
3. (1937) 4 M.L.J. 453 (F.B.).
4. A. A. A O. No. 138 of 1937.

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sufficient reason for referring this matter to a Full Bench. As I have already said there are two Benches which have already expressed the view that 'final' in Art. 182 (5) cannot be interpreted as being merely the last in point of time. With respect, I think those decisions are correct. 'Final' is a word which has many meanings but all of them I think involve the notion of putting an 'end' to something. It is not possible to call an order a "final order" unless it puts an end to something or other. Now, in my opinion, it is impossible to say of any of these orders of return on the second, third and fourth execution petitions that they put an end to anything. They were expressly orders requiring the petitioner to do something more in order that the Court might proceed with his execution petition. They did not contemplate the end of that execution petition at all. Learned Counsel for the appellant wishes us to say that such orders as these ought to be construed as if they contained further clauses. He says that when an execution petition is returned for amendment within 15 days it ought to be read as if it contained a statement that in default of re-presentation within 15 days, it should stand dismissed. I am not able to accept this contention. Art. 182 (5) refers expressly to "the date of the final order". It is not possible for this purpose to bring in some fictitious date of an order which has not been passed. Learned Counsel for the appellant has relied strongly upon the case of *Pitambar Jana* v. *Damodar Guchait*[1]. But that case was before the amendment of the Act in 1927 as the ruling shows. It is therefore not applicable to this case. Learned Counsel has also referred to the decision of Mr. Justice Madhavan Nair in *Muhammad Abu Bakkar Maracair* v. *Ramakrishna Chettiar*[2]. What is stated in that decision is that so long as the Court does not dismiss a petition, it must be deemed to be still pending. With respect I do not think that that principle can be applied to execution petitions of this kind where there is a period of limitation prescribed. If that view is taken, it is possible, as I have pointed out elsewhere, for a decree-holder to extend the period of limitation at his will by presenting a defective execution petition, and on its return to him by refraining from re-presenting it. This course could be taken before the amendment of Art. 182 in 1927. In 1927 it was the date of an execution

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1. (1926) I.L.R. 53 Cal. 664. 2. (1932) 64 M.L.J. 401.

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petition that gave the start for the period of limitation of three years. Any execution petition presented within three years of the date of the presentation of a former execution petition was in time. It was therefore possible to present an execution petition with no intention of proceeding with it, and to take no further steps upon it, for two years and 364 days and then to come in with another execution petition. Pandrang Row, J., in *Mottaya Padayachi* v. *Rajagopalan*[1] has expressed some views about the policy of the amending Act passed in 1927. With respect it is not quite self-evident to me that the policy underlying the amendment was to give the decree-holder more time. I would prefer to follow the views on this subject expressed by Mr. Justice Venkatasubba Rao in *Kesavuloo* v. *Official Receiver, West Tanjore*[2]. I do not think, therefore, that there is any sufficient reason for putting this matter before a Full Bench. I am quite satisfied that the execution petitions which were returned for amendment and which were not re-presented within the proper time cannot save limitation.

The judgment of the learned Subordinate Judge is, therefore, in my opinion, correct, and this appeal should be dismissed with costs.

Stodart, J.

Stodart, J.—I agree with my learned brother. I think that my decision in C. R. P. No. 682 of 1933 was wrong. In that decision I held that the expression 'final order' in Art. 182 (5) of the 1st Schedule of the Limitation Act must be construed as the 'last order' and that a direction of the Court that an application made to it in execution should be amended as if the amendment was never made the 'last order' on that application. On further consideration I think that such a direction is not final in the sense in which that word should be construed, namely, as putting an end to the application: and I would go further and hold that such a direction is not an order at all. It is simply an intimation to the applicant that his petition cannot be admitted and acted upon unless he supplies the Court with further particulars or observes some formality which he has omitted to observe. There are in my opinion only three ways of dealing with an application for the execution of a decree: and these are unambiguously defined in O. 21, r. 17 of the Civil Procedure Code. If the application conforms to the requirements of rr. 11

1. (1936) M.W.N. 547.
2. (1936) 71 M.L.J. 336.

to 14 it must be admitted which means that it receives a serial number in the execution petition Register and comes on in the usual course in open Court for the orders of the Judge. In such a case there will be a final order which will effectively dispose of the matters raised in the application. Secondly, if the application does not comply with the requirements of rr. 11 to 14 it may be forthwith rejected. Thirdly, and this is the case now under consideration, if the application does not comply with the provisions of rr. 11 to 14, the Judge, instead of rejecting it forthwith, may allow the defect to be remedied and if necessary may grant time to enable the applicant to do this. The practice universally followed by the Courts is to embody a direction to this effect on the application itself and to return it to the party. If within the time allowed, the application is not presented nothing more is heard of it. In my opinion the direction of the Court, stating that the application is defective, that the Court allows the defect to be remedied and that the Court grants time for that purpose—generally a certain number of days—is not an order at all, much less a final order. It sometimes happens that a decree-holder makes an application for the execution of a decree not with any idea of realising anything towards his decree, but in order to extend the time during which it is lawful for him to execute his decree. Such an application may be perfectly *bona fide*. He may know at the time that the judgment-debtor is not able to pay anything: or he may wish to give the judgment-debtor further time to pay, either at the request of the judgment-debtor himself or for a variety of other reasons. Nevertheless, in his own interests, it is necessary to present an application for the execution of the decree to the proper Court lest he should lose his remedy altogether. Since the amendment of the Limitation Act in 1927 (Act IX of 1927) the mere presentation of an execution application to the proper Court is not sufficient to extend the period of limitation. Surely enough time has now elapsed for decree-holders to realise that the law has been changed and that they must not only present an application but must see that it conforms to the requirements of rr. 11 to 14 of O. 21 and that it is admitted and finally disposed of by an order of the Court. It may occasionally happen that an application does conform to the requirements of rr. 11 to 14 but is nevertheless not admitted but is held in abeyance pending the furnishing of some further information which the Court

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requires but which should not properly be called for till a later stage is reached. In that case the attention of the Court may be drawn to the fact that the application is one which should be under the provisions of r. 17 admitted and disposed of in the ordinary course. Lastly I would like to say that in my opinion Art. 182 (5) of the 1st Schedule to the Limitation Act does not seem to provide for the case where an order is passed by the Court on a defective application. The relevant words are:

"The date of the final order, passed on an application made in accordance with law to the proper Court."

But an application which does not conform to the requirements of O. 21, rr. 11 to 14 and which for that reason has to be kept in abeyance—if the Judge so wishes—to permit the defect to be remedied, is not in my opinion an application made in accordance with law. Even therefore if the direction allowing time for the remedy of the defect is regarded as an 'order' of the Court, it would in my view not be an order passed on an application made in accordance with law. If the application on the other hand were not defective it would necessarily be admitted and a final order would be passed on it in due course. When it is defective and no order can be passed on it except an order—if order it can be called—that the defect can be remedied in a certain time, it seems to me that it falls altogether outside the provisions of Art. 182 (5).

I agree that this appeal must be dismissed with costs.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Viyathen Sreedevi *alias* Kozhikote Kishakke Kovilagath Valia Thamburatti .. *Appellant** (*Appellant*)

v.

Aydross Kurikkal and another .. *Respondents* (*Respondents*).

Sreedevi v. Kurikkal.

Malabar Compensation for Tenants Improvements Act (I of 1900), S. 19—Clause in a kanom demise—Landlord stipulating for full value of trees felled by tenant, when not for improvement—Clause valid—Full value payable to landlord by tenant.

Where a kanom demise contained the following clause:

*L. P. A. No. 13 of 1937. 21st February, 1939.

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"If I cut trees such as veeti, teak, jack, etc., from the parambas without obtaining the written consent of the kovilagam, I shall be answerable for the costs of such trees and shall surrender the properties irrespective of the twelve years term, if the kovilagam demands it" and the appellant claimed by virtue of this clause to recover the full value of the trees felled by the respondent, when no improvement was effected to the land by such cutting,

Held, that there is no limitation in the Malabar Compensation for Tenants Improvements Act preventing the landlord and tenant to agree upon such terms of the tenancy as the clause above contains. There is nothing which contravenes the provisions of S 19 in charging the full value of the trees.

Kelu Nair v. *Viyathan Mahadevi*, (1923) 16 L.W. 310, followed.

Apart from there being no statutory prohibition of such a clause, it is only right that a landlord should be allowed to make a stipulation for payment of the full value when the felling is not an improvement within the meaning of the Act.

Rajah of Cochin v. *Kittunni Nair*, (1916) 32 M.L.J. 295: I.L.R. 40 Mad. 603 (F.B.), referred to.

Appeal under cl. 15 of the Letters Patent from the judgment of Venkataramana Rao, J., dated 20th November, 1936 and passed in S. A. No. 1853 of 1931 preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 200 of 1930 preferred against the decree in O. S. No. 316 of 1929, District Munsif's Court, Manjeri.

K. P. Ramakrishna Aiyar and *P. K. Manavikraman Raja* for Appellant.

N. R. Sesha Aiyar for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The appellant was the plaintiff in the suit out of which this appeal arises. He is the owner of certain lands in Malabar and in 1923 executed a kanom demise of the lands in favour of the respondent, who executed a counter-part (kychit). The demise, which was a renewal of an earlier demise, was for the usual period of twelve years. Although this period has expired, the respondent is still in possession of the property. The suit was filed by the appellant to recover a sum of Rs. 643 from the respondent. Of this amount Rs. 37-7-7 was claimed on the ground that the appellant had been compelled to pay to Government the land revenue owing to default by the respondent. The demise provided that the land revenue should be paid by the tenant. The balance of the claim, Rs. 605-5-5, represented a claim for damages for the wrongful selling of 75 teak trees growing on the property. It is common ground that the trees

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had not been sown by the tenant, but had grown spontaneously. It is also common ground that the appellant's claim for compensation did not exceed the value of the trees as timber. The kanom demise contained the following clause:—

"If I cut trees such as veeti, teak, jack, etc., from the parambas without obtaining the written consent of the kovilagam, I shall be answerable for the costs of such trees and shall surrender the properties irrespective of the twelve years' term if the kovilagam demands it."

The appellant contended that by virtue of this clause he was entitled to recover the full value of the trees, there being nothing in the Malabar Compensation for Tenants Improvements Act, 1899, to deprive him of this right.

The case was tried by the District Munsif of Manjeri, who found that the respondent had not defaulted in the payment of land revenue and dismissed the suit so far as this claim was concerned. He held that the appellant was entitled to compensation for the trees which the respondent had cut down, but limited the amount to Rs. 37-8-0, which represents 8 annas per tree. The appellant accepted the decision of the District Munsif so far as it concerned the claim in respect of the money paid to Government, but appealed to the Subordinate Judge of Calicut on the finding of the District Munsif that he was only entitled to compensation at the rate of 8 annas per tree. While holding that the appellant was entitled to an amount of compensation larger than that awarded by the District Munsif, the Subordinate Judge refused to accept the contention that he was entitled to the full value of the trees. He held that the appellant was entitled to Rs. 187-8-0 being a quarter of the amount claimed. In arriving at this decision the Subordinate Judge apparently had regard to the provisions of S. 10 of the Malabar Compensation for Tenants Improvements Act. The appellant then appealed to this Court. The appeal was heard by Venkataramana Rao, J., who refused to interfere with the decree of the Subordinate Court. The learned Judge considered that the provision in the kanom demise for the payment of the full value of the trees was penal and contrary to S. 19 of the Act. In his opinion the appellant was only entitled to "reasonable" compensation and the amount awarded by the Subordinate Judge was reasonable.

The question which falls for decision is whether the Act precludes a landlord and a tenant from agreeing that the tenant shall pay full compensation when he fells trees spontaneously

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grown during the tenancy and the felling does not constitute an improvement to the estate. The scheme of the Act is to provide for compensation being paid to a tenant for improvements when he is required to quit the land held by him. The main sections relating to the payment of compensation are Ss. 9, 10, 13 and 19. S. 19 relates to an improvement producing an increase in the value of the annual net produce. When the improvement is not an improvement to which S. 13 applies and has caused an increase in the value of the annual net produce of the holding, the Court shall determine, as nearly as may be, the average net money value of the increase and the number of years during which the increase may reasonably be expected to continue, and shall then ascertain the present value "at 6 per cent. of an annuity equal to such money value for such number of years", and shall also determine the cost of making the improvement. If the present value of the annuity does not exceed the cost of making the improvement, the present value shall be the compensation to be awarded. If the present value of the annuity exceeds the cost of making the improvement, the compensation to be awarded shall be the cost together with one half of the excess. S. 10 deals with the case where the improvement is not an improvement within the meaning of S. 9, but consists of timber trees or other useful trees or plants spontaneously grown during the period of the tenancy or sown or planted by the tenant, or any of the other persons mentioned in S. 5. Where the improvement is of the nature contemplated by S. 10 the compensation to be awarded shall be three-fourths of the sum which the trees or plants might reasonably be expected to realise, if sold by public auction to be cut and carried away. Therefore, under this section if at the end of the tenancy there are trees which have been spontaneously grown or sown by the tenant the tenant gets three-fourths of the value of such trees as timber and the landlord one-fourth. By virtue of S. 13 when the improvement consists in the protection and maintenance of timber or fruit trees or of other useful trees or plants not sown or planted by the tenant or of such trees or plants spontaneously grown prior to the commencement of the tenancy, the compensation to be awarded shall be the proper cost of the protection and maintenance. S. 19 says that nothing in any contract made after the first day of January, 1886, shall take away or limit the right of a tenant to

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make improvements and to claim compensation for them in accordance with the provisions of the Act. As I have already indicated the learned Judge in holding that the appellant was not entitled to the full value of the timber felled by the respondent relied on this section. I fail, however, to see how S. 19 can apply to a case like the present one. The section merely prevents a tenant from entering into a contract which takes away or limits his right to make improvements and on the termination of the tenancy to claim compensation for them in accordance with the Act. When the tenant is required to quit, his landlord must pay him three-quarters of the value of the trees which have grown spontaneously, but that does not mean that the tenant is entitled to commit waste and the respondent here committed waste. It was the appellant's case that the respondent had deliberately cut the timber for the purpose of selling it to a timber merchant. Before giving his decision Venkataramana Rao, J., called for a finding on the question whether the felling of the trees was in itself an act of improvement within the meaning of the Act. He also called for a finding whether the felling was for the purpose of building farm houses or making any other improvements. The Subordinate Judge recorded evidence and answered the questions in the negative. It was not necessary for him to hold that the respondent had cut down the trees for the purpose of selling the timber for his own benefit and confined his findings to the wording of the issues framed by Venkataramana Rao, J. Before us the learned advocate for the respondent conceded that the trees were felled and that the timber was sold by the respondent for his own benefit. He, however, contended that the respondent was entitled in law to do this. This argument cannot be maintained, as the landlord's right to compensation for waste committed by the tenant is left unaffected by the Act. Even if the respondent had not sold the timber his action in felling the trees would still be waste as it did not lead to an improvement to the estate.

The learned Judge in the course of his judgment, discussed at length the decision of this Court in *Rajah of Cochin* v. *Kittunni Nair*1. In that case the following question was referred to a Full Bench for decision:

"Whether a provision in a Malabar lease that a tenant shall pay kuttikanom or some fee to his landlord in respect of trees cut down is contrary

1. (1916) 32 M.L.J. 295: I.L.R. 40 Mad. 603 (F.B.).

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to the provisions of S. 19 of the Malabar Compensation for Tenants Improvements Act."

The Full Bench consisted of Wallis, C.J., and Abdur Rahim, Oldfield, Srinivasa Aiyangar and Phillips, JJ. They all answered the question in the negative. By kuttikanom is meant a customary fee of eight annas per tree or some such sum as may be agreed upon. It is common ground that the word 'kuttikanom' only implies the payment of a small charge per tree felled. This case is, therefore, an authority for the proposition that S. 19 of the Act does not prevent the parties from entering into an agreement by which the tenant shall pay a small fee in the event of trees being felled by him for the purpose of making an improvement. The judgment in *Rajah of Cochin* v. *Kittunni Nair*[1] did not deal with the position where the felling is not for an improvement, but for the tenant's own purposes. Venkataramana Rao, J., considered that the Court dealt with the question on the footing that the felling of trees was not an improvement, but this is not so. The Court was only concerned with the case of felling of trees for the purpose of improvement and deciding whether in such a case the landlord was entitled to be paid a small fee in respect of each tree felled, notwithstanding the provisions of S. 19. The judgment does not support the judgment now under appeal.

The right of a landlord and a tenant to agree upon the terms of the tenancy can only be limited by statute. The agreement entered into by the parties in this case does not run contrary to the Transfer of Property Act or the Contract Act, and unless there is a provision in the Malabar Compensation for Tenants Improvements Act which prevents the appellant from recovering from the respondent the full value of the timber felled by him the appellant is entitled to succeed. There is clearly no such limitation in the Act and therefore I hold that the appellant is entitled to the full amount of the compensation claimed by her.

I am supported in my opinion by the judgment of Ramesam, J., in *Kelu Nair* v. *Viyathan Mahadevi*[2] a case in which the landlord was allowed the full amount claimed by him as compensation in respect of trees felled by the tenant. Ramesam, J., dealt with the case where the act of felling of trees was an

1. (1916) 32 M.L.J. 295: I.L.R. 40 Mad. 603 (F.B.).
2. (1923) 16 L.W. 310.

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act of improvement and the case where it was not. In the first case the imposition of a small kuttikanom fee would, he said, relying on the decision of the Full Bench in *Rajah of Cochin* v. *Kittunni Nair*,[1] not contravene the provisions of S. 19, but if the fee imposed was the full value of the trees it would, he said, contravene the section. In a case falling in the second category there was nothing which contravened the provisions of S. 19 in charging the full value. An examination of the record in the case decided by Ramesam, J., discloses the fact that the clause in the kanom demise there was of the same nature as the clause in this case.

Apart from there being no statutory prohibition of such a clause it is only right that a landlord should be allowed to make a stipulation for the payment of the full value when the felling is not an improvement within the meaning of the Act. If the trees were allowed to grow to maturity the landlord would be entitled to one-fourth of the value of the matured trees at the termination of the tenancy. The felling of trees before reaching maturity would clearly affect his pocket. The Court is only concerned here with the felling of trees spontaneously grown during the tenancy and my observations are limited to a case like the present one.

For the reasons indicated, I would allow the appeal and grant a decree for the full value of the timber, namely, Rs. 605-5-5, with costs here and below on this amount.

Somayya, J.

Somayya, J.—I agree.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Krushnacharana Padhi, minor by next friend Chinna Padhiyani .. *Appellant** (*Plaintiff*)

v.

Gourochandro Dyano Sumanto .. *Respondent* (*Defendant*).

Krushnacharana Padhi v. Gourochandro Dyano Sumanto.

Negotiable Instruments Act (XXVI of 1881), S. 87—Alteration of dates of execution of document and indorsement of interest paid—Material alteration—Party suing being minor—Promissory note could be validly sued upon—Interpretation of section—Promissory note admissible in evidence—Original cause of action for consideration paid existing.

The rule has now been well established by a series of English cases that any alteration or change in an instrument which 'causes to speak a different

1. (1916) 32 M.L.J. 295: I.L.R. 40 Mad. 603 (F.B.).

* S. A. No. 457 of 1936. 2nd August, 1939.

to the provisions of S. 19 of the Malabar Compensation for Tenants Improvements Act."

The Full Bench consisted of Wallis, C. J., and Abdur Rahim, Oldfield, Srinivasa Aiyangar and Phillips, JJ. They all answered the question in the negative. By kuttikonam is meant a customary fee of eight annas per tree or some such sum as may be agreed upon. It is common ground that the word 'kuttikanom' only implies the payment of a small charge per tree felled. This case is, therefore, an authority for the proposition that S. 19 of the Act does not prevent the parties from entering into an agreement by which the tenant shall pay a small fee in the event of trees being felled by him for the purpose of making an improvement. The judgment in *Rajah of Cochin* v. *Kittunni Nair*1 did not deal with the position when the felling is not for an improvement, but for the tenant's own purposes. Venkataramana Rao, J., considered that the Court dealt with the question on the footing that the felling of trees was not an improvement, but this is not so. The Court was only concerned with the case of felling of trees for the purpose of improvement and deciding whether in such a case the landlord was entitled to be paid a small fee in respect of each tree felled, notwithstanding the provisions of S. 19. The judgment does not support the judgment now under appeal.

The right of a landlord and a tenant to agree upon the terms of the tenancy can only be limited by statute. The agreement entered into by the parties in this case does not run contrary to the Transfer of Property Act or the Contract Act, and unless there is a provision in the Malabar Compensation for Tenants Improvements Act which prevents the appellant from recovering from the respondent the full value of the timber felled by him the appellant is entitled to succeed. There is clearly no such limitation in the Act and therefore I hold that the appellant is entitled to the full amount of the compensation claimed by him.

I am supported in my opinion by the judgment of Ramesam, J., in *Kelu Nair* v. *Viyathan Mahadevi*2 a case in which the landlord was allowed the full amount claimed by him as compensation in respect of trees felled by the tenant. Ramesam, J., dealt with the case where the act of felling of trees was an

1. (1916) 32 M.L.J. 2-5: I.L.R. 40 Mad. 603 (F.B.).
2. (1923) 16 L.W. 310.

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act of improvement and the case where it was not. In the first case the imposition of a small kuttikanom fee would, he said, not contravene the provisions of S. 19, but if the fee imposed was the full value of the trees it would contravene the section, relying on the decision of the Full Bench in *Rajah of Cochin* v. *Kittunni Nair*[1]. In a case falling in the second category there was nothing which contravened the provisions of S. 19 in charging the full value. An examination of the record in the case decided by Ramesam, J., discloses the fact that the clause in the kanom demise was of the same nature as the clause in this case.

Apart from there being no statutory prohibition of such a clause it is only right that a landlord should be allowed to make a stipulation for the payment of the full value when the felling is not an improvement within the meaning of the Act. If the trees were allowed to grow to maturity the landlord would be entitled to one-fourth of the value of the matured trees at the termination of the tenancy. The felling of trees before reaching maturity would clearly affect his pocket. The Court is only concerned here with the felling of trees spontaneously grown during the tenancy and my observations are limited to a case like the present one.

For the reasons indicated, I would allow the appeal and grant a decree for the full value of the timber, namely, Rs. 605-5-5, with costs here and below on this amount.

Somayya, J.

Somayya, J.— I agree.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Krushnacharana Padhi, minor by next friend Chinna Padhiyani.. *Appellant** (*Plaintiff*)

v.

Gourochandro Dyano Sumanto .. *Respondent* (*Defendant*).

Krushnacharana Padhi v. Gourochandro Dyano Sumanto.

Negotiable Instruments Act (XXVI of 1881), S. 87—Alteration of dates of execution of document and indorsement of interest paid—Material alteration—Party suing being minor—Promissory note could be validly sued upon—Interpretation of section—Promissory note admissible in evidence—Original cause of action for consideration paid existing.

The rule has now been well established by a series of English cases that any alteration or change in an instrument which 'causes to speak a different

1. (1916) 32 M.L.J. 295: I.L.R. 40 Mad. 603 (F.B.).

* S. A. No. 457 of 1936. 2nd August, 1939.

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language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it' is a material change. An alteration in the date of a bill of exchange has been stated by the corresponding section of the Bills of Exchange Act to be material. Although the Indian Act does not clearly say so, yet there is no reason to hold that what would be regarded as a material alteration in England should not be held to be so in India.

The alterations referred to in S. 87 of the Negotiable Instruments Act refers to a deliberate alteration by a party to the instrument or by one on whom his interest had devolved and not by a stranger, particularly, when no conduct can be imputed to the party in whose interest the alteration has been effected or from which either his complicity, laches or negligence may be inferred.

Hongkong and Shanghai Banking Corporation v. *Lo Lee Shi*, (1928) A.C. 181: 55 M.L.J. 627 (P.C.); *Hutchins* v. *Scott*, (1837) 2 M. & W. 809: 150 E. R. 984 and *Halsbury's Laws of England*, para. 287, relied on.

S. 87 would not therefore stand in the way of a plaintiff, who was a minor when the alterations were effected, in getting relief on the original cause of action. In view of the above interpretation of S. 87 it is unnecessary to order an amendment and grant relief on the basis of the consideration paid.

Appeal against the decree of the District Court of Ganjam in A. S. No. 84 of 1935 preferred against the decree of the Court of the District Munsif of Aska in O. S. No. 399 of 1934.

B. V. Ramanarasu for Appellant.

B. Jagannadha Das for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit instituted on the basis of a promissory note dated the 15th October, 1928, executed by the defendant-respondent in favour of one Brojo Padhi who died shortly after its execution leaving him surviving an adopted minor son the plaintiff-appellant in this case. A sum of Rs. 10 seems to have been paid by the defendant on the 12th October, 1931. This payment was endorsed on the back of the promissory note and the endorsement was duly signed by the defendant. The suit was instituted on the 22nd October, 1934, while the plaintiff-appellant was a minor. It appears however that two dates in the promissory note were altered before the suit was brought. The first alteration was that the figure "1" in 15, that is, the date on which the promissory note was executed was altered into 2 and thus the promissory note would now read as if it was executed on the 25th October, 1928, and not on the 15th October. The second alteration was that the figure "1" in 12 was substituted by 2 and thus the endorsement by the defendant of the payment of Rs. 10 would appear to have been

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made on the 22nd October, 1931, and not on the 12th October, 1931, the date on which the endorsement was actually made by the defendant. The District Munsif passed a decree against the defendant as the plaintiff was held to have been unaware of these alterations but the learned District Judge accepted the appeal on the ground that having regard to the provisions of S. 87 of the Negotiable Instruments Act, it was not possible to found an action on a promissory note which was proved to have been altered in material respects. The plaintiff now appeals.

In support of his appeal the first contention raised by the learned Counsel for the appellant is that the alteration in the promissory note was not material in character and the motive with which the alteration might have been made was wholly irrelevant. His second contention is that even if the alterations are held to be material his client who was, as stated above, a minor at the time when the suit was instituted, did not know anything about them and could not in the absence of any conduct of his, either fraudulent or negligent, be held to be debarred from suing on the basis of the promissory note—particularly when the dates of the promissory note and of the endorsement of payment were correctly stated in the plaint and no advantage was attempted to have been taken on account of these alterations. The third contention raised on behalf of the appellant is that even if his first two contentions do not prevail, he should at all events be allowed to fall back on the original consideration as although the promissory note might have to be declared void and unenforceable on account of the alterations, yet it does not become inadmissible in evidence and the debt could not in any case be held to have been extinguished. It was admitted that the suit, as framed, was not based on the original consideration but this defect should be, it was alleged, cured by a formal amendment which might be allowed by the Court even at this stage. Lastly it was urged that a decree should have been passed against the defendant on the admission made by him as a witness to the effect that the money in regard to the promissory note in suit had not been paid and was still outstanding.

The first question to decide is whether the alterations made in the promissory note were material in character?

Since it was conceded on behalf of the respondent that the suit could have been instituted, on account of the plaintiff's

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minority, not only on the date on which it was actually brought but even later, it was vehemently argued on behalf of the appellant that the alterations could not be regarded as material. I am not however impressed by this argument although it must be admitted that the motive of the person making the alterations is to a large extent immaterial. In order to decide the material character of the alteration, one will have to obviously confine himself to the alteration and the effect it is shown to have produced on the document itself. If the legal identity or the character of the instrument have been affected or if the liability has been attempted to have been extended by the alteration, it must be held to be material and this would be so irrespective of the fact whether the alteration is to the prejudice of the promisor or the executant of the instrument or not. The reason behind the rule is based on sound sense and is intended to prevent persons from tampering with valuable securities under the penalty of not being able to found their claims on them if the alterations are found to be material. If the integrity of a contract has been broken and its identity changed either by a party to the contract or by one who is entitled to sue on it or with their connivance and possibly even when their negligence has contributed to the alteration, the instrument incorporating such a contract must be held to have been vitiated. This rule can be deduced from a number of cases cited at the bar. It is unnecessary however to refer to all of them and it would be sufficient to refer to three English and one old Calcutta case on which reliance was placed by learned Counsel for the respondent. (See *Davidson* v. *Cooper*[1], *Gardner* v. *Walsh*[2], *Master* v. *Miller*[3] and *Gogun Chunder Ghose* v. *Dhuronidhur Mundul*[4].) It was held in the first case (*Davidson* v. *Cooper*[1]) that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state, and that any material alteration will vitiate the instrument." Lord Denman, C.J., in delivering his judgment laid down as a test for determining the materiality of the alteration whether the addition gave a different legal character to the writing and whether it would change the nature of the relation of the parties towards each other and

1. (1844) 13 M. & W. 343: 153 E.R. 142.
2. (1855) 5 E. & B. 83: 119 E.R. 412.
3. (1791) 1 S. L. C. 803: 4 T.R. 320: 100 E.R. 1042.
4. (1881) I.L.R. 7 Cal. 616.

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their remedies upon it. In the second case the promissory note had been altered by adding another party to it. The alteration was apparently of no disadvantage to the defendant and yet the promissory note was held to be invalid as against the defendant. Lord Campbell, C.J., observed:

> "We conceive that the defendant is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice."

The same rule was stated in *Master* v. *Miller*1. A study of these cases would show that the rule has now been well established that any alteration or change in an instrument which "causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it" is a material change. It might not be out of place to mention that an alteration in the date of a bill of exchange has been stated by the corresponding section of the Bills of Exchange Act to be material. Although the Indian Act does not clearly say so yet I do not think that there is any reason to hold that what would be regarded as a material alteration in England should not be held to be so in India. I am, for the above reasons, of opinion that the alteration of dates was a material alteration.

As for the second contention it was conceded on behalf of the respondent that the alterations in the promissory note were not made either by the minor or by his adoptive father who had died shortly after the execution of the promissory note in his favour. There was no suggestion that they were made by or with the knowledge of his next friend either who is no other than his adoptive mother and with whom the minor was living. It was however alleged that the alterations were effected by the plaintiff's natural father who had appeared as a witness on behalf of the plaintiff. There is no evidence on the record from which it could be concluded that the promissory note was altered by him although the learned District Judge has on account of certain circumstances hazarded that guess. I have considered these circumstances carefully. They are inconclusive in my opinion and the expression of opinion by the lower appellate

1. (1791) 1 S. L. C. 803: 4 T.R. 320: 100 E.R. 1042.

Court must be regarded to be in the nature of a surmise. There is no evidence on the record that these alterations were made by the plaintiff's natural father. That is why the trial Court abstained from giving a definite finding in regard to the person who had effected them. The learned District Judge refused to believe the statement made by P.W. 1 and since as a natural father he was to some extent interested in the plaintiff and he was the last person who had admitted to be in possession of the promissory note before the suit was brought, the conclusion was drawn that these must have been made by him. I have already said that it would not be safe to draw this conclusion; but even assuming this to be correct, would this be enough to debar the plaintiff from maintaining his suit? Learned Counsel for the respondent contends that this would be so and urges that the question whether these alterations were made with the knowledge of the minor plaintiff or with that of his next friend is wholly immaterial. The language of S. 87 of the Negotiable Instruments Act does, if literally construed, seem to support his contention but in view of the fact that this construction would lead to most undesirable and absurd results, the question is whether one should not have a little measure of freedom in construing this section somewhat liberally. But before interpreting the language of this section in the light of certain decided cases, it is essential to ascertain whether there is anything in evidence which would show whether these alterations were made either with the knowledge or complicity of the plaintiff or even with that of his next friend. The plaintiff, as observed before, was a minor at the time when the suit was instituted and there is nothing on the record which would suggest his knowledge or complicity. The same must be said, although it is not perhaps necessary, of his adoptive mother, who was the plaintiff's next friend when the suit was instituted. Moreover there is nothing to show that they, that is, the plaintiff and his adoptive mother, were guilty of laches or negligence in permitting the promissory note to go out of their custody. The plaintiff was a minor and the next friend was an old Indian lady who would have found it difficult to look after the estate left by her deceased husband without the help of servants and persons who took an interest in their affairs. The question to decide is whether the plaintiff should be held to be debarred from suing on the basis of the promissory note which had been

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proved to have been materially altered although without his or even his next friend's knowledge or complicity. It must be remembered in this connection that no advantage was taken of these alterations when the suit was instituted and the dates on which the promissory note was executed or the endorsement made were correctly stated. The cause of action was also stated to have arisen on the dates when the promissory note had actually come into existence and when interest had been paid and endorsed by the defendant. It is thus clear that nothing has been done either by or on behalf of the plaintiff which would induce the Court to withhold the relief asked for on the ground that he had not come to Court with clean hands. It may be however contended that this is not a case where it is discretionary with the Court to grant or refuse the relief asked for or in other words the Court was not being asked to dismiss the suit on any equitable grounds but on account of a clear bar created by the statute. This takes me to the language employed in S. 87 of the Negotiable Instruments Act. A careful study of the words used in this section leads me to the conclusion that the obvious intention of the legislature was to render the negotiable instruments to be void which were materially altered either by the party in whose favour the document was executed or the person on whom its ownership had devolved on account of a contract or by operation of law. The Legislature intended or may be presumed to have intended to take both the parties to the instrument or their representatives in interest into consideration and was providing a penalty for the unauthorised alterations effected by one of them without the consent of the other. The section did not obviously relate to an alteration by a stranger or contemplate a consent to the alteration by both the parties but only by one of them for the act of the other. Moreover as observed by Maxwell on the Interpretation of Statutes at page 198 in Chapter IX, 7th Edition:

"When the language of a statute in its ordinary meaning and grammatical construction leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar by giving unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt of an irresistible conviction that the legislature could not possibly have intended what its words signify and the modifications thus made are mere corrections of careless language and really give the true

meaning . . . . The rules of grammar yield readily in such cases to those of common sense."

This is however not all. When the corresponding section of the Bills of Exchange Act where the language was almost identical with S. 87 of the Negotiable Instruments Act came up for construction before their Lordships of the Judicial Committee in *Hongkong and Shanghai Banking Corporation* v. *Lo Lee Shi*[1], it was held by their Lordships that the words of the section related only to alterations effected by the will of the person by whom or under whose directions they were made and that they did not apply to a change due to a pure accident such as the document being mutilated and defaced by the wash and ironing of the garment in which it was left or by the ravages of the white ants or the seal of a deed being torn off by a child or eaten off by rats or burnt by the hot-end of a cigarette. If cases of pure accident were not found to fall within the terms of the corresponding section of the Bills of Exchange Act, is there any reason to interpret S. 87 of the Negotiable Instruments Act in such a manner as to debar an innocent person from maintaining an action simply because the promissory note was taken away without the knowledge or consent of its owner by a stranger who made some alterations in the instrument either knavishly or foolishly. In *Hutchins* v. *Scott*[2], Anderson, B., remarked:—

"It is difficult to understand why an alteration by a stranger should in any case avoid the deed, why the tortious act of a third person should affect the two parties to it unless the alteration goes the length of making it doubtful what the deed originally was or what the parties meant."

The question "suppose the stranger destroyed it instead of altering it?" put by Lord Abinger during the course of the arguments in the above case discloses the view the noble Lord was taking of the case. There is no doubt that an action would lie on a destroyed bill both at common law and under the Indian Act. The rule has been stated thus in paragraph 287 of Halsbury's Laws of England (Halsbury's edition):—

"If an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party thereto or person entitled thereunder but without the consent of the party or parties liable thereunder, the deed is thereby made void. The avoidance, however, is not *ab initio*, or so as to nullify any conveyancing effect which the deed has already had; but only operates as from the time of

1. (1928) A.C. 181: 55 M.L.J. 627 (P.C.).
2. (1837) 2 M. & W. 809: 150 E.R. 984.

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such alteration, and so as to prevent the person, who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound thereby, who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made (*h*).

A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed (*i*), or reduces to certainty some provision which was originally unascertained and as such void (*k*), or may otherwise prejudice the party bound by the deed as originally executed (*l*).

The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed (*m*). The avoidance of the deed is not retrospective, and does not revest or reconvey any estate or interest in property which passed by the deed (*n*). And the deed may be put in evidence to prove that such estate or interest so passed, or for any other purpose than to maintain an action to enforce some agreement therein contained (*o*)."

For the above reasons I would hold that the alteration referred to in S. 87 of the Negotiable Instruments Act refers to a deliberate alteration by a party to the instrument or by one on whom his interest had devolved and not by a stranger particularly when no conduct can be imputed to the party in whose interest the alteration has been effected or from which either his complicity, laches or negligence may be inferred.

The third contention raised on behalf of the appellant was that he might be permitted to fall back on the original consideration. It must be remembered in this connection that the promissory note, even if my interpretation of S. 87 of the Negotiable Instruments Act be assumed to be incorrect can only be declared to be void under S. 87 of the Negotiable Instruments Act but does not become inadmissible in evidence as would have been the case if the document were not duly stamped. It is unnecessary to say what the effect would have been if the alteration had been made fraudulently by the plaintiff himself but in the absence of fraud it does not seem to me possible to hold that not only the note but the original debt is also destroyed. He could in my opinion fall back on the original consideration since the promissory note was a valid document and remained so for a long time after it came into existence. A subsequent alteration in the document by a stranger would not deprive the person, who had advanced the money or to whom the money had become payable subsequently, on account of the promisee's death, of his remedy to bring a suit for the money advanced to

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the defendant by way of loan. As already observed, it might be remembered in this connection that the dates mentioned in the plaint both of execution and in regard to the payment made by the defendant towards interest were the original dates and not those which were subsequently altered and the cause of action also was stated to have arisen on the dates on which it would have been stated if no alteration had taken place. If therefore no claim was made on behalf of the plaintiff upon the promissory note as altered, there is no reason to hold that the document would not be admissible in evidence in proof of the original right which had come into existence at the time when the money was paid. *Sutton* v. *Toomer*[1] may be referred to in this connection with advantage. It has been argued that since S. 87 of the Negotiable Instruments Act appears in Chapter VII which relates to discharge from liability on notes, bills and cheques it must not be taken to have rendered the document void only but also to have discharged the liability which arose at the time when the promissory note was executed. The argument is not correct in my opinion for two reasons. First of all, the Chapter relates to discharge from liability *on notes, etc.*, and not to discharge from liability altogether. The suggestion that after a note has been avoided on account of a fraudulent conduct of a party the party will not be entitled to sue on it may be plausible but this does not mean that the party has no right to bring a suit on the original cause of action also. Moreover in this very section the second part states that an endorser's liability would be discharged if his indorsee made an alteration. If the alteration was meant to discharge the liability of every person under the negotiable instrument, where was the necessity of referring to an indorser's liability in the second paragraph of the section. Why did not the section, it may well be asked, clearly provide that the liability of every person under the instrument would be discharged—if that was the intention of the legislature? The case decided by the Full Bench reported in *Perumal Chettiar* v. *Kamakshi Ammal*[2], on which reliance was placed on behalf of the respondent has no application to this case for the simple reason that the promissory note which had been materially altered has not been declared by law to be inadmissible in evidence. It may have become unenforceable by operation of law—this being all that could be said against it

1. (1827) 7 B. & C. 416: 108 E.R. 778.
2. (1938) 2 M.L.J. 189: I.L.R. 1938 Mad. 933 (F.B.).

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—and thus incapable of forming the basis of a suit but it would not entail the penalty of depriving the drawee or promisee or their representatives in interest from maintaining an action on the original consideration unless specifically declared to be so by the legislature. One may not be able to enforce the terms contained in the instrument but there can be no objection to the Court looking at it and granting the relief on the basis as if the document had not come into existence. The promissory note having become void, the defendant who had received an advantage under the instrument is bound to restore it or to make compensation for it. There seems to be no reason why the Court should not act in such a case on the principle embodied in S. 65 of the Indian Contract Act.

S. 87 would not therefore in my opinion stand in the plaintiff's way of getting the relief on the original cause of action. The application for amendment, made in this Court would have to be determined therefore on the ordinary principles contained in O. 6, r. 17, Civil Procedure Code, and there is no reason why in the circumstances of this kind the plaintiff should not have been permitted to amend the plaint so as to fall back upon the original consideration if the second contention had not been decided in his favour. In view of the interpretation I have placed on S. 87 it is unnecessary to order the amendment and grant relief on the basis as if no promissory note had come into existence.

The third position taken upon on behalf of the appellant was that a decree should have been passed by the lower appellate Court on the admission made by the defendant. As I stated above I am not concerned in this case with what would have happened if the plaintiff had been guilty of fraud or had come into Court with unclean hands. But in this particular case nothing has been or can be said either against the plaintiff or his next friend which would show that he was not entitled to the relief when the defendant had admitted it in his statement before the Court as a witness that the debt due under the promissory note was still outstanding.

For these reasons, I set aside the decree of the lower appellate Court and pass a decree in favour of the plaintiff for the amount claimed by him with costs in this and in the lower Courts.

Leave granted.

K. C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Machingal Potte Veetu *alias* Thakke Veettil Seetha Neithyar and others .. *Appellants** (*Plaintiffs 1 to 4 and Defendants 28 to 43*)

v.

Machingal Potte Veetu *alias* Patinhara Veettil Karnavan Kelu Menon and others .. *Respondents* (*Defendants 2, 4, 6 to 26, 5 and 45 to 49*).

Seetha Neithyar *v.* Kelu Menon.

Malabar Law—Adoption—Resemblance to krittrima *form—Nature of—If adoptee retains rights in original family—Proof of custom*—Putravakasam *properties granted to wife and children—One of the daughters given in adoption to another family—Right of adoptee and her descendants to claim maintenance from those properties.*

The form of adoption prevailing in Malabar amongst Nair community resembles the *krittrima* form only in this, that the adoption is based purely on secular motives and it has no religious significance. But there is no authority for the position that the adoptee in Malabar does not lose his or her rights of inheritance in the natural family, as in the *krittrima* form of adoption recognised in the Mithila country. A custom to that effect, if set up, must be proved and each case will have to be decided on the evidence put before the Court.

Where a member in a Malabar tarwad acquired *Putravakasam* properties with an intention that his wife and children should be benefited by them and gifted those properties to them and one of his daughters was adopted into another family,

Held, that the daughter and her descendants were entitled to claim maintenance from the *Putravakasam* properties.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 139 of 1928 preferred against the decree of the Court of the District Munsiff of Alathur in O. S. No. 462 of 1920.

D. A. Krishna Variar for Appellants.

K. Kuttikrishna Menon and *T. S. Anantharama Aiyar* for Respondents.

The Court made the following

ORDER.—Plaintiffs 1 to 4 and defendants 28 to 43 are the appellants. The second appeal arises out of a suit instituted by the plaintiffs to recover arrears of maintenance.

*S. A. No. 666 of 1930. 25th March, 1938.

Seetha Neithyar v. Kelu Menon.

Seetha and Pattu were two members of a tarwad called the Machingal Pottai Veettu tarwad. The second defendant is the son of Pattu. In 1866-67 Valia Parvathi and Kunju Menon (a female and a male), two children of Seetha, were adopted by Pangi Menon Kandi Achan who was the sole remaining member in his tarwad known as Tekkai Veettu tarwad. The plaintiffs in the present suit are the descendants of Valia Parvathi through her daughter Seetha (*see* the Genealogical tree given in paragraph 9 of the Munsiff's judgment). The suit properties cover 20 items. Of these, items 1 to 12 are *Putravakasam* properties granted to Seetha, the mother of Valia Parvathi, by her husband Chathu Achan who ultimately became the Palghat Raja, items 14 to 20 belong to the Pottai Veettu tarwad. Admittedly the plaintiffs are members of the Tekkai Veettu tarwad. They, however, claim maintenance from the defendants, who are members of the Pottai Veettu tarwad on the ground that Valia Parvathi, their ancestors, though given in adoption to the Tekkai Veettu tarwad, continued to retain her original status as a member of the Pottai Veettu tarwad. They contended that in spite of the adoption the adoptees still remained members of their original family. They also contended that the adoptees and their descendants acquired, apart from status, right to the properties of Pottai Veettu tarwad on pleas such as estoppel and prescription. This latter contention was raised in issues 11 and 13 which are as follows:—

11. Have the adoptees or their descendants acquired apart from status any right to the properties of Pottai Veettu?

13. Can a right to maintenance be acquired by prescription and have the adoptees and their descendants acquired such a right to the properties of Pottai Veettu?

They also raised various other contentions which need not be considered for the purposes of this second appeal.

On the first contention which was the subject-matter of issue 9:

"What was the result of the adoption on the status of the adoptees with regard to the membership in Pottai Veettu?

the District Munsiff found that the adoptees lost their status as members in Pottai Veettu tarwad as a result of their adoption. On issue 11 the learned District Munsiff recorded the following finding:—

"I therefore held that the defendants are now estopped from denying that plaintiffs have all the rights which the members of Pottai Veettu have

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over the properties thereof. As Valia Parvathi had for over the statutory period dealt with the properties of Pottai Veettu as a member would have done, she and her descendants through her have acquired by prescription all the right which they would have had if they had (not?) been adopted. Both by prescription and by estoppel the rights of plaintiffs have been perfected"

In view of the findings on issues 11 and 12 no separate finding was recorded on issue 13. As a result of the findings on issues 11, 12 and 13 a decree for maintenance was passed in favour of the plaintiffs. The finding on issue 11 was based on a consideration of the evidence which related, amongst other things, mainly to the dealings of the properties of the Pottai Veettu tarwad by Valia Parvathi after the adoption.

In appeal the learned Subordinate Judge agreed with the District Munsiff in his view that Valia Parvathi and Kunju Menon, the adoptees, lost their status as members of the Pottai Veettu tarwad as a result of their adoption by the Tekkai Veettu tarwad. On the second point, that is, the point covered mainly by issues 11 and 13, he differed from the District Munsiff and in the result the Munsiff's decision was set aside and the plaintiff's suit was dismissed. But it must be mentioned that with regard to items 1 to 12 the learned Subordinate Judge held the plaintiffs have a joint right with some of the defendants but that that right cannot be enforced in this suit.

In second appeal, Mr. Variar's first argument on behalf of the appellants is that in spite of the adoption of Valia Parvathi and Kunju Menon by the Tekkai Veettu tarwad, they still retained their status as members in their natural family. On this point the main argument is that adoption under the Malabar Law amongst the Nairs, to which community the parties belong, is in the krittrima form, and as according to this form of adoption the adoptee does not lose his rights of inheritance in his natural family, Valia Parvathi and her descendants are still members of the Pottai Veettu tarwad. According to Moore's Malabar Law there are said to be three kinds of adoption in use in Malabar: (1) adoption by ten hands. This form of adoption is very rarely used except in Brahmin families. It is probably almost identical with the Hindu form of adoption. (2) Adoption by *chammata*, that is, by burning a pan of sacred grass. (3) Adoption by taking into the family. The last is the form commonly adopted by Brahmin widows and Sudras for the purpose of perpetuating the family when it is in danger of becoming extinguished. The learned author says:

"Whatever religious motive may be attached to the first two modes of

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adoption the third mode appears to be based on entirely secular motives and to be closely akin to the krittrima form of adoption which is still in force in the Mithila country."

To the same effect is the law stated in his Manual of Malabar Law by Mr. Ramachandra Aiyar. Arguments have proceeded on the assumption that the adoption in the present case was of the third type. Both these writers say that this kind of adoption is akin to the krittrima form of adoption, but they do not say that, in consequence, as in the krittrima form of adoption recognised in the Mithila country, the adoptee in Malabar does not lose her rights in the natural family. It is argued that this conclusion should be accepted by analogy. When they say that this form of adoption is akin to the krittrima form of adoption the two text writers refer to Mayne's Hindu Law. Mr. Ramachandra Aiyar refers to Ss. 182 to 187 and Mr. Moore refers to Ss. 184 to 190 in the 5th edition. In the latest edition of Mayne, 9th edition, pages 279 to 281 we find the following statement in S. 208:

"The systems of adoption in force in Malabar vary according as the adoptive family is governed by the Marumakkathayam or by the Makkathayam rule of inheritance."

In S. 209 it is stated that:

"Among families which trace descent by sons, three systems of adoption prevail. The first strongly resembled the krittrima."

The statement of the law contained in Mayne in the latest edition does not apparently support the statement of the above-mentioned two text writers that the third form of adoption is akin to krittrima form. What the statement of Mayne was in his 5th edition I was not able to gather as that edition is not available for reference. In the well-known case of *Vasudevan v. Secretary of State for India*[1], the learned Judges commenting on the evidence of the witnesses examined in that case point out that the appointment of an heir to an illom by a Nambudri widow is called krittrima adoption in contradistinction to *pattu kayal dattu* which is the regular and religious adoption prevalent among the Nambudris. (*See* page 177.) At page 174 they state that the krittrima form of adoption does not sever the adoptee from his natural family and that "this is precisely the effect of appointing a person as heir." When it is said that the krittrima form of adoption prevails amongst the Nairs, does it necessarily mean that the incident that the adoptees does not

1. (1887) I.L.R. 11 Mad. 157.

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lose his rights of inheritance in his natural family, which is the consequence of that form of adoption in the Mithila country, should also be the consequence of the adoption in Malabar where the customary law of Marumakkathayam prevails? Their Lordships of the Privy Council observed in *Raman Menon* v. *Raman Menon*[1], that:

"There is no sacred book or other writing having legal authority, and there is no series of decisions which can be appealed to in order to determine the circumstances under which and the consents if any subject to which the karnavan for the time being can adopt strangers to the family and thereby make them and their descendants heirs to its property."

In the same judgment their Lordships observed generally that:

"Litigation between Nayars in South Malabar has to be decided according to the laws and usages of these persons. These laws and usages are very peculiar; some of them are so well established as to be judicially noticed without proof. But others of them are still in that stage in which proof of them is required before they can be judicially recognised and enforced."

Malabar Law is essentially a customary law. In *Veluthakal Chirudevi* v. *Veluthakal Tarwad Karnavan*[2], it was observed by Sankaran Nair, J., that:

"In deciding questions as to customary law (in that case the question related to partition under Malabar law) if there are texts or series of decisions we should follow them; otherwise such a question has to be decided upon evidence."

It is admitted that there are no texts explaining the rights of adoptees under the Malabar law. The same in the case with regard to decisions also. As mentioned in Mr. Justice Sundara Aiyar's book at page 31:

"As to whether as a rule the persons adopted lose their rights in their natural family or only gain rights in the family into which they are adopted without losing any of those rights, has not yet been finally decided."

Then the learned author gives the following summary of the decisions of this Court having a bearing on the point. In *Andale* alias *Shekhara Pisharodi* v. *Secretary of State*[3], a case relating to Pisharodies, it was contended that the latter was the effect, but their Lordships held that such a custom was not made out. In S. A. No. 1555 of 1894, the District Judge of South Kanara sent down an issue, to be tried by the Court of first instance whether according to the rule of law and custom in Aliyasanthana families if a woman is adopted she retains her

1. (1900) 10 M.L.J. 245: L.R. 27 I.A. 231: I.L.R. 24 Mad. 73 at 80 (P.C.).
2. (1916) 31 M.L.J. 879.
3. (1893) 3 M.L.J. 242.

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old rights or loses them. The Sub-Judge Mr. Chandu Menon found that the evidence adduced by the plaintiff to show that women of the caste of the parties adopted into other families did not lose their rights in their natural families, was good so far as it went but was insufficient to establish a custom. He found however that the conduct of the parties and the documentary evidence showed that in that particular case the adoption did not sever the status, and that as understood by all the parties from the beginning the adoption conferred on her a status in the new family in addition to that which she had at the time and not in supersession of it. In second appeal in giving effect to this conclusion their Lordships repel the argument of the appellants so far as it rested on the analogy of the Hindu Law by referring to *Chandu* v. *Subba*[1], and observing that even under that law there is the krittrima form of adoption in which the adopter retains his original status to which they liken the adoption in question. Having regard to the facts of the case the decision of the Travancore High Court in *Velayudam Eswaran* v. v. *Ramaswami Iyer*[2], cannot I think be extended to cases of adoption arising in Malabar; at any rate the learned Judges do not purport to base the decision on considerations applicable generally to Malabar as a whole. In the absence of decisions or texts bearing on the point, it is not safe to decide on the mere ground that the adoption in question has been compared to the krittrima form, that the adopted persons do not lose their rights of inheritance in their natural family. When the text writers say that the form of adoption resembles the krittrima form I think what they purport to emphasise mainly is this, that the adoption is based purely on secular motives and that it has no religious significance, and nothing more. As I have said, the law applicable to the case being essentially a customary law, the question can be decided only by having recourse to evidence as to custom in the absence of texts or express decisions of this Court. In neither of the lower Courts was the question raised as to whether according to the customary law of Malabar persons adopted lose their rights in the natural family. The point was raised in the plaint and denied in the written statement. The evidence, such as it is, says the respondents' learned Counsel, does not support the plaintiff's case. However, as the question is an important one, and as the learned Counsel for the appellants

1. (1889) I.L.R. 13 Mad. 209. 2. 7 Travancore H.C.R. 66.

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says that the appellants are prepared to give evidence on the point, I think this second appeal cannot be satisfactorily decided without calling for a finding from the lower Court on the question whether, according to the form of adoption prevailing amongst the Nair community in Malabar the persons adopted lost their rights in the natural family. It is open to both parties to adduce fresh evidence on this point.

The next point raised relates to the dealings of the properties by the adoptees, which it is alleged, will show that they have acquired what may shortly be described as prescriptive title to these properties, even though as a result of the adoption they may have severed their connection with their natural family; and reliance is placed on *Vasudeva Padhi Khadanga Garu* v. *Maguni Devan Bakshi Mahapatrulu Garu*[1]. This is the question raised in issues 11 and 13 on which the learned District Munsiff after a detailed and careful examination of the documents gave his finding in paragraph 50 of his judgment which I have already quoted. The learned Subordinate Judge has dealt with the point in paragraph 8 of his judgment somewhat summarily. He says, after referring to the points of attack against the District Munsiff's finding:

"With regard to properties belonging to Pottai Veedu, all that the documents show is that an attempt was made to combine the two tarwads so that while Valia Parvathi would retain her exclusive right to the Tekkai Veetu properties she might also gain to have an interest in the Pottai Veetu properties. I fail to see how any estoppel can arise."

He does not deal with the question of prescriptive rights considered by the District Munsiff. This part of the plaintiff's case was considered in considerable detail by the learned District Munsiff. That the plea is not an unusual or an unimportant one is clear from the fact that in S. A. No. 1585 of 1894 Mr. Chandu Menon though he found that there was no evidence to support the custom that the adoptees did not lose their rights in their natural family, yet held that "the conduct of the parties and the documentary evidence showed that in that particular case the adoption did not sever the status" and the High Court accepted the finding. The Subordinate Judge has set aside the finding of the District Munsiff on what appears to me a very meagre consideration of the question. I would therefore ask the lower Court to submit a fresh finding on the

1. (1901) L.R. 28 I.A. 81: I.L.R. 24 Mad. 387 (P.C.).

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question raised in issues 11 and 13 after discussing the evidence already on record. Mr. Anantharamier on behalf of the respondents says that even if the Subordinate Judge comes to the same finding as has been arrived at by the District Munsiff, still the plaintiff cannot in law claim right to the Pottai Veetu properties on account of any such ground as estoppel or prescription. This question may be argued after the receipt of the finding. As all the evidence on this point has been already adduced, I allow no fresh evidence.

In case the lower appellate Court finds that the plaintiffs are entitled to claim maintenance, the learned Subordinate Judge will record a finding as to the rate and amount of maintenance that may be claimed by them from all the suit properties. The learned District Munsiff has given his finding on this question but the Subordinate Judge has not considered it. To avoid any further remand the lower appellate Court will also record a separate finding as to what amount of maintenance the plaintiffs may claim from items 1 to 12 alone.

Whether the plaintiffs can in this suit claim maintenance at least from the admittedly Puthravakasam properties items 1 to 12 in any event, will be considered if necessary after the receipt of the findings.

Findings will be submitted within a month after the reopening of the High Court after the midsummer recess. Time for objection ten days.

Finding:—

* * * * * * *

The case coming on for final hearing after the finding the Court made the following

ORDER.—The facts necessary for appreciating the point for decision have been already stated in my order calling for a finding. The findings called for have been submitted and now the second appeal has to be disposed of on the findings.

The first point relates to the question whether the plaintiffs, who are the descendants of Valia Parvathi who was adopted into the Tekkai Veetu tarwad, have any rights to the Pottai Veetu tarwad from which family Valia Parvati was taken in adoption. The evidence with regard to custom, in support of the contention of the appellants and against their contention, has been given; and the learned Subordinate Judge has submitted a

finding that the plaintiffs have failed to show that according to the custom of adoption prevailing among the Nair community, a person adopted still retains his or her rights to the property of the family to which he or she belonged before adoption. The finding of the District Munsif and of the Subordinate Judge was to the same effect.

It is argued by Mr. Variar appearing for the appellant that the evidence shows that though a person is adopted into another family, that person still retains the right to the properties of the original family. I have been taken through the evidence in the case. After giving my best consideration to it, I must hold that the evidence is very inconclusive to show that after adoption the adopted person retains the right to the properties of the family from which his adoption was made. I confine my remarks only to the facts of the present case and this decision on the question of custom should not be taken as a general decision which will cover all cases of adoption in Malabar. Each case will have to be decided on the evidence which the parties put before the Court in that case. I must say that there is a certain amount of evidence in support of the plaintiffs' case but that evidence, as I have said, is not conclusive enough to establish the custom set up.

The next point relates to the question of prescription. It was alternatively contended by the plaintiffs that if it is found that they did not retain their rights after adoption, they are still entitled to claim the properties, because for over 12 years the properties of the original family were dealt with by Valia Parvathi as if she had a right to those properties and therefore by prescription she has acquired rights to them. On this point, the District Munsiff found originally in favour of the plaintiffs and the appellate Court did not accept that finding. The learned Judge now records a finding against the plaintiffs. Now, that finding has been attacked by the Counsel for the appellants. The question, having regard to the evidence, is one of some difficulty to decide. From 1867 to 1880, it is clear that the two tarwads after adoption separated from each other. Then we have a set of documents to show that Valia Parvathi dealt with the original tarwad properties. When I say 'original' I mean the properties of the family from which she was adopted; along with one or other of the members of that family as if the properties belonged to her. Among the documents referred to

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on the plaintiff's side, there is at least one document which shows that with respect to a portion of one of the items, no right was exercised by Parvathi, that is, the Paramba portion of item 20. But it is argued that the evidence with respect to the rest of the dealings are sufficient to show that Parvathi exercised rights with respect to the other tarwad items 14 to 20 which will show that her prescriptive rights is established to those properties and so the plaintiffs can claim a right in them. Mr. Kuttikrishna Menon has drawn my attention to a series of documents, which, he says, would show that with respect to the properties, dealt with in those documents members of the original family carried on transactions without any reference to Valia Parvathi at all. Some of those documents have not been printed. The lower Court has not considered those documents but relying on the documents of the plaintiffs themselves, it has come to the conclusion that the right claimed has not been established. As I said, of course, if the dealings for over 12 years of the character described, that is, claiming right to the properties dealing with them have been established, then, a right by prescription can be declared in favour of the plaintiffs. Whether such a right has been established appears to me to be a question of fact, which should be judged on the evidence in the case. Now, the Judge has considered this matter very carefully and in second appeal, I must treat the finding as a finding of fact. The inferences drawn from documents on which the finding has been based are questions of fact which cannot be upset in second appeal. I would therefore accept as a question of fact the finding arrived at by the learned Judge on this point.

The third point relates to the question as to whether the plaintiffs are entitled to maintenance from what are called the Puthravakasam properties with regard to items 1 to 12. There is no dispute that they are Putravakasam properties with respect to which the plaintiffs claim rights of maintenance. The plaintiffs also claim that they are entitled to claim money rights maintenance represented by Exs. A and B. It is alleged by the appellants that Exs. A and B are assignments of usufructuary mortgages over items 14 to 19 of the suit properties. The respondents state that Exs. A and B cover only portions of items 17 and 18 and that Ex. A is not an assignment at all. The Subordinate Judge who heard the appeal refers to these

properties in three places in his judgment. In paragraph 5 he says:

"The money right which Exs. A and B represent must be taken to have been acquired by Chathu Achan for the benefit of all his children."

In paragraph 8 again he says:

"The properties which Chathu Achan acquired for the children (items 1 to 12 and the money rights as per Exs. A and B) were acquired in the names of all his children including Valia Parvathi."

Then in paragraph 10 he says:

"With regard to items 1 to 12 and the money rights represented by Exs. A and B, they are what may be described P. ...vakasam properties in which Valia Parvathi and her descendants, the plaintiffs, are jointly interested with the other descendants of Sitha senior and Chathu Achan."

There can be no question that items 1 to 12 and the money rights represented by Exs. A and B are Puthravakasam properties from which the plaintiffs are entitled to claim maintenance. As regards items 1 to 12 there is no dispute at all. But as the parties cannot agree as regards the items which are covered by Exs. A and B, one side saying that Exs. A and B cover items 14 to 19 and the other side saying only portions of items 17 and 18, a finding has got to be called for from the lower Court as to the maintenance which the plaintiffs are entitled from Putravakasam rights represented by Exs. A and B; and what rate of maintenance the plaintiffs are entitled to out of those properties. As regards items 1 to 12, the lower Court has stated that the plaintiffs are entitled to Rs. 60 per annum and the minor plaintiffs to half that rate. I accept that finding.

Now, I shall deal with the question raised by the respondents as to whether the plaintiffs are entitled to claim maintenance at all from the Putravakasam properties. The argument advanced is this. These properties were acquired after the adoption, that is, after Valia Parvathi lost her rights by adoption in the original family. Therefore, it is argued that the present plaintiffs should be treated as only co-tenants of these properties and the right that they can claim is only for partition and not for maintenance. It appears to me that these properties were acquired by Chathu Achan with the intention that his wife and children should be benefited by them and though Valia Parvathi was adopted into another family, it does not make her any the less entitled to the benefits out of the properties acquired by Chathu Achan and gifted by him to his wife and children of whom she is one. The relationship which is natural and the

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right which is personal and individual as distinguished from the right to the properties of the tarwad cannot be disrupted by the adoption. In any event, it cannot be disputed that they are entitled to claim mesne profits on the properties, the only argument being that in this suit such a relief cannot be claimed but as I have said I do not think the affiliation of this Parvathi to another family can take away her and her children's right to claim maintenance from the Putravakasam properties. I must therefore overrule this argument.

The only point now remaining for decision after the finding will be what rate of maintenance the plaintiffs will be entitled to from the Putravakasam rights which they claim under Exs. A and B. The finding will be submitted within four weeks after the receipt of this order and ten days for objections.

FINDING of 15th October, 1937.

* * * * *

This second appeal coming on for final hearing the Court delivered the following

JUDGMENT.—No objections have been filed. I accept the finding. The result is that the plaintiff will be given a decree for Rs. 795-10-1 for the suit period with interest thereon at 6 per cent. from the date of plaint till the date of payment. The contesting defendants 1 to 26 will pay half the plaintiff's costs throughout.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUNHI RAMAN.

Viswanathan Chettiar .. *Petitioner* (Respondent)*

v.

The Official Receiver of Coimbatore .. *Respondent (Petitioner).*

Viswanathan Chettiar v. Official Receiver of Coimbatore.

Insolvency—Father insolvent—Interim Receiver appointed—Court exercising jurisdiction and granting stay of execution proceedings—Son's share in joint family properties proceeded against—Stay in the circumstances unlawful.

If a creditor attaches the son's share as well in the properties of the joint family prior to the insolvency of the father, the attachment being prior to the insolvency of the father, the Official Receiver's right, if any, to exercise the father's privilege of selling the son's share for his debts has been destroyed.

* C. R. P. Nos. 1381 of 1936 and 947 of 1937 and C. M. P. No. 3086 of 1937. 18th August, 1939.

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Where a judgment-debtor had attached the son's share also before insolvency of the father and the Court granted stay of the entire execution proceedings,

Held, the proper order was not to stay execution proceedings altogether, but to direct stay of execution so far as the petition related to the interest of the father only and not against the interests of the son in the attached properties.

Official Receiver, Kistna v. *Kodandaramayya*, (1935) 68 M.L.J. 681: I.L.R. 58 Mad. 1056, relied on.

The position is this, while the interest of the son remains unsold or unattached the Official Assignee or Receiver has the right to sell the properties for the lawful debts of the insolvent father, but unless he exercises his right he may lose it and, he loses it if the interest of the son is attached by a creditor of the son.

Gopalakrishnayya v *Gopalan*, (1926) 54 M.L.J. 674: I.L.R. 51 Mad. 342 and judgment in *Manicka Pillai* v. *Vellayya Naicken*, (A. A. O. No. 253 of 1939), followed.

Baluswami Naidu v. *Official Receiver, Madura*, (1938) 1 M.L.J. 824, dissented from.

Petitions under Ss. 115 and 151 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Udumalpet dated 16th June, 1936 and made in C. M. P. No. 748 of 1936 in E. P. No. 1433 of 1935 in O. S. No. 407 of 1935.

P. N. Appuswami Aiyar for Petitioner.

S. Ramachandra Aiyar and *P. S. Ramachandran* for Respondent.

The Court delivered the following

JUDGMENT.—These petitions arise out of execution proceedings which were started by the petitioner in the Court of the District Munsif of Udumalpet. The petitioner had obtained a decree against one Madha Naicken and his son on the 8th July, 1935, the decree amount being Rs. 2,702-12-0. On the 21st October, 1935, he filed an execution petition for attachment of the immovable properties of the judgment-debtors. The attachment was ordered on the 1st November, 1935. Subsequently on the 6th November, 1935, Madha Naicken, the father who was one of the judgment-debtors filed I. P. No. 199 of 1935 in the Court of the Subordinate Judge at Coimbatore for being adjudicated insolvent. On the 1st of September, 1936, he obtained an order of adjudication and the Official Receiver of Coimbatore was appointed interim receiver of his properties. Thereupon the Official Receiver in his capacity as interim receiver applied to the District Munsif on the 26th March, 1936, for stay of execution proceedings and his request was granted.

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by the learned District Munsif. Against that order, the petitioner has filed C.R.P. No. 1381 of 1936. He had also appealed to the District Judge of Coimbatore who has upheld the order of the District Munsif staying execution proceedings. In his judgment the learned Judge has also upheld the contention urged on behalf of the respondent that no appeal lay, the petition of the Official Receiver before the District Munsif being in the nature of a claim petition. Against the order of the learned Judge the petitioner has filed C. R. P. No. 947 of 1937. He has also presented C. M. P. No. 3086 of 1937 to convert C. R. P. No. 947 of 1937 into a Civil Miscellaneous Appeal, should it be held that the order of the learned Judge is appealable and that consequently no revision petition lies to the High Court. It is however not necessary to deal with these aspects of the case since no technical objection has been taken on behalf of the respondent to anticipate which these different petitions have been filed.

The learned Advocate for the petitioner contends that the District Munsif of Udumalpet has refused to exercise a jurisdiction that is vested in him in making the order against which the first Civil Revision Petition is presented. To appreciate this argument, it is necessary to refer to the reasons given in the order of the learned District Munsif for staying execution proceedings. Subsequent to the insolvency of Madha Naicken, the petitioner was trying to bring the properties of Madha Naicken's son to sale in executing the decree that he had obtained against both the father and the son. His contention before the learned District Munsif was that he was entitled to proceed with the sale of the son's share because the son has not been adjudicated insolvent and consequently the son's share did not vest in the Official Receiver. He also contended that even if the Official Receiver wanted to proceed against the son's share on the ground that the father's right to dispose of the son's share had become vested in him on the insolvency of the father, that argument could be successfully met by the petitioner relying on the order of attachment of the son's share which, as already stated, was obtained by him on the 1st of November, 1936. This attachment being prior to the insolvency of the father, the Official Receiver's right if any to exercise the father's privilege of selling the son's share for his debts has been destroyed.

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The contentions urged before the learned District Munsif on behalf of the Official Receiver were that the property that was sought to be attached by the petitioner was the self-acquired property of the father Madha Naicken and not his joint family property and that consequently the son of Madha Naicken did not have any interest in it. The learned District Munsif states in his judgment that the question which he has to determine is whether the properties are the self-acquisitions of Madha Naicken or the joint family properties of Madha Naicken and his son Ramaswami Naicken. Following the decision in *Official Receiver, Kistna* v. *Kodandaramayya*[1], he has held that the proper Court to determine this question is the Sub-Court at Coimbatore before which the insolvency proceedings took place as otherwise it might lead to multiplicity of proceedings of a conflicting nature. He granted a stay of execution proceedings as prayed by the Official Receiver and directed the petitioner to apply to the Sub-Court at Coimbatore under S. 4 of the Provincial Insolvency Act.

The learned Advocate for the petitioner argues that by making this order the learned District Munsif has in effect upheld the contentions of the respondent that the properties that were sought to be attached are the self-acquisitions of Madha Naicken. He also argues that the decision quoted above does not debar the learned District Munsif from allowing the execution proceedings to continue as against the right, title and interest of Madha Naicken's son in the property sought to be attached whatever those rights may be. It seems to me that these contentions are well founded. The judgment reported in *Official Receiver, Kistna* v. *Kodandaramayya*[1] shows that the view taken is that it is only when the property proceeded against is the property of a person who has been adjudicated insolvent that the Court is bound to deliver it to the receiver. This is clear from the following sentences that occur in the judgment:

> "Whatever has been proceeded against as the property of the person who was subsequently adjudicated insolvent has to be delivered to the receiver.... I am of opinion that the policy of S. 51 is really to put an end, as it were, to the powers of the executing Court to proceed against or do anything in respect of property against which it has issued execution as soon as it is found that the judgment-debtor as whose property it was proceeded against has been adjudicated an insolvent, and an application is made by the Receiver under S. 52 of the Act."

1. (1935) 68 M.L.J. 681: I.L.R. 58 Mad. 1056.

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Therefore it is only where the property is sought to be attached as the property of the judgment-debtor who has been adjudicated insolvent that these observations can apply. In the present case the petitioner wanted to continue execution proceedings against the interest of the insolvent's son who was also a judgment-debtor and who admittedly has not been adjudicated insolvent. The judgment in the case mentioned above shows that there also the judgment-debtors were an insolvent father and his son and that the order that was upheld by Pandrang Row, J., was the order made by the Subordinate Judge permitting the Official Receiver in that case to take possession only of the interest of the insolvent father in the attached properties and allowing the decree-holders to proceed with the execution of their decrees so far as the insolvent's son's interest in the attached properties was concerned. Therefore as contended by the learned Advocate for the petitioner, the proper order was not to stay execution proceedings altogether but to direct a stay only so far as the petition related to the interests of Madha Naicken the insolvent. So far as the proceedings related to the interest if any of Madha Naicken's son in the attached properties they should have been permitted to be continued by the petitioner.

The petitioner's learned Advocate also invites my attention to the decision reported in *Arunachalam Chettiar* v. *Sabaratnam Chettiar*[1]. That is a decision of a Bench of two judges of this Court. Reliance is placed on the following sentences in the judgment :

"The learned Advocate for the Official Receiver has quoted the decision of Pandrang Row, J. (sitting alone) in *Baluswami Naidu* v. *Official Receiver, Madura*[2]. The learned Judge does appear to have formed the opinion that in the case of the insolvency of a Hindu father S. 28 (2) of the Provincial Insolvency Act does prevent the creditors of a son from attaching the son's share in the family property without the leave of the Insolvency Court. As I have indicated I do not share this view and as I have also indicated it is opposed to the decisions of two Benches of this Court. (*Gopalakrishnayya* v. *Gopalan*[3] and *Manicka Pillai* v. *Vellayya Naicken*[4].) The position is that while the inter- of the son remains unsold or unattached, the Official Assignee has the right to sell the properties for the lawful debts of the insolvent father, but unless he exercises his right he may lose it and, he loses it if the interest of the son is attached by a creditor of the son."

1. (1939) 1 M.L.J. 889: I.L.R. (1939) Mad. 585.
2. (1938) 1 M.L.J. 824.
3. (1926) 54 M.L.J. 674: I.L.R. 51 Mad. 342.
4. A.A.O. No. 253 of 1939.

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The present case seems to fall within the scope of the observations which form the basis of the decision in the case referred to.

The respondent's learned Advocate then contends that the petitioner has a remedy open to him, namely, to go before the Court in which the insolvency proceedings of Madha Naicken are pending and ask for suitable relief and that therefore he must not be permitted to resort to a Civil Revision Petition in which the granting of the relief asked for is discretionary. I am not able to accept this contention as well founded. When it is clear that the Court below has refused to exercise a jurisdiction that is vested in it, that is a typical case in which the High Court will interfere in revision. The petitioner had attached the interests of the insolvent Madha Naicken and his son prior to Madha Naicken's insolvency and his execution proceedings before the learned District Munsif were only in respect of the son's share in the attached properties and therefore even according to the decision reported in *Official Receiver, Kistna* v. *Kodandaramayya*[1], the learned District Munsif had jurisdiction to direct the execution proceedings to continue against the right, title and interest, if any, of Madha Naicken's son in the attached properties. The refusal of the learned District Munsif to make such an order cannot be supported. I therefore allow the Civil Revision Petitions and order that the stay granted by the learned District Munsif so far as it relates to proceedings in execution as against the right, title and interest of the insolvent Madha Naicken's son be cancelled and that the petitioner be permitted to continue his execution proceedings against such interest whatever that may be, in the Court of the learned District Munsif. The petitioner is entitled to his costs and I allow one set of costs in the three applications payable out of the estate.

K.C. —— *Petitions allowed.*

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1. (1935) 68 M.L.J. 681 : I.L.R. 58 Mad. 1056.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

In the matter of The Indian Trusts Act (II of 1882)

and

In the matter of The Trust Deed of Thomas Richmond, deceased.

Edward H. M. Bower .. *Appellant**

v.

Lt.-Col. A.M.V. Hesterlow and others .. *Respondents.*

Bower *v.* Hesterlow.

Civil Procedure Code (V of 1908), S. 92—Trust for making advances to Anglo-Indian students for higher studies—If a public charitable trust—Originating summons for deviation of trust—If maintainable—Proper course to apply under S. 92, Civil Procedure Code.

A trust of a fund from the income of which advances are to be made to Anglo-Indian students for purposes of higher studies, re-payable by them on certain terms (and secured by insurance policies to be taken by the recipients of the advances and to be assigned to the trustees) is a public charitable trust and therefore it is not open to a trustee to take out an originating summons for an order permitting a deviation of the trust as such a matter comes under S. 92 of the Civil Procedure Code, and proceedings under that section can only be taken with the sanction of the Advocate-General.

On appeal against the judgment and decree of the Hon'ble Mr. Justice Gentle dated 24th August, 1937 and passed in C. S. No. 135 of 1937 (Original Side) in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

V. Sundararajan for Appellant.

V. C. Viraraghavachari for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal arises out of a decision on an originating summons issued under O. 45 of the rules of the Original Side of this Court. The summons was taken out by the appellant, the sole remaining trustee of a trust known as the Richmond Educational Trust. The appellant sought an order of the Court permitting a deviation from the trust deed and asked for the appointment of two new trustees. The appellant regarded the trust as a private one and relied on the provisions of S. 34 of the Indian Trusts Act. The matter came before Gentle, J., who dismissed the summons so far as it related to the prayer for permission to deviate from the trust deed, but

* O.S.A. No. 78 of 1937. 9th August, 1939.

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granted the prayer for the appointment of additional trustees. The appellant has appealed against the first part of the order as he contends that the learned Judge erred in not sanctioning the deviation. The main question, however, is whether this trust is to be regarded as being of a public or private nature. If it is a public trust the application did not lie.

The trust was created by one Thomas Richmond, a member of the English and the Madras Bars, under a deed dated 11th April, 1918. The founder apparently regarded the trust as being of a private character. He was a member of the Anglo-Indian community and he formulated a scheme to help Anglo-Indian youths in their studies. He set aside Government securities of the face value of Rs. 30,000 as an endowment fund. The interest on the capital was to be devoted to making advances to Anglo-Indian youths who wished to qualify for professions or obtain higher education generally. The advances which were to be called "scholarships" were to be repaid by the recipients out of their earnings on completion of their education. The trust deed which was drawn up and executed provided that each recipient of an advance should take out a life insurance policy for a sum equivalent to double the advance and assign the policy as security to the trustees. The premium and other incidental expenses were to be met by the trustees and added to the amount of the loan. On repayment of the loan with interest at 4 per cent. the policy was to be re-assigned to the insured. In the event of the insured dying before the re-payment of the loan sufficient of the money due on the policy to discharge the debt was to be paid to the trustees and the balance paid to the person nominated by him "or otherwise according to the terms of the policy taken in the matter." There were to be certain restrictions and these are embodied in paragraphs 4 and 5 of the deed. These paragraphs read as follows:—

"(4) The candidate shall not be less than the age of 18 years on the date of the execution of the instrument for re-payment and must have passed either the High School Examination, the School Final Examination or any other Examination or Test qualifying the candidate to appear for the University Examinations or for professional Examinations or Tests in India, Great Britain or elsewhere."

"(5) The candidate's father, mother, guardian or himself shall have been a *bona fide* member of the Anglo-Indian Association, Southern India, for a period of one year before the award of the scholarship or the candidate an orphan brought up in an Orphanage in Southern India for a period of more than two years and who had won a Government Scholarship while in the

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Orphanage and has further been a recipient of a Scholarship from the Anglo-Indian Association, Government or other sources after his sixteenth year."

Mr. Richmond was one of the original trustees and acted as such until his death in 1930. Since the creation of the trust a large number of advances had been made to Anglo-Indian students. Unfortunately many of them have not fulfilled their obligations to the trust. In fact, we are told that only a very few of them have repaid their advances. The consequence has been that the trustees have had to keep up the payments under the policies in order to safeguard themselves. The payment of premia on the policies on the lives of those who have already benefited by the trust materially restrict the carrying out of the objects of the trust. There is at present outstanding about Rs. 44,000. The main object of the appellant in taking out the originating summons was to obtain an order from the Court permitting the trustees to change the form of security. It was proposed that a beneficiary should provide two sureties for the repayment of the loan made to him and the obligation to take out a life policy should be cancelled. If this were allowed it was anticipated that the trustees would be able to fulfil the objects which the donor had in mind.

The learned Judge refused to give any direction because he considered that the Court should not interfere with the provisions of a trust deed unless there were exceptional circumstances and in his opinion there were no exceptional circumstances here. He held that the donor must have had in mind when he decided on the conditions of the trust that a portion of the income would of necessity have to be devoted to the payments of premia on the lives of beneficiaries and in refusing to give the direction sought relied on the judgment of Romer, L.J., in In re *New*: In re *Leavers*: In re *Morley*[1]. We are unable to share the view that the facts in this case did not warrant a deviation from the trust deed to the extent of permitting security to be given in another form and we can see nothing in the case cited which runs contrary to this view. If relief were not given in this case it would undoubtedly mean the frustration to a large extent of the objects of the trust. If the matter remained there we should have no hesitation in passing an order which would enable the trustees to take the security in the shape of

1. (1901) 2 Ch. 534.

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surety bonds. The matter, however, does not remain there. There is the further question whether this is a public or a private trust? We are of opinion that this is not a private trust, but is a public trust and is therefore governed by the provisions of S. 92 of the Code of Civil Procedure. The trust was created for the benefit of the Anglo-Indian community of this Presidency. The fact that the donor placed restrictions to the extent set out in cls. 4 and 5 of the deed which I have already quoted does not, we consider, make the trust any the less a public trust.

Authority for the proposition that a loan fund of this nature constitutes a charity is to be found in In re *Monk*: *Giffen* v. *Wedd*[1]. In that case the testator bequeathed his residuary estate to trustees upon trust to set aside £800 as a "coal fund" for the benefit of the inhabitants of his native village and to hold the rest of his residuary estate as a "loans fund" for the purpose of making loans to poor and deserving inhabitants of the village. It is true that in that case there was no interest to be charged on the loans and in this case the rules which have been framed in accordance with the trust deed do require interest at the rate of 4 per cent. to be paid by the beneficiaries on the amounts received by them. Considering that it was the intention to grant loans to Anglo-Indian youths without occupation merely on the security of life policies the interest to be charged was very low. A scheme of loans for educational purposes at such low interest must be regarded as a scheme of a charitable nature.

Holding as we do that this is a public trust it was not open to the appellant to take out an originating summons. The matter comes within S. 92 of the Civil Procedure Code, and proceedings under that section can only be taken with the sanction of the Advocate-General. It follows that the order dismissing the appellant's application must stand because the application was not competent, but the trustees will be at liberty to take such other steps as they may be advised.

The costs of the trustees will come out of the estate.

S.V.V. ——— *Appeal dismissed.*

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1. (1927) 2 Ch. 197.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Marakkarkandi Krishnan and others .. *Appellants** (*Respondents 2 to 4*)

v.

P. R. N. Ramanatha Aiyar and Company .. *Respondents* (*Petitioners*).

Krishnan *v.* Ramanatha Aiyar & Co.

Malabar Law—Thiyyas of Calicut Taluk—Customary law—Incident of impartibility—If judicially recognised so as to dispense with actual proof in a particular case.

On an examination of the state of authorities on the custom as to impartibility among Thiyyas of Calicut Taluk,

Held, it cannot be said that the incident of impartibility has been recognised in judicial decisions so as to dispense with proof. It must be proved by the party setting up the incident of impartibility that it exists in the community or in the families in question.

Appeal against the decree of the District Court of South Malabar in A. S. No. 208 of 1935 preferred against the order of the Court of the Subordinate Judge of South Malabar at Calicut dated 18th April, 1935 and made in E. P. No. 324 of 1933 in O.S. No. 6 of 1925.

K. Kuttikrishna Menon and *K. N. Kumaran* for Appellants.

T. S. Anantaraman for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in this appeal is whether the property of the debtors is impartible and if so whether the debt due to the decree-holder is recoverable from that property.

The respondent in this appeal obtained a money decree against one Baputty who died in April, 1926, leaving two brothers Velukutty and Choyi. The first of them died in 1926 and the second is still alive. In the execution petition filed by the respondent herein to execute his decree, the sons of the judgment-debtor Baputty were impleaded as his legal representatives. They are the appellants in this appeal. Objection was taken that the property of the family consisting of the deceased Baputty, his brothers and sons is impartible and that according to the customary law applicable to the Thiyyas of Calicut Taluk, such an impartible estate cannot be proceeded against in

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* A. A. A. O. No. 60 of 1938. 20th April, 1939.

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execution of a decree obtained against the deceased Baputty. By 'impartible' it is said that the property is not partible unless all the parties consent. It is urged that as it is not partible at the instance of one member against the wishes of the others, the property is such that it cannot be proceeded against in execution of a money decree obtained against that member.

The Subordinate Judge held that the effect of the decisions of the Madras High Court is that laid down in the decision in *Patukkayil Chakkutti* v. *Kothambra Chandukutti*[1], that the Thiyyas of Calicut are governed by the Makkatayam law of inheritance and that they are governed by customary law. If no evidence is forthcoming as to what is the rule of customary law on a particular point the rule of Hindu Law on that point must be adopted as the customary law obtaining in the community on that point. If a person alleges that the rule of customary law on any particular point is something different from the Hindu Law, the evidence which he adduces in support of his allegation ought not to be subjected to those well-known tests which are applied to the case of an alleged custom contrary to or in derogation of the law and should be viewed simply as evidence adduced to show what is the rule of customary law itself. Applying this principle, the Subordinate Judge discussed the evidence adduced by either party and came to the conclusion that it was proved by the objectors that the property was impartible and that it cannot be proceeded against in execution of a money decree obtained against Baputty. On appeal the learned District Judge of South Malabar came to the opposite conclusion. The learned District Judge applied the same test as the Subordinate Judge and weighed the evidence according to that standard. He came to the conclusion that the evidence on record was not such as to justify a finding in favour of the objectors. He reversed the order of the Subordinate Judge and directed execution to proceed. Against this decision, the present appeal is filed by the sons of Baputty. They urge that the decision of the District Judge is wrong.

It is argued by the appellants' learned Advocate that according to the decision of this Court, the incident of impartibility in the sense in which that expression is used as stated above is applicable to all cases of Thiyyas of Calicut Taluk. It

1. (1927) 53 M.L.J. 368.

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is said that the law was laid down correctly in *Raman Menon* v. *Chathunni*[1], and that this incident has been judicially recognised so well as to dispense with actual proof of it in this case. This and the latter decisions were all referred to at length and discussed by Mr. Justice Waller and Mr. Justice Madhavan Nair in the decision reported in *Patukkayil Chakkutti* v. *Kothambra Chandukutti*[2]. As is pointed there when the matter came up before the High Court on the first occasion in *Raman Menon* v. *Chathunni*[1], the pleadings and the evidence were all vague and unsatisfactory, the issue that was raised was vague, the evidence that was adduced inconclusive, the witnesses were not even asked about the real questions at issue, and the Subordinate Judge arrived at the conclusion that the ordinary rule of Marumakkatayam against compulsory partition was applicable to the Thiyyas of Calicut on the authority of two unreported decisions. When the matter came before the High Court in Second Appeal the High Court observed that it should not have been decided in that way and they framed an issue whether according to the customary law followed by the parties to the suit, compulsory partition can be effected according to the wish of one member of the tarwad. When the matter went back, the Subordinate Judge based his finding upon the ground that there was no presumption of partibility of family property in the case of Thiyyas and that the evidence adduced before him was not sufficient to support the custom of partibility. Starting from that standpoint he examined the evidence adduced before him and held that the incident of partibility was not proved. When the matter came after the return of the finding, the High Court did no more than accept the finding. The Subordinate Judge really went too far in laying down that there was no presumption of partibility. In the first place, the presumption must be that all joint property is partible, that being the rule of equity recognised in the absence of any usage to the contrary, and secondly, the Hindu rule of partibility is also the same and hence the rule of partibility must prevail unless displaced by evidence that some other rule is recognised by the community as binding upon it. When the question came up with respect to another community who were also Thiyyas but belonged to Palghat, this Court refused to extend the rule laid down in the decision in *Raman Menon* v. *Chathunni*[1] and confined the case

1. (1893) I.L.R. 17 Mad. 184.
2. (1927) 53 M.L.J. 368.

to the Thiyyas of Calicut, *Velu* v. *Chamu*[1]. In Second Appeal No. 580 of 1917 Mr. Justice Phillips and Mr. Justice Krishnan observed that it was questionable whether a single decision in *Raman Menon* v. *Chathunni*[2], can be said to be a final decision binding on all Thiyyas of Calicut. The question came before Mr. Justice Waller and Mr. Justice Madhavan Nair in *Patukkayil Chakkutti* v. *Kothambra Chandukutti*[3]. There the learned Judges went into the matter at great length and came to the conclusion that the decision in *Raman Menon* v. *Chathunni*[2] must be confined to the facts and circumstances of that case and held that among the Thiyyas of Calicut there was no rule that the rule of impartibility was applicable unless it was proved to be so by evidence adduced in any given case. The question again came before this Court in *Kundan* v. *Andi*[4] before Mr. Justice Wallace and Mr. Justice Srinivasa Aiyangar. Wallace, J., followed without any reserve the decision of Waller and Madhavan Nair, JJ., and laid down the rule in the same terms. Mr. Justice Srinivasa Aiyangar though he was inclined to doubt whether the observations of Mr. Justice Waller and Mr. Justice Madhavan Nair were correct, applied the law as laid down by them and held that the evidence adduced in the case before him proved a custom of impartibility. This being the state of authorities it cannot be said that the incident of impartibility has been recognised in judicial decisions so as to dispense with proof. It must be proved by the party setting up the incident of impartibility that it exists in the community or in the families in question. As is pointed out at page 239 of Sundara Aiyar's Malabar Law partibility is a rule that is incidental to common ownership, it is a rule of equity applicable to joint status and it is upon the person setting up that the property is impartible to allege and prove it.

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[His Lordship after discussing the evidence in the case proceeded.]

I therefore hold that the question of impartibility has not been established by the evidence on record. On the other hand the evidence referred to proves the contrary. The appeal therefore fails and is dismissed with costs.

Leave refused.

K. S. —— *Appeal dismissed.*

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1. (1898) I.L.R. 22 Mad. 297.
2. (1893) I.L.R. 17 Mad. 184.
3. (1927) 53 M.L.J. 368.
4. A I.R. 1929 Mad 508.

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD MACMILLAN, SIR GEORGE RANKIN AND MR. M R. JAYAKAR.

Hari Chand and others .. *Appellants**

v.

Secretary of State .. *Respondent.*

P.C. — Hari Chand v Secretary of State.

Land Acquisition Act (I of 1894), S. 4—Land held on cantonment tenure—Buildings erected by grantee—Notification of resumption by Government—Offer of compensation for buildings refused—Notification by Government of intention to acquire buildings under Land Acquisition Act—Validity—Compensation—Method of valuation.

Where the Government has within the area of cantonments granted land to individuals who have erected buildings on it and has, in exercise of its powers in that behalf, issued notifications of resumption to the grantees, and where the grantees refuse the offers of compensation for the buildings contained in the notifications, a notification by the Government under the Land Acquisition Act, 1894, for the purpose of expropriating the owners of the buildings is valid notwithstanding that it is a notification for the acquisition only of buildings on the land and not of the land itself, for in the Act the expression "land" is stated to include benefits to arise out of land and things attached to the earth, and it would be of no purpose for the Government to state in its notification of acquisition under the Act that it proposed to acquire land which was its own property.

In such a case, the subject to be valued being a building apart from its site, the principle of fixing its value by ascertaining the cost of reproducing the building and then allowing for depreciation and cost of the repairs required apart from depreciation is a recognised method of valuation for purposes of compensation, and accordingly it cannot be objected by the grantees that the value of their buildings has been depreciated by the previous issue of the notification of resumption.

Where, as in such a case, the compensation has to be restricted to the value of buildings apart from the land on which they stand, no additional allowance should be made in respect of amenities such as trees, gardens, pathways and culverts and other things enjoyed by the owners of the buildings as useful amenities in connection with them.

Consolidated appeals from decrees of the Judicial Commissioner's Court, North-West Frontier Province, Peshawar, dated 28th July, 1936 (Middleton, J.C. and Kazi Mir Ahmad, A.J.C.) affirming, with slight modifications, eight out of twelve decrees passed on 15th February, 1935, by the District Judge, Peshawar.

A. M. Dunne, K.C. and *S. P. Khambatta* for Appellants.

J. M. Tucker, K.C., W. Wallach and *Hon. Q. Hogg,* for the Government.

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* P. C. Appeal No. 39 of 1938. 30th June, 1939.

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The facts and arguments sufficiently appear from the judgment.

30th June, 1939. Their Lordships' judgment was delivered by

LORD MACMILLAN.—Their Lordships are invited in these 12 consolidated appeals to reconsider a number of awards made by way of compensation for the acquisition by the Government of certain bungalows in the Cantonment of Peshawar. In the Courts below a large number of questions were raised and debated in relation to the awards, but before their Lordships, Mr. Dunne, on behalf of the appellants, confined himself to two or three main issues.

As a matter of history the cantonments are regulated, so far as regards grants to individuals, by an Order of the Governor-General in Council dated so far back as 1836. That Order appears to have been carried forward to date by a series of subsequent Orders more or less identical in their terms. Where the Government grant any rights to individuals within the area of the cantonments one of the cardinal conditions of the grant is that the Government retain the power of resumption at any time on giving one month's notice. If they give that notice they are required to pay the value of such buildings as may have been authorised to be erected.

In this case the Government proposed to resume 12 or 13 of properties originally granted out, and they issued notifications of resumption, of which there is an example in the case of the first appellant Hari Chand's property. It runs as follows:—

"Whereas the land comprising the site of the property known as Bungalow No. 5. Fort Road, Peshawar Cantonment, belongs to Government and is held by you on Cantonment tenure under which Government are entitled to resume the said land subject to paying the value of such buildings as may have been authorised to be erected thereon; And whereas Government have decided to resume possession of the said land and to obtain possession of the buildings standing thereon: Take notice therefore that Government will under all powers enabling them in that behalf through their Agent on 15th October, 1932, resume possession of the said land and your occupation and any rights, easements and interests you may have in the said land and the buildings thereon shall cease as from that date."

The notification also contained an offer of compensation.

Apparently none of those to whom the notices were addressed was satisfied with the offer, and, while the natural and ordinary course would have been to proceed to arbitration for the purpose of assessing the compensation, for some reason or

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other that course does not seem to have been pursued or to have been acceptable to the parties, and the Government accordingly resorted to the Land Acquisition Act, 1894, for the purpose of expropriating the owners of the bungalows on the terms of that Statute. Accordingly a notification was served on each of the proprietors of the bungalows, and in the recital of each notification it was set out that the Government claimed to be the owners of the land upon which the various bungalows and outhouses had been erected. That is set out as a matter of narrative in the notification. Then it proceeds to state that the Government have given notice that the land has been resumed by them and that they are desirous now of acquiring the buildings thereon and any other outstanding interest therein, and for that purpose they invoke the provisions of the Land Acquisition Act of 1894.

The first point taken here has been that the notification was bad because it was not a notification for the acquisition of the land, but a notification of an intention to acquire only buildings on the land. It was said that the Land Acquisition Act only authorised notification of an intention to acquire land and therefore that the whole proceedings under the Land Acquisition Act were fundamentally bad because the notification upon which the proceedings started was invalid. It has to be noticed, however, that in the Land Acquisition Act "the expression 'land' includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." In the present case, the Government's position being that they were the owners of the site, it would have been manifestly idle for them to have proposed to acquire what was already their own, and therefore when they sought to put in force the provisions of the Land Acquisition Act they naturally requisitioned what was not their own but what they desired to acquire, namely, the buildings on the land. It appears to their Lordships that in any event this objection to the notification comes too late, because the parties proceeded under the Land Acquisition Act to follow forth all the procedure which that statute lays down, right up to and including the final determination of compensation. The Court that dealt with the matter was really a compensation Court, and if it had been intended to attack the whole proceedings as initially invalid this would more properly have been done before some other tribunal. The Court did, however, incidentally consider the question of the

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validity of the notice, and their Lordships agree with the view taken that the notification is not open to objection.

Junior counsel for the appellants sought to satisfy their Lordships that the statement in the recital, namely, that the site belonged to the Government, was in fact inaccurate, and that the claimants were entitled to the sites upon which the various bungalows were erected. One thing is quite clear from the legal point of view and that is that a claimant who desires to obtain compensation must establish his title, and in the case to which we were referred, the recent case of the *Secretary of State for India in Council* v. *Satish Chandra Sen*[1], where the question of cantonment tenure in Bengal was under consideration, it was made clear that a claimant must establish his title affirmatively. In the present case it may be that there might be some question as to the Government's title, but it was for the claimants themselves to establish affirmatively their title to the sites. The Court below which had the advantage of having documents before them which have not been before their Lordships, went very fully into the matter and satisfied themselves that the claimants here had not established their title to the sites. Their Lordships see no reason to differ from this conclusion.

That being so, the only remaining question is whether the compensation to which the claimants are entitled for the deprivation of their buildings has been ascertained according to law. It is not the practice of their Lordships to consider detailed criticisms of valuation. It is always open to an appellant before their Lordships to raise a question of principle relating to the method of assessment, and if their Lordships are satisfied that the compensation officer or the Court which reviewed his award has erred on a matter of principle then relief will be given. In the present instance the subjectmatter of valuation or compensation being the buildings and not the site, inasmuch as the site was already the property of the Government, the question is what was the appropriate method of valuing the buildings. It was made a matter of complaint that in consequence of the resumption notice having been served, the value of all these buildings, some of them no doubt attractive residences, had been seriously depreciated. Their Lordships could have appreciated that criticism if the principle of valuation adopted had been that of proceeding upon the rental value of the buildings,

1. (1930) 60 M.L.J. 142: L.R. 57 I.A. 339: I.L.R. 58 Cal. 858 (P.C.).

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but in the present case the method adopted has been what is commonly known as the contractor's method. The subject to be valued being a building apart from the site, the principle of fixing value by ascertaining the cost of reproducing the building at the present time and then allowing for depreciation in consideration of the age of the building and for the cost of such repairs as might be required apart from depreciation, is quite a well-known and recognised method of valuing buildings for the purpose of compensation. That method was pursued here, and that method is not, as their Lordships conceive it, affected by the resumption notice, because the prices which would be taken and were taken in this case for the purpose of ascertaining the cost of reproducing the building would not be affected by the resumption notice at all. The buildings accordingly in their Lordships' view have been valued for the purpose of compensation on a perfectly admissible and perfectly legitimate principle, and that being so there would appear to be no valid objection on this score to the awards that were made.

One further point was taken, however, a point of detail, to which it is proper that allusion should be made. It is said that nothing has been given in the awards in respect of what might be called the appurtenances of the buildings, such things as roads, pathways, culverts, gardens, trees, and various things which were enjoyed by the occupants of the bungalows as useful amenities in connection with them. The Court below considered this matter and were of opinion that it was not proper to include any figure for these items in the awards, with one small exception; they did allow something, a small acknowledgment, in respect of what are described as necessary roads, presumably access which were necessary for the enjoyment of the bungalows, and a small addition was made to the awards under this head. Their Lordships do not feel called upon to comment upon that circumstance, but they are of opinion that in the case of premises such as had to be valued here and which were enjoyed throughout on terms which were certainly precarious, namely, that at any time the Government might resume the premises on giving one month's notice, and that all that the grantee was to be entitled to receive in the event of that power being exercised was the value of the buildings erected on the ground, anything which might be done by the grantee in the way of utilising the ground surrounding the building for the purposes of amenity or enjoy-

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ment was, as the Court below has held, associated rather with the site than with the building. If the compensation has to be restricted, as it has to be in this case, to the value of the buildings, their Lordships agree with the Court below that no additional allowance should be made in respect of amenities such as trees and gardens and so on associated with the enjoyment of the bungalows.

Mr. Dunne, on behalf of his clients, has brought before their Lordships all that could be advanced by way of criticism of the awards, but these criticisms, in their Lordships' opinion, fail. The result is that their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondent: *The Solicitor, India Office.*

R. C. C. —— *Appeals dismissed.*

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE STODART.

Ellappa Chettiar .. *Petitioner* (Petitioner-2nd Defendant).*

Ellappa Chettiar, *In re.*

Madras Debt Conciliation Act (XI of 1936), S. 25—Judgment-debtor filing successive applications for conciliation—If entitled to obtain stay under S. 25 more than once.

Though in the Debt Conciliation Act there is nothing to prevent a debtor filing one application after another and under S. 25 of the Act he can obtain stay of a suit or other proceedings so long as an application is pending before the Board, a judgment-debtor is not entitled to obtain stay under S. 25 of any individual suit or proceedings more than once.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Kallakurichi dated 21st November, 1938 and made in M. P. R. No. 987 of 1938 in O. S. No. 426 of 1936.

P. S. Ramachandran and *K. R. Krishnaswami Aiyar* for Petitioner.

The Court delivered the following

JUDGMENT.—The District Munsif is clearly right.

The first application to the Board though nominally filed by the fourth defendant was clearly adopted by all the defendants. For they applied for and got stay of execution from the District

* C. R. P. No. 273 of 1939. 6th October, 1939.

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Munsif under S. 25 of the Debt Conciliation Act on the strength of that application.

It is also argued that having made another application to the Board, this time through the second defendant, the judgment-debtors are again entitled to stay.

To admit such a proposition would lead to absurd results. In the Debt Conciliation Act there is nothing to prevent a debtor filing one application after another and under S. 25 of the Act he can obtain stay of a suit or other proceedings so long as an application is pending before the Board. When he files an application before the Board a little time must elapse before it is dismissed. In that time under S. 25 he can obtain stay of proceedings in suits and other proceedings and so on indefinitely without limit of time, and obviously without any great expense.

In my opinion this is not the intention of the law. A judgment-debtor is not entitled to obtain stay under S. 25 of any individual suit or proceedings more than once. Petition is dismissed.

K. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Coimbatore Venkataramana Vilas Co., Ltd., by its Secretary C. V. Ramasesha Aiyangar .. *Petitioner** (*Petitioner*)

v.

The Official Receiver, Coimbatore and another .. *Respondents* (*Respondents*).

Coimbatore Venkataramana Vilas Co., Ltd. *v.* Official Receiver, Coimbatore.

Insolvency—Debts of deceased father—Eldest son asking for and obtaining time for collecting outstandings and payment—If personally liable for the debts—Adjudication on such debts—Propriety.

The mere asking for and obtaining of time by a son for payment of his deceased father's debts would not make the son personally liable and if he was not personally liable he could not be adjudicated for his father's debts

Petition under S. 75 (1) of Act V of 1920 praying the High Court to revise the order of the District Court of Coimbatore dated 24th June, 1937 and made in C. M. A. No. 104 of 1932 preferred against the order of the Court of the Subordinate

* C. R. P. No. 761 of 1937. 4th August, 1939.

Coimbatore Venkataramana Vilas Co., Ltd. v. Official Receiver, Coimbatore.

Leach, C. J.

Judge of Coimbatore (Additional) dated 19th August, 1932 and made in I. A. No. 383 of 1932 in I. P. No. 43 of 1924 (District Court, Coimbatore).

K. S. Desikan for Petitioner.

P. Govinda Menon for Respondents.

The judgment of the Court was delivered by

The Chief Justice.—One Kandaswami Pillai died in 1923 leaving a considerable amount of property, but large debts. He was survived by two widows and seven sons, of whom only two were majors. The eldest son was Sivagurunatha. On the 16th January, 1924, the second son, Chidambaram, and the widows purporting to act as the guardians of their respective sons, granted a power-of-attorney to Sivagurunatha to administer the estate of the deceased. Why it was necessary to execute this power-of-attorney is not apparent. Sivagurunatha was under Hindu law the manager of the family and lawful guardian of the minors. On the 18th January, 1924, Sivagurunatha sold certain immovable property belonging to the estate and five days later sold other estate property. On the 22nd February, 1924, a creditor applied for his adjudication in insolvency on the ground that the two transfers which he had effected in the previous month constituted fraudulent preferences under the insolvency law. The application was filed in the District Court of Coimbatore and the District Judge dismissed it. An appeal followed to this Court and this Court being of the opinion that the case had not been properly dealt with on the merits set aside the order of dismissal and remanded the case for further enquiry. When the case came before the District Judge on remand Sivagurunatha consented to an order of adjudication being passed against him and to an order vesting in the Official Receiver the properties which his father had left. Accordingly orders to that effect were passed on the 11th August, 1926. The Official Receiver took possession of the estate and has to a very large extent carried out the task of administration. Nearly all the properties have been sold and the creditors have been paid eight annas in the rupee.

The present petitioner is admittedly a creditor of the estate. He also claims to be a secured creditor under two bonds executed respectively on the 30th January, 1924 and 21st February, 1924, but the validity of these documents is being challenged by the Official Receiver. On the 18th March, 1932, the peti-

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tioner, as a counterblast, filed an application for an order annulling the adjudication. This application was heard by the Subordinate Judge of Coimbatore and was dismissed. The petitioner appealed to the District Judge, who concurred in the order dismissing the petition and consequently dismissed his appeal. He then filed a petition asking this Court in the exercise of its revisional powers to set aside the adjudication.

When the case was before the District Judge the petitioner contended that the order was bad because Sivagurunatha had no personal liability in the matter and that in any event the Court had no power to order the vesting of the entire estate properties in the Official Receiver. On the first point the District Judge held that there was personal liability because when pressed for payment by a creditor Sivagurunatha had asked and obtained time to collect the outstandings. On the second point he held that the petitioner could have appealed against the vesting order, but as he had not done so it was too late to attack it. The petition now before us came in the first instance before Varadachariar, J., who referred it to be a Bench because he was unable to accept as correct the opinion of the District Judge that the mere asking for and the obtaining of time to collect the outstandings was sufficient to make Sivagurunatha personally liable for his father's debts. The learned Judge also considered that the language used in the judgment of this Court *Muthu Veerappa Chettiar* v. *Sivagurunatha Pillai*[1] in setting aside the order dismissing the application for adjudication and remanding that application for inquiry was too general in character.

We are in entire agreement with Varadachariar, J., that the mere asking for and obtaining of time for payment would not make Sivagurunatha personally liable and if he was not personally liable he could not be adjudicated for his father's debts. But the question of what is the effect of time being asked for and granted really does not arise in this case. The position here is that Sivagurunatha accepted in the insolvency proceedings the contention that he was personally liable and had committed acts of insolvency. What was operating in his mind it is not necessary to inquire. It is far too late in the day for the petitioner to challenge the order of adjudication, and

1. (1925) 49 M.L.J. 697: I.L.R. 49 Mad. 217.

the same remark applies to his attempt to have the vesting order set aside. For over 11 years he and the members of Sivagurunatha's family have acquiesced in the adjudication and in the administration of the estate by the Official Receiver. Had he so desired the petitioner could have challenged on appeal both the order of adjudication and the vesting order. He accepted these orders as being proper orders and would not have come into Court to-day if the Official Receiver had not questioned his claim to rank as a secured creditor. This is certainly not a case in which the exercise of the Court's revisional powers are called for. The order of the District Judge was a proper one and the application for its revision must be dismissed with costs.

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S. V. V. — *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD RUSSELL OF KILLOWEN, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

Tan Ma Shwe Zin and others .. *Appellants**

v.

Koo Soo Chong and others .. *Respondents.*

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Tan Ma Shwe Zin *v.* Koo Soo Chong.

Burma Laws Act (XIII of 1898), S. 13—Chinese family professing Buddhist religion—Succession dispute—Law applicable.

Where the *propositus* a Chinese Buddhist whose father had settled in Burma died leaving a widow and on her death a dispute relating to succession arose.

Held, that the law applicable is the Burmese Buddhist law and not the Chinese Customary law.

Appeal from a decree of the High Court, Rangoon, dated 1st March and 6th April, 1937 (Goodman Roberts, C. J. and Leach, J.) reversing a decision of Sen, J., given in the exercise of the Court's Original Civil Jurisdiction, and dated 3rd June, 1936.

The respondent, Khoo Soo Chong, was the nephew of one, Khoo Boon Tin, who was the eldest of four sons of a Buddhist Chinaman who had settled in Burma. Tin died childless in 1906 and his widow entered into possession of his property and carried on his business. She died in April, 1929, having made a will bequeathing *inter alia* a sum of money to the respondent, no bequest of the residuary estate having, however, been made. In proceedings instituted in 1930 to which respondent was not a party it was held

* P. C. Appeal No. 58 of 1938. 22nd June, 1939.

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that two of the widow's sisters, and a brother, the present appellants, were each entitled to one-third of Tin's estate not disposed of by his widow's will, it being held on appeal that the law applicable to Chinese Buddhists was Chinese Customary law (*Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin*[1]). In March, 1934, the present respondent instituted these proceedings, claiming that he was sole heir both to Tin and to his widow, on the footing that Chinese Customary law governed inheritance and succession in the case of Chinese Buddhists, and that the widow had accordingly no right to dispose of her husband's estate. The Courts below held that Chinese Customary law ruled the case, but the appellate Court reversed the decision of the trial Judge on the application of that law and held that the respondent was at Chinese Customary law entitled to the estate on his uncle's death. The present appeal to His Majesty was accordingly brought.

A. M. Dunne, K.C. and *A. P. Pennell* for Appellants.

W. Wallach for Respondents and other parties joined with him.

The arguments appear sufficiently from the judgment.

22nd June, 1939. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The suit out of which this appeal has arisen was brought on the 7th March, 1934, by the first respondent, Khoo Soo Chong, in the High Court at Rangoon in its original civil jurisdiction. The purpose of the suit was to establish that the plaintiff is the sole heir to the estates of his uncle, Khoo Boon Tin, and of Tan Ma Thin, this uncle's widow, either (1) as their adopted son, or (2) as the former's nephew. It has been held in the High Court, both at first instance and on appeal, that the plaintiff failed to prove that the alleged adoption was in fact made, and, though this issue has been raised again before the Board, their Lordships see no reason to disturb the concurrent findings on this point.

The facts which bear upon the plaintiff's claim as nephew may be shortly stated. His uncle, Khoo Boon Tin, was the eldest of four sons of a Chinaman who lived in Burma. The family professed the Buddhist religion, and Khoo Boon Tin married Tan Ma Thin, also a Chinese and a Buddhist. He died in 1906 childless. Of his three brothers, the second son had predeceased him leaving no children. The third Khoo Htwa

1. (1932) I.L.R. 10 Rang. 97.

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Khan survived till 1917, and died leaving three sons of whom the plaintiff is the eldest, having been born on 31st March, 1905. The fourth son, Khoo Hine Htow, was alive at the time of the present suit and gave evidence at the trial for the plaintiff.

On the death of Khoo Boon Tin in 1906, his widow, Tan Ma Thin, entered into possession of his property, obtained letters of administration to his estate from the Chief Court, carried on his business, and engaged in other business. She died on the 14th April, 1929, having made a will dated the 29th June, 1927. Her estate was sworn at over two lakhs of rupees. Probate was obtained of the will from the High Court on the 24th August, 1929. By it she had made a number of charitable and other bequests, including a legacy of Rs. 2,000 to the plaintiff, but she had made no residuary bequest, and part of her property was not disposed of by her will. If the Indian Succession Act applied to her will, the charitable bequests were invalid under S. 118 thereof, as the will had not been deposited in accordance with the terms of that section.

On the 24th November, 1930, her sister, the first appellant, sued on the Original Side of the High Court for administration of her estate, claiming that the present appellants (that is, herself, her sister and her brother) were the only heirs and that the charitable bequests were invalid. The present plaintiff was not impleaded, and the suit proceeded against the other sister of the testatrix, her brother and her executors. The trial Judge upheld the charitable bequests on the ground that the will was governed by English law and not by the Indian Succession Act; but on appeal Page, C. J. and Cunliffe, J. [*Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin*[1]] held that the law to be applied to "Chinese Buddhists" was Chinese Customary law and remanded the case. On remand it was held by Sen, J. (11th July, 1933), that the charitable bequests were valid and that each of the present appellants was entitled to one-third of the property not disposed of by the will.

Thereafter, on the 7th March, 1934, some 28 years after the death of his uncle and about five years after the death of his aunt, the respondent by his plaint in the present suit claimed that he was sole heir to both, on the footing that Chinese Customary law governed inheritance and succession to Chinese

1. (1932) I.L.R. 10 Rang. 97.

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Buddhists in Burma, and that in any case the widow had only a limited interest in her husband's estate and had no right to dispose of it. In the High Court both the trial Judge (Sen, J.) and the Division Bench (Robert, C. J. and Leach, J.) on appeal from him, held that Chinese Customary law governed the case. But the trial Judge was not satisfied that under that law, a childless widow had no rights in her husband's estate or in her own personal estate acquired after the death of her husband. By his decree dated the 3rd June, 1930, he dismissed the suit.

The Division Bench, however, proceeding largely upon Jamieson's "Chinese Family and Commercial Law", held in favour of the plaintiff that on the death of his uncle the plaintiff should have been adopted by the agnates and was entitled to the inheritance; that a wife is entitled to no estate of her own as all she brings to her husband or receives vests in her husband's family; but that, as she is entitled to be in control of the inheritance during her life, time did not run against the plaintiff till the death of Tan Ma Thin in 1929. The result of this decision was an order that an account be taken to ascertain what the plaintiff was entitled to, with a direction that the only property to be excluded as property of Tan Ma Thin to which the plaintiff was not entitled, was "ornaments and jewellery and valuables of the like nature together with silk stuffs and all property of whatever kind as [*sic*] may have been given by her husband to her in his lifetime".

The plaintiff can maintain this decree only if he establishes (1) that Chinese Customary law governs the succession, (2) that under it the eldest son of the younger brother of the *propositus* takes in preference to his widow if he died childless, and (3) that in her lifetime the widow is entitled to possession of the estate so that her possession is not adverse to the nephew. By this appeal the two sisters and the brother of the widow challenge each of these propositions.

The first question is as to the law to be applied by the High Court at Rangoon to determine the person or persons entitled to succeed to the property in Burma of a Chinaman who was a Buddhist and who was domiciled in Burma at the date of his death. This question depends upon the true construction and effect of S. 13 of the Burma Laws Act (XIII of 1898):—

"(1) Where in any suit or other proceeding in Burma it is necessary for

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the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution—

(a) the Buddhist Law in cases where the parties are Buddhists,

(b) the Muhammadan Law in cases where the parties are Muhammadans, and

(c) the Hindu Law in cases where the parties are Hindus,

shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

(2) Subject to the provisions of sub-S. (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

(3) In cases not provided for by sub-S. (1) or sub-S. (2), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience."

This section is in similar terms to those of Ss. 6 and 7 of Act VII of 1872, Ss. 4 and 5 of Act XVII of 1875 and S. 4 of Act XI of 1889. These enactments introduced into Burma a distinction which arose in Bengal as regards the law applied to Indians (1) throughout the province by the Company's Courts and (2) within the town of Calcutta by the Supreme Court. Sub-Ss. (1) and (3) of S. 13 above set forth correspond to the provision first made by Warren Hastings in 1772, later incorporated in S. 15 of Regulation IV of 1793, and now to be found in S. 37 of the Bengal, Agra and Assam Civil Courts Act, 1887. This prescribed the law to be applied by the Civil Courts throughout the province of Bengal; it had special reference to what may be called family law and religious institutions leaving other matters to the general principles of justice; it contemplated two classes only—Mahomedans and Hindus. In applying it to Burma the Indian Legislature put Buddhists on the same footing as Mahomedans and Hindus, and "the Buddhist law" on the same level as the Mahomedan and Hindu laws. It introduced at the same time an express saving for custom which the Bengal enactments had never contained. Sub-S. (2) above cited points to the provision made by S. 17 of 21 Geo. III, c. 70, whereby jurisdiction within Calcutta was given or confirmed to the Supreme Court over Indians, but the law of England which would otherwise have been the general rule of decision applied by the Court within Calcutta was excluded in favour of the Hindu or Mahomedan law so far as regards the matters mentioned in the section. This provision when re-enacted in

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1915 in the Government of India Act, S. 112, was generalised and is not now limited by any specific reference to particular races or religions. It was never at any time confined to family and religious matters; it included "all matters of contract and dealing between party and party".

That these two different methods should have existed side by side for so long and should from 1872 have been applied to Burma is a remarkable fact—only in part explained by the consideration that over a wide field express legislation has in the interval superseded both; statutory codes like the Indian Contract Act and the Transfer of Property Act having provided for many matters a law common to all races and religions. As the present suit was instituted in the High Court, if not concluded by the provisions of sub-S. (1), it will fall to be decided if possible under sub-S. (2).

In the application of sub-S. (1) of S. 13 above cited, difficulty has arisen out of the immigration into Burma of Chinamen some of whom profess the Buddhist faith. It does not appear that there is any Chinese form of Buddhist law, and as regards succession and inheritance the Chinaman who is a Buddhist is in China governed by customs or laws which are not connected with the religious beliefs of Buddhists and are applied equally to Chinamen who are not Buddhists. This is referred to as Chinese Customary law, though it would seem that in or about 1930 a new code was introduced in China and that parts of the "Customary law" have from of old been codified. For a number of years the Courts in Burma have been in doubt as to the effect to be given to sub-S. (1) in these circumstances. In 1881 the difficulty was noticed by Sir John Jardine in *Hong Ku* v. *Ma Thin*[1]:

> " We all know that the Courts apply different systems of both Hindu and Mahomedan law to people belonging to different races, countries or sects. I doubt therefore whether it is obligatory on our Courts here to apply the Burman Buddhist law to Buddhists from Ceylon or China."

In *Fone Lan* v. *Ma Gyee*[2], Sir Charles Fox considered that by the words Mahomedan law and Hindu law the legislature meant "the laws applicable to such Mahomedan and Hindu parties whencesoever such laws may be derived" and that "the terms Buddhist law must be read in the same way—namely, as

1. Select Judgments, Vol. I, pp. 135, 144.
2. (1903) 2 L.B.R. 95.

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meaning the law of succession, inheritance, marriage, etc., applicable to the Buddhist parties in the case". "The personal law", he held, "is left to all who are exempted from the operation of the Indian Succession Act". Accordingly he applied the Chinese Customary law to the claim of the plaintiff to be an adopted daughter and to succeed to the estate of a Chinese Buddhist. This view was followed in a considerable number of cases though it had been dissented from in *Apana* v. *Ma Shwe Nu*[1]. In *Man Han's case*[2], Chari, J., considered that Chinese Customary law had been applied as equity under sub-S. (3): he doubted the equity of this but agreed that Burmese Buddhist law should not be held applicable:

> "The provision of the Burma Laws Act that Buddhist Law shall apply in cases where the parties are Buddhists presupposes the existence of a Buddhist Law applicable to the particular class of Buddhist before the Court."

In the case of *Ma Yin Mya*[3], Maung Ba, J., referred to a Full Bench the question of the law to be applied to marriages in Burma between Chinese Buddhists. The question seems to have related to the form or ceremonial of marriage, and the discussion was to some extent clogged with questions as to mixed marriages between Chinamen and Burmese women. It was held that the Burmese Buddhist law was applicable as the *lex loci contractus* and that to escape from it a Chinaman must prove a custom contrary thereto. Thereafter the Division Bench which dealt with *Man Han's case*[2] on appeal (*V. R. M. A. L. Chettyar Firm* v. *Man Han*[4]) applied Burmese Buddhist law to the question whether a judgment creditor of a Chinese Buddhist could levy execution on the wife's share of their joint property.

In *Chan Pyu* v. *Saw Sin*[5], Pratt, J., regarded the Full Bench decision as applicable to the "law of marriage" only and not to the "law of inheritance," and agreed with what Sir Charles Fox had said in *Fone Lan's case*[6], which he regarded as settled law. Cunliffe, J., disagreed with the Full Bench decision but thought it binding, though only as to marriage. He appears to have considered that "Buddhist law" could not mean Burmese Buddhist law unless "Buddhists" was confined to Burmese Buddhists.

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1. (1907) 4 L.B.R. 124.
2. (1926) I.L.R. 4 Rang. 110 at 114.
3. (1927) I.L.R. 5 Rang. 406 (F.B.).
4. (1927) I.L.R. 5 Rang. 443.
5. (1928) I.L.R. 6 Rang. 623.
6. (1903) 2 L.B.R. 95.

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Thereupon in *Phan Tiyok* v. *Lim Kyin Kauk*[1] there was referred to a Full Bench the question: Does Burmese Buddhist law govern the succession to the estate of a Chinese Buddhist born in China but who was domiciled and died in Burma? All five members of the Full Bench answered this question in the negative; but they varied in opinion as to the law which does govern such succession. The suit in that case had been brought in the District Court of Amherst. Otter, J., considered that Chinese Customary law was to be applied though a Chinese Buddhist was just as much a Buddhist as a Burmese Buddhist. Heald, A. C. J. and Chari, J., thought that Chinese Buddhists were not Buddhists within the meaning of the section or of the exceptions to the Indian Succession Act, and that the Indian Succession Act applied to them *proprio vigore*. Maung Ba, J. and Brown, J., thought that the Chinese Buddhist is a Buddhist within the section but that the provisions of the Indian Succession Act applied to him as a matter of justice, equity and good conscience under sub-S. (3).

In 1932, as already mentioned, the suit brought by the first appellant in the High Court to administer the estate of her sister Tan Ma Thin came before Page, C. J. and Cunliffe, J. The appeal was from Dunkley, J., who had held that English law must govern the succession as a matter of justice, equity and good conscience under sub-S. (3). The Division Bench did not regard itself as bound by the Full Bench decision in *Phan Tiyok's case*[1] to apply the English law or the rules of the Indian Succession Act, as the only question referred to the Full Bench had been the question whether Burmese Buddhist law applied. Page, C. J., with whom Cunliffe, J., agreed, held that a Chinese Buddhist is a Buddhist within the meaning of the Burma Laws Act and the Indian Succession Act, and that the case fell accordingly within the first sub-section of S. 13. Applying sub-S. (1) he proceeded on the ground that it was a fundamental principle of British policy that the particular habits and customs of the various communities under British rule should be recognised and respected:

"But the language in which the section is couched is unfortunate for there is no law by which all Hindus or all Mahomedans are governed, and in the strict sense of the term no Buddhist law at all. The system of law applicable to Sunni Mahomedans differs from that to which Shiah Maho-

1. (1930) I.L.R. 8 Rang. 57 (F.B.).

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medans are subject; Hindus who follow the Benares school are governed by the Mitakshara, those who follow the Bengal school by the Dayabhaga; while in the religious system known as Buddhism no rules of law concerning secular matters are laid down or prescribed. Bearing in mind the object that the Legislature had in view, however, the meaning and effect of the expressions 'Buddhist Law', 'Mahomedan Law' and 'Hindu Law' in S. 13, in my opinion, is plain and S. 13 (1) must be construed as laying down that in 'any question regarding succession, inheritance, marriage or caste or any religious usage or institution' where the parties profess the Buddhist or Mahomedan or Hindu religion the rule of decision shall be the personal law that governs the community or religious denomination to which the parties belong, except in so far as their personal law in Burma 'has by enactment been altered or abolished or is opposed to any custom having the force of law'. In my opinion it would be neither reasonable nor feasible to construe the section in any other sense."

This decision was regarded by both of the tribunals in India who dealt with the present case as settling the law in the sense that Chinese Customary law must in Burma govern the succession to a Chinese Buddhist. Had there in fact been a settled course of judicial decision in Burma upon the question, their Lordships would have been loath to disturb it. But from their review of the decisions it is abundantly clear that the important question now before the Board cannot be answered upon the mere principle of *stare decisis*. At the highest it may be said that there is a substantial preponderance of opinion against applying Burmese Buddhist law to the case of a Chinaman who is a Buddhist. As to the consequences of this opinion—the choice between Chinese Customary law and the principles of English law or the Indian Succession Act—the decisions are not settled but conflicting. The matter must now be determined upon the words of S. 13 as a question of construction.

Their Lordships are in agreement with Page, C. J., that a Chinaman who is a Buddhist comes within the term "Buddhists" in cl. (*a*) of sub-S. (1) of S. 13, and cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist or because the law which governs him in China is not a specifically Buddhist or even a religious law. The same is true of the word "Buddhist" in the Indian Succession Act, 1865 and in the present Act of 1925. It follows from this view, as the learned Chief Justice noticed, that sub-S. (1) must be applied to such a case as the present. There would be little difficulty, were it shown that different schools of Buddhist law obtained in different places or among different peoples. in applying to Buddhist law the principle that in each case the appropriate school of law is

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that to which the *propositus* or the persons concerned owned allegiance. As regards Hindu Law, indeed, this principle has never been in doubt. Ample authority for it is to be found in decisions of the Board—as regards Mahomedan law in *Rajah Deedar Hossein* v. *Ranee Zuhoor-oon-nissa*[1]; as regards Hindu law, in *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae*[2], *Soorendronat hRoy* v. *Heeramonee Burmoneah*[3], *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*[4] and *Balwant Rao* v. *Baji Rao*[5].

'But this principle does not justify the Court in applying as Buddhist law a law which is not Buddhist at all, merely because it is applied generally in China to Chinamen without any special exception for Buddhists. The law which is described in the statute as "the Buddhist law" is, like the Hindu and Mahomedan law, intended to be applied by the Court as a law known to the Court, and administered by the Court of its own skill and competence. If the phrase *lex fori* be used in this sense, the Buddhist law, as Sir John Jardine observed in *Hong Ku's case*[6], becomes under the Act one of several *leges fori*. It cannot be confounded or identified with a foreign law which has to be proved as matter of fact in each case by the appropriate evidence. It is doubtless true of the provisions made for Buddhists, Hindus and Mahomedans by the sub-section, as it was of the parellel provisions for Hindus and Mahomedans previously in force in Bengal, that the general intention of the legislature is that persons coming within these classes should be governed by their own law. That is the intention which has always been attributed to Regulation IV of 1793, and to the Civil Courts Acts which took its place. It was never, perhaps, better stated than by Sir William Jones, advocating the passing of such a Regulation:—

> "Nothing could be more obviously just than to determine private contests according to those laws, which the parties themselves had ever considered as the rules of their conduct and engagements in civil life: nor could anything be wiser than by a legislative Act, to assure the Hindu and Mussulman subjects of Great Britain, that the private laws which they severally hold sacred, and violation of which they would have thought the most grievous oppression, should not be suppressed by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance." [Lord Teignmouth's Life of Jones, p 106]

1. (1841) 2 Moo.I.A. 441.
2. (1839) 2 Moo.I.A. 132.
3. (1868) 12 Moo.I.A. 81.
4. (1902) L.R. 29 I A. 82: I.L R. 29 Cal. 433 (P.C.).
5. (1920) 39 M.L.J 166: L.R. 47 I.A. 213: I.L.R 48 Cal. 30 (P.C.).
6. Select Judgments, Vol. I, pp. 135, 143-144.

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And in *Moonshee Busloor Ruheem* v. *Shumsoonnissa Begum*[1] this Board said:—

"They can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision that their law, the application of which has been justly secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations."

The same principle is at the root of the decisions, already referred to, applying to Hindus and Mahomedans the school of law applicable to their particular family or sect. Baron Parke, in a Hindu case, based this construction of S. 15 of Regulation IV of 1793 on the consideration that "the law of succession of the *Hindoos* partakes greatly of their religious opinions and is part of their system" (*Rutcheputty Dutt Jha* v. *Rajunder Narain Rae*[2]) and in a Mahomedan case said:—

"Such is the natural construction of this Regulation, and it accords with the just and equitable principle upon which it was founded, and gives effect to the usages of each religion which it was evidently its object to preserve unchanged." (*Rajah Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa*[3].)

The principle was most succinctly stated by Sir Erskine Perry in the well-known *Cutchi Memon case*[4] with reference to similar provisions in the statute establishing a Supreme Court at Bombay and Madras (37 Geo. III, c. 142, S. 13) as "the principle of *uti possidetis*."

But while the policy or general purpose of the Legislature in prescribing "the Buddhist law in cases where the parties are Buddhists" is not in doubt, and has full effect upon the general population of Burma, it is not open to the Courts to adopt some other law for particular classes of Buddhists by reason that the prescribed method will not in such cases attain the desired result. The statute has made such exceptions to the enforcement of Buddhist law as were considered necessary, including a highly important saving as to custom, and it does not admit of being interpreted in such a sense that Buddhist law is only to be applied to Buddhists if it be the law prevailing in the country of their origin. The historical considerations to which their Lordships have alluded do not suggest that the intention of the sub-section is to prescribe for each Buddhist whatever law is found to govern him, but rather that all Buddhists shall be governed by a religious law which is deemed to be theirs

1. (1867) 11 Moo. I.A. 551. 2. (1839) 2 Moo. I.A. 132 at 167.
3. (1841) 2 Moo. I.A. 441 at 477.
4. (1847) Perry's Oriental Cases 110.

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as Buddhists. This assumption may be in some respects ill-founded. The influx of Chinese into Burma may not have been anticipated, or the relation between religion and law in China may have been imperfectly understood in 1872 when the rule now contained in the statute of 1898 was first introduced, or in 1865 when Buddhists were excepted from certain provisions of the Indian Succession Act. There may be difficulty and inconvenience in applying to Chinese Buddhists a law which is different from that which is applicable to them in China. It may therefore be that there is something here for reconsideration by the legislature. But it is a problem *de lege ferenda* and is not to be solved by interpreting the section in a sense of which it does not admit. Nor is a true construction of the section advanced by entertaining doubt whether the Buddhist law as it obtains in Burma really deserves so to be described in view of its Indian origin and of the indirectness of the influence of Buddhism thereon.

Some assistance is to be derived from the view taken by the Board in *Abraham* v. *Abraham*[1] which was distinguished in *Jowala Baksh* v. *Dharum Singh*[2]. In the former case, before the Indian Succession Act of 1865, a Hindu family converted to Christianity had no law of inheritance imposed on them by statute, and, as a matter of equity and good conscience, its members were held to be governed by the law and usages which they had either retained or adopted. But it was held in the later case that this reasoning did not apply to a Hindu family which had embraced Islam because "the written law of India has prescribed broadly that in questions of succession and inheritance the Hindu law is to be applied to Hindus and the Mahomedan law to the Mahomedans" (p. 537). Hence Hindu law could not be applied to them save on proof of special usage controlling the Mahomedan law which was not in that case forthcoming.

Their Lordships find themselves in agreement with the view which was taken by the Judicial Commissioner, Mr. Burgess, in the case of a Buddhist native of Chittagong who had settled in Burma, that "*prima facie* as a Buddhist deceased would come under the Buddhist law of the country at large, and the burthen of proving any special custom or usage varying the ordinary

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1. (1863) 9 Moo. I.A. 195 at 199. 2. (1866) 10 Moo. I.A. 511.

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Buddhist rules of inheritance would be on the person asserting the variance" (*Ma Tin* v. *Doop Raj Bavna*[1].) In *Fone Lan's case*[2], Sir Charles Fox cited these words and added, "If by the words 'country at large' he meant 'the province of Burma' I venture to doubt the proposition"; but their Lordships think that the proposition is well founded. As a question of construction this view is greatly to be preferred to the view that there is really no such law as Buddhist law but only Burmese Buddhist law; and the consequences which it entails are not less reasonable or convenient than are arrived at by applying to a Chinese Buddhist in the name of justice, equity and good conscience, those English principles of succession from which the Indian Succession Act exempted Buddhists.

To what extent and on what conditions the provision as to custom may enable a Chinaman who is a Buddhist to retain the usages of his country of origin as regards matters mentioned in the sub-section are questions of considerable moment upon this construction of sub-S. (1). As observed by Sir Lawrence Jenkins, delivering the judgment of the Board in a case under the very similar provision of S. 16 of the Madras Civil Courts Act (III of 1873) "In India custom plays a large part in modifying the ordinary law" (*Mohammad Ibrahim Rowther* v. *Shaik Ibrahim Rowther*[3]). The importance of *kulachar* or family custom in the case of Hindus has given rise to a line of decisions by British Indian Courts applicable to migrating families. Some of these have already been mentioned in this judgment, and *Mailathi Anni* v. *Subbaraya Mudaliar*[4] may be added as an instance of migration from without into British India. There are, moreover, cases of Hindu converts to Islam where it has been held that Hindu law "had been engrafted as a custom on the Mahomedan law" (*per* Lord Dunedin in *Khatubai* v. *Mahomed Haji Abu*[5]) and the effect of migration as to these was considered by the Board in *Abdurahim* v. *Halimabai*[6]. Such matters require special consideration of the individual facts of each case as well as of the nature and character of the laws or usages of the country of origin. The tenacity of

1. Chan Toon, L.C, Vol. I, p. 370. 2. (1903) 2 L.B.R. 95.
3. (1922) 43 M.L.J. 69: L.R. 49 I.A. 119: I.L R. 45 Mad. 308 at 314 (P.C.).
4. (1901) 11 M.L.J. 309: I.L.R. 24 Mad. 650.
5. (1922) 44 M.L.J.: 35 L.R. 50 I.A. 108 at 112: I.L R 47 Bom 146 (P.C.)
6. (1915) 30 M.L.J. 227: L.R. 43 I.A. 35 at 41 (P.C.).

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customs of succession even under the strain of migration has been repeatedly recognized. "An adherence to family usages is a strong Oriental habit: it is in most places not a weak one" (per Sir James Colvile in *Soorendranath Roy's case*[1]).

In the present case it is not in dispute that the *propositus* Khoo Boon Tin and his wife Tan Ma Thin were Chinese Buddhists and that unless the plaintiff can show that the law applicable in Burma to them in questions of succession is Chinese Customary law his suit cannot succeed. Their Lordships are of opinion that the Burmese Buddhist law is the law applicable to them, and it is not contended that according to that law the plaintiff has any claim to be the heir of either.

Their Lordships are further of opinion that, on the evidence adduced in the present case, it is not proved that according to Chinese Customary law the plaintiff as nephew would be entitled, although not in fact adopted to succeed as heir of Khoo Boon Tin in preference to the widow. No reliable expert witness was called to speak to this question, and though the book relied on by the Division Bench may have been admissible under S. 60 of the Indian Evidence Act the conclusion drawn from its contents is drawn precariously and from material both obscure and inadequate. The order of succession which is essential to the plaintiff's case is not established by the evidence either as matter of foreign law or as a custom and his suit must fail.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Division Bench be set aside, and that the decree of the trial Judge, including his direction as to costs, be restored. The plaintiff will pay the appellants' costs of the appeal to the Division Bench and of this appeal.

Solicitors for Appellants: *Lambert & White.*

Solicitors for Respondents: *Gard, Lyell & Co.*

R.C.C.
K.S. —— *Appeal allowed.*

1. (1868) 12 Moo. I.A. 81 at 96.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

T. P. Vasantha Rao Sahib Bhonsle .. *Petitioner** (*Petitioner*)

v.

O. A. Narayanaswami Aiyar (Receiver) .. *Respondent* (*Respondent*).

Vasantha Rao Sahib Bhonsle v. Narayanaswami Aiyar.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 20 and 21—Decree for partition—Appellate Court reducing party's share—Restitution—Party allowed to retain the share originally allotted but subject to a charge in respect of certain amounts—Such a charge if a "debt"—Son of party when entitled to maintain an application under S. 20—Insolvency of father and declaration of a dividend—Son in possession of family property if also precluded from the benefits of the Act by reason of S. 21.

In a suit for partition the trial Court passed a preliminary decree awarding certain shares to each of the parties to the suit. On appeal the shares were altered and as a result the shares of some were reduced. But in the interval partition was actually made and the parties had drawn from Court various sums of money under certain conditions imposed by the High Court on a stay petition. The trial Court instead of repartitioning allowed the parties to retain the shares as originally allotted but imposed a charge for the restitution amounts on the shares of the parties whose shares were reduced. The son of one of such defendants applied under S. 20 of the Agriculturists' Relief Act for stay of execution against him on foot of the charge. The defendant himself had become an insolvent long ago and a dividend had been declared in his insolvency. It was contended (*i*) that there was no debt to entitle the petitioner to apply as there was no personal liability; (*ii*) that as the decree was against the father and not against the son the applicant, he cannot apply under S. 20; and (*iii*) that as a dividend had been declared in the father's insolvency, the father cannot apply and therefore his son cannot apply by reason of S. 21.

Held, (*i*) the charge was a substituted liability in the place of the original personal liability of the father to make restitution. The definition of the word "debt" in the Act does include a liability to make restitution and it is wide enough to cover the case of every person who is in any manner liable either because he is personally liable or because he is liable on account of the possession of property and takes in his heirs, legal representatives or assigns.

Perianna Goundan v. *Sellappa Goundan*, (1938) 2 M.L.J. 1068: I.L.R. 1939 Mad. 218, followed and *Narayanachari* v. *Annamalai Chettiar*, (1939) 2 M.L.J. 225, distinguished.

(*ii*) The decree passed against the father in respect of a family liability must be deemed in law to be a decree passed against the son also and the son is entitled to maintain an application under S. 20.

(*iii*) The exclusion of an insolvent enacted in S. 21 must be limited only to the insolvent and the debts payable by him and even if the same debt is payable by another, say, his son, the son cannot be regarded as being virtually excluded by S. 21.

* C. R. P. No. 1609 of 1938. 11th August, 1939.

Vasantha Rao Sahib Bhonsle v. Narayanaswami Aiyar.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of West Tanjore at Tanjore dated 27th October, 1938 and made in E. A. No. 308 of 1938 in E. P. No. 20 of 1937 in O. S. No. 3 of 1919.

S. V. Venugopalachariar for Petitioner.

A. V. Viswanatha Sastri for Respondent.

The Court delivered the following

JUDGMENT.—This is an application to revise the order of the District Judge of West Tanjore dated 27th October, 1938, on a petition presented under S. 20 of the Madras Agriculturists' Relief Act IV of 1938 praying for stay of execution of the decree in O. S. No. 3 of 1919. The suit was one known as the Tanjore Palace Estate suit which was last dealt with in this Court so far as the present controversy is concerned. In the case reported in *Arunachalam Chettiar* v. *Pratapasimha Rajah Saheb*[1], the facts necessary for understanding the present dispute are stated, at least, most of them. The present application under S. 20 of the new Act was made by the son of the twenty-ninth defendant in the suit. The twenty-ninth defendant belonged to one group of defendants to whom the preliminary decree in the suit passed on 1st July, 1918 (the suit had been originally instituted as O. S. No. 26 of 1912) awarded 3/4th share. In appeal, this share was reduced, but in the interval, the twenty-ninth defendant as well as others belonging to his group had taken away from Court various sums of money under certain conditions imposed in the order made on a stay petition. Instead of however restitution being made as a result of the appellate Court's modification of the first Court's decree, the partition having been made actually in the interval, the first Court allowed the parties to retain the shares originally allotted to them but imposed a charge in respect of certain amounts on those shares in the case of those who had received more than their proper share according to the appellate Court's decree. The present execution petition in connection with which the application for stay was made was for the purpose of enforcing this charge. The twenty-ninth defendant became an insolvent long ago and it is conceded that a dividend also has been declared by the Official Receiver.

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1. (1930) 60 M.L.J. 79 at 80.

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The application of the petitioner was dismissed by the learned District Judge on several grounds. So far as one of the points is concerned, namely, that the petitioner is not an agriculturist, it is clear that this finding that he is not an agriculturist cannot remain as it stands for the simple reason that the parties had no real opportunity to adduce evidence on this point. It would seem as if the petition was posted for hearing on points of law leaving the question of fact, namely, whether the petitioner is an agriculturist to be decided later on, if necessary. Unfortunately, however, the learned District Judge happens to have lost sight of this fact and recorded a finding, so to say, on this point against the petitioner by saying that no evidence had been produced on this point and it is not conceded on the other side. It is not as if there is a clear and definite finding on the point, but I wish to make it clear that if there is a definite finding against the petitioner, that finding cannot stand for the reason that the parties had no reasonable opportunity to adduce evidence relating thereto, and if on other grounds, the petitioner succeeds, this point will have to be decided afresh by the Court below after giving an opportunity to both parties to adduce evidence.

It has been argued that there is no debt in this case which would entitle the petitioner to apply under S. 20 of the Act. No doubt the charge does not make the petitioner personally liable nor indeed his father personally liable for the amount charged. But it must be remembered that the charge was, as it were, a substituted liability in place of the original personal liability of the father to make restitution. The definition of the word 'debt' found in the Act does, in my opinion, include a liability to make restitution. All that the definition says is that if there is a liability in cash or kind due from an agriculturist whether payable under a decree or order of a civil or revenue Court or otherwise, it constitutes a debt. There was here an undoubted liability on the part of the twenty-ninth defendant to pay in cash as restitution whatever amounts he had drawn from Court in excess of what he was ultimately found to be entitled to under the decree of the appellate Court. Moreover, as pointed out by the petitioner's advocate, it has been held in *Perianna Goundan* v. *Sellappa Goundan*[1] by a Bench that

1. (1938) 2 M.L.J. 1068: I.L.R. 1939 Mad. 218.

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the definition of 'debt' in the Act cannot be restricted to cases where a person is personally liable and that it is wide enough to cover the case of every person who is in any manner liable either because he is personally liable or because he is liable on account of the possession of property, and takes in his heirs, legal representatives or assigns. On the other side, the decision of a single Judge reported in *Narayanachari* v. *Annamalai Chettiar*[1] has been brought to my notice. That is to the effect that a puisne usufructuary mortgagee who is made a party to a suit by the first mortgagee which is decreed, is not a debtor within the meaning of the new Act. The judgment in that case is a very short one and the reason there given is that an usufructuary mortgagee is not a debtor, because in no sense of the word he is a debtor. That is so because *qua* mortgagee he could not be regarded as a debtor but only as a creditor. There is also a sentence following to the effect that the decree is not against him for a debt payable by him but in his favour allowing him a right in equity to redeem the first mortgage and therefore he was under no liability under the decree. In other words, the decree in that case was one which gave him an opportunity to do something but which did not make him liable to pay anything in cash or in kind. That being the case, that decision cannot support the respondent's contention in this case where there is undoubtedly an attempt made by him to execute a decree, by enforcing the charge allowed by the decree against properties which are in the possession of the judgment-debtor's son. I have little doubt in my mind that this is a case in which so far as S. 20 of the Act is concerned, assuming that the petitioner is an agriculturist, there is a debt in respect of which he is entitled to get relief; but at the last moment, so to say, it has been contended by Mr. Viswanatha Sastri on behalf of the respondent, abandoning for the time being the contention that there is no debt, that S. 20 can be availed of only if there is a decree passed against a person entitled to the benefits of the Act, and that the petitioner is not such a person because there is no decree passed against him even assuming that he is entitled to the benefits of the Act. This contention can be shortly met by the remark that a decree passed against the father in respect of a family liability, that is to say, a liability enforceable against

1. (1939) 2 M.L.J. 225.

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the family property must be deemed in law to be a decree passed against the son also. The subsequent insolvency of the father does not make the decree any the less a decree passed against the son. Whether the effect of the insolvency deprives the son of any of the benefits which he would otherwise be entitled to is not a question that falls to be decided at present. At present the only point for decision is whether the petitioner is entitled to maintain an application under S. 20 and not to determine the exact relief to which he may be entitled. That question has to be, and should be, left to be decided later on if and when an application is made under S. 19 of the Act.

Mr. Viswanatha Sastri has also relied on the case reported in *Mottai Meera* v. *Abdul Kadir*1, but that case is really not in point because the decision there was not on the basis that the liability was not a debt at all from a general point of view but that it was not a debt under the Act and that for the special reason that the liability arose by reason of the fact that one of several co-owners was in possession of common property and therefore liable to account. As pointed out by Varadachariar, J., at page 528, the relationship between such co-owners of whom one is in possession of common funds is not that of creditor and debtor. Dealing with the claim to interest in that case, it was observed that interest could be claimed only on the basis of some breach of trust and that by reason of that fact, the liability could not be regarded as a debt under the Act solely by reason of the specific provision in clause (*f*) of S. 4 of that Act which excludes from the operation of the Act liabilities arising out of any breach of trust.

The learned District Judge appears to have relied also on S. 21 of the Act as a ground for dismissing the petition for stay. That section merely says that:

"Nothing in this Act shall apply to the debts payable by any person who has been adjudicated an insolvent, if prior to the coming into force of this Act, a dividend has been declared out of his assets."

It may be that the debt in the present case is one payable by the father and he is an insolvent in whose insolvency a dividend has been declared long ago, but that does not mean that his son who is in possession of the family property is not entitled to claim the benefits of the Act simply because his father cannot do so by reason of S. 21 of the Act. In the view

1. (1939) 1 M.L.J. 528: I.L.R. 1939 Mad. 525.

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that I have taken, it follows that the original decree itself which is now being executed must be regarded as a decree to which the petitioner is virtually a party though not by name, and he must be regarded as being a person by whom the debt is payable as well as by his father and the insolvency of the father and the payment of a dividend cannot, in my opinion, disentitle the son from applying under the Act, if otherwise he satisfies the conditions laid down in the Act. The exclusion of an insolvent enacted in S. 21 must be limited only to the insolvent, and the debts payable by him, and even if the same debt is payable by another, say, his son, the son cannot be regarded as being virtually excluded by S. 21. For instance, if a debt is payable by more than one person, the insolvency of one cannot deprive the other person liable for the debt of his right to apply under the Act if he otherwise satisfies the provisions of the Act. This seems to be fairly clear, and therefore any reason based under S. 21 for the purpose of non-suiting, so to say, the petitioner, must be dismissed as one based on a misapprehension of the scope of S. 21. It follows from what I have said that the reasons given by the learned District Judge for dismissing the petition are not sustainable in law and his order must be set aside, but, as I have observed already, as the main question of fact which arises in this case, namely, whether the petitioner is an agriculturist has not been properly decided, the petition will be remanded to the Court below for fresh disposal according to law in the light of the observations contained in this judgment after giving reasonable opportunities to both parties to adduce evidence on the point which is to be enquired into, namely, whether the petitioner is an agriculturist.

The costs of this petition will abide the event and should be provided for in the revised order of the lower Court.

K.S. *Order set aside and petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Maddukuri Subba Rao and others.. *Petitioners** (*Accused*).

Subba Rao, *In re.*

Criminal Procedure Code (V of 1898), S. 106—Conviction for offence under S. 426, Penal Code—Order under S. 106 on basis of—Validity.

* Crl. Rev. Case No. 677 of 1938. (Crl. R. P. No. 645 of 1938). 9th September, 1938.

Subba Rao, *In re.*

The offence under S. 426 of the Indian Penal Code does not involve a breach of the peace and an order under S. 106, Criminal Procedure Code, cannot be passed on the basis of a conviction under S. 426, Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Bezwada, dated 30th May, 1938 and passed in Criminal Appeal No. 6 of 1938 (C. C. No. 1023 of 1937, Stationary Sub-Magistrate, Bezwada).

P. Satyanarayana Rao for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The evidence justifies the conviction of the petitioners under S. 426 of the Indian Penal Code and the fines are not excessive. But the offence under S. 426 of the Indian Penal Code does not involve a breach of the peace and the order under S. 106 of the Criminal Procedure Code cannot be sustained. The order under S. 106 of the Code of Criminal Procedure is therefore set aside and otherwise this petition is dismissed.

B. V. V. —— *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Thirugnanavalli Ammal .. *Petitioner** (*Respondent*)

v.

P. Venugopala Pillai and others .. *Respondents* (*Appellants*).

Thirugnanavalli Ammal *v.* Venugopala Pillai.

Civil Procedure Code (V of 1908), Ss. 34 (2) and 152—Decree in accordance with judgment silent as to further interest from date of decree—If can be amended under S. 152 as accidental slip or omission so as to allow further interest—S. 34 (2)—Applicability.

Where a decree which has been drafted in accordance with a judgment contains no reference to further interest from date of decree to date of payment the Court must be deemed to have refused it. The provisions of Civil Procedure Code, S. 34 (2) govern the matter. The Court cannot under S. 152 amend the decree by allowing further interest on the decretal amount from the date of decree to date of payment or realization.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the amendment of the decree of the High Court in Appeal No. 130 of 1929, preferred against the decree of the District Court of South Arcot in O. S. No. 6 of 1927.

* C. M. P. No. 1781 of 1939. 9th August, 1939.

Thirugnana-valli Ammal v. Venugopala Pillai.

T. E. Ramabhadrachariar for Petitioner.

R. Viswanathan for *J. R. Gundappa Rao* for Respondents.

The Court made the following

ORDER.—This is an application by a decree-holder for the amendment of a decree passed by this Court on the 30th August, 1932, on the ground that there has been an accidental omission. The petitioner obtained a decree in the Court of the District Judge of South Arcot for the payment of two sums, Rs. 10,817 and Rs. 11,183, with interest at 9 per cent. per annum. On the first amount interest was to be calculated from the 16th March, 1925, and on the second amount from the 16th March, 1926, "till this date", that is, the date of the decree, the 21st December, 1928. There was no reference to further interest in the judgment and the decree was drawn up in accordance with the judgment which was signed by the District Judge who delivered it. On appeal this Court held that the petitioner was entitled to Rs. 10,276 and Rs. 10,623 with interest on these amounts at six per cent. per annum from 16th March, 1925 and 16th March, 1926, respectively to the date of the decree. Again there was nothing said in the judgment with regard to the payment of further interest after the date of the decree. The draft decree was submitted to the learned Advocates who appeared in the case and they approved of the wording. It is clear, however, that they did not realize that further interest had not been awarded, because in the subsequent execution proceedings the amounts claimed included further interest and no objection was taken. Recently the judgment-debtors applied for the scaling down of the balance due under the decree in accordance with the provisions of the Madras Agriculturists' Relief Act. In those proceedings it was discovered that the decree which had been passed was silent on the question of further interest. This led to the present application being filed and the Court is asked to amend the decree by allowing further interest on the decretal amount from the date of the decree to the date of payment or realization.

S. 152 empowers the Court to correct clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. As the decrees passed are in accordance with the respective judgments it is difficult to support the contention that there has been an accidental omission, but even if the decree-holder ought to have had further interest

granted to him and this was accidentally overlooked the Court cannot in face of the provisions of S. 34 (2) of the Code of Civil Procedure rectify the omission. S. 34 (1) provides that where and in so far as a decree is for the payment of money the Court may award further interest, but sub-S. 2 expressly states that where a decree is silent with respect to the payment of further interest from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie. As in the decree which the petitioner wishes to have amended there is no reference to further interest and the decree follows the judgment the Court must be deemed to have refused it. I do not suggest that if in the judgment further interest had been specifically allowed S. 34 (2) would prevent the Court acting under S. 152 and correcting the decree, but as the decree is in accordance with the judgment the provisions of S. 34 (2) govern the matter.

Thirugnanavalli Ammal *v.* Venugopala Pillai.

The application must be dismissed with costs.

K. S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUNHI RAMAN.

Gopu China Jogayya and Seshavatharam Firm .. *Appellant** (*Petitioner*)

v.

Mamidi Satyanarayana and others.. *Respondents* (*Respondents*).

Gopu China Jogayya *v.* Satyanarayana.

Provincial Insolvency Act (V of 1920), S. 35—Petitioning creditor's debt alleged to be bogus—When adjudication to be annulled.

Where a creditor applied to have an order of adjudication annulled on the ground that the petitioning creditor's debt was a bogus one,

Held, unless it is shown that the debtor did not owe any other debts or that the debtor was not really insolvent at the time the order of adjudication was made by the lower Court the order of adjudication cannot be annulled.

Case-law discussed.

Appeal against the order of the District Court of Kistna at Chilakalapudi dated 14th December, 1937 and made in I.A. No. 1864 of 1935 in I.P. No. 15 of 1935.

N. Vasudeva Rao for Appellant.

V. Parthasarathi and *V. Govindarajachari* for Respondents.

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* A. A. O. No. 184 of 1938. 15th September, 1939.

Gopu China Jogayya v. Satyanarayana.

The Court delivered the following

JUDGMENT.—This is an appeal from the order made by the learned District Judge of Kistna in I. A. No. 1864 of 1935 in I. P. No. 15 of 1935 on the file of his Court.

The facts are briefly as follows. On a petition presented by the first respondent, the second respondent was adjudicated insolvent on the 17th October, 1935. Then the appellant who is one of the creditors of the insolvent applied on 7th November, 1935, for annulling the adjudication under S. 35 of the Provincial Insolvency Act. The ground alleged in the petition before the District Judge was that the debt mentioned in the petitioning creditor's application was a bogus debt and that consequently there was abuse of the process of the Court. The learned District Judge dismissed the petition for a reason which cannot be supported. The order is worded as follows:—

" The petitioner is practically trying to make me review the order of the District Judge who adjudicated the respondent insolvent. I do not think he can be allowed to do so and that his real remedy lies in having the debt declared void or annulled by appropriate action. The petition is dismissed. All parties to bear their own costs."

The learned Advocate for the appellant very rightly comments on the wrong view taken by the learned District Judge. The respondents' learned Advocate while conceding that the reason given in the order may not be quite satisfactory, contends that in substance the order is correct though in form it looks unsatisfactory.

The question therefore for determination is whether in substance the order made by the Court below is correct and warranted by law. It is first necessary to bear in mind an important feature which the respondents' learned Advocate has pointed out in the course of his arguments, namely, that before the petitioning creditor in this case filed his petition for adjudicating the second respondent insolvent, the appellant before this Court had himself presented a similar petition on the 29th of July, 1935, in the Court of the Subordinate Judge of Bezwada asking for a similar relief. Since the order of adjudication was made by the District Court of Kistna on the petitioning creditor's application prior to the disposal of the present appellant's application filed in Bezwada, that petition does not seem to have been pressed. The learned Advocate for the respondents argues with

considerable force that it does not lie in the mouth of the present appellant now to say that at the time the second respondent was adjudicated insolvent, the adjudication ought not to have been made.

The learned Advocate for the appellant argues that S. 9 of the Provincial Insolvency Act prescribes the conditions that should be fulfilled to entitle a creditor to present an insolvency petition against a debtor and he points out that the main condition is the existence of a debt due to that creditor to the extent of at least Rs. 500. Therefore, if on a petition presented by a creditor, an adjudication is made, if it is possible to establish subsequently, that on the date of that petition, there was no genuine debt due to that creditor, then that is a fit case in which the adjudication should be set aside under S. 35 on the ground that the debtor ought not to have been adjudged insolvent. This contention I am not able to accept as well-founded. There is no doubt that but for the petition presented by the creditor, the adjudication would not have taken place but once an adjudication takes place, all the other creditors of the debtor become interested in the matter and unless the appellant here is able to show that the debtor did not owe any other debts or that the debtor was not really insolvent at the time the order of adjudication was made by the lower Court, it is not open to him to contend that it is a case in which the order of adjudication ought not to have baen made.

The learned Advocate for the respondents cites the decision reported in Ex parte *French*: In re *Trim*[1], where the facts were similar to the facts in the present case. Under the English law, it is only if a debt of £50 is due by the debtor that the creditor to whom such a debt is due can validly file a petition for adjudicating the debtor insolvent. In that case, after the adjudication, the debtor came forward and satisfied the Court that made the order of adjudication that the debt due to the petitioning creditor was below £50. Thereupon, the County Court Judge annulled the order of adjudication but the Court of Appeal reversed this decision. The following sentences that occur in the judgment of Bacon, C.J., are relied on by the learned Advocate for the respondent:—

"Proceedings in bankruptcy are for the benefit not only of the petitioning creditor, but of all the creditors. . . . . It is no reason, even

1. 52 L.J. Ch. 48.

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if the petitioning creditor's debt is not established, that the other creditors should be deprived of their rights."

This decision seems to me to be strongly against the appellant in the present appeal. The learned Advocate for the appellant cites the following decisions in support of his contentions. (*Koya Mohideen* v. *Hashim Khan*[1], In re *Whelan*: Ex parte *Sadler*[2], *Kumarappa Chettiar* v. *Chidambaram Chettiar*[3], *Alamelumangathayarammal* v. *Baluswami*[4] and *Karuthan Chettiar* v. *Raman Chetty*[5].) In the case reported in *Koya Mohideen* v. *Hashim Khan*[1] during the temporary absence of the debtor, a person who said he was a creditor filed a petition and got the debtor adjudicated insolvent. The debtor on coming to know of this order of adjudication applied for its annulment and he succeeded in showing that it was not competent to the creditor to obtain the order of adjudication. What is significant in the report of this case is that there is nothing in it to show that there were other creditors who were interested in the proceedings. In the case in In re *Whelan*: Ex parte *Sadler*[2], it was shown that there was no debt to the extent of £50 due by the debtor to the creditor. In *Kumarappa Chettiar* v. *Chidambaram Chettiar*[3], the petition that was filed for adjudication showed on its face that there was no act of insolvency committed by the debtor within three months before its date. In the case in *Alamelumangathayarammal* v. *Balusami*[4], it was held that the debtor was in a position to discharge his debts in full and therefore it was an abuse of the process of Court to apply for and obtain an order of adjudication. In the case in *Karuthan Chettiar* v. *Raman Chetty*[5], it was found that there was no allegation of any act of insolvency when the petition was filed for adjudication. These cases cannot, in the circumstances mentioned above, be regarded as authorities for the proposition that the learned advocate for the appellant wants the Court to accept, namely, that if the appellant merely proves that there was no binding debt due to the petitioning creditor then the Court is bound under S. 35 to set aside the order of adjudication on the ground that the order ought not to have been made. In my opinion, the allegations contained in the affidavit filed by the appellant in the Court below in support of his contention that

1. A.I.R. 1935 Rang. 276.
2. 43 L.J. (Bankruptcy) p. 43.
3. (1938) 2 M.L.J. 385.
4. A.I.R. 1928 Mad. 394.
5. (1926) 24 L.W. 486.

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the adjudication should be annulled were not sufficient for such annulment. In these circumstances, the conclusion arrived at by the lower Court is correct although the reasons given in its order cannot be supported.

The appeal therefore fails and must be dismissed with costs (one set).

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mammili Kunhi Raman Kitavu, Karnavan and Manager of the Thavazhi of Kallod Amsom and Desom .. *Appellant** (*Plaintiff*)

v.

Vengileri Thanancheri Kunhi Karnavan Kitavu .. *Respondent* (*Defendant*).

Kunhi Raman Kitavu v. Kunhi Karnavan Kitavu.

Hindu Law—Joint family—Property acquired by manager—Presumption that it is family property—When arises—Mortgage of such property along with item proved to be family property—If raises presumption that it is family land.

In the absence of evidence that the family possessed property with the income of which the new acquisition might have been made there is no presumption that the property acquired by the manager is family property.

Vythianatha Aiyar v. *Varadaraja Aiyar,* (1938) 1 M.L.J. 216: I.L.R. 1938 Mad. 696, followed

The fact that an item the character of which is in dispute is mortgaged along with another item proved to be family land will not raise a presumption that the disputed item was also family land unless it be shown that the mortgage itself was a borrowing for the benefit of the family.

Appeal against the remand order of the District Court of North Malabar dated 25th July, 1936 and made in A. S. No. 354 of 1935 preferred against the decree dated 23rd September, 1935 (in O. S. No. 552 of 1934, District Munsif's Court, Payoli).

K. Kuttikrishna Menon for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—In the absence of evidence that the family possessed property with the income of which the new acquisition might have been made there is no presumption that the property acquired by the manager is family property—*Vythia-*

* A. A. O. No. 114 of 1937. 17th August, 1939.

Kunhi Raman Kitavu v. Kunhi Karnavan Kitavu.

natha Aiyar v. *Varadaraja Aiyar*[1]. The fact that an item the character of which is in dispute is mortgaged along with another item proved to be family land will not raise a presumption that the disputed item was also family land unless it be shown that the mortgage itself was a borrowing for the benefit of the family. On both these points the evidence is lacking. The appeal has therefore to be dismissed.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Minor Narayanan Chetti and another .. *Appellants** (*Petitioners*)

v.

Panchanathan Chettiar and others .. *Respondents* (*Respondents 1 and 4 to 11*).

Narayanan Chetti v. Panchanathan Chettiar.

Civil Procedure Code (V of 1908), O. 21, r. 16—Decree in favour of father—Devolution on death of father on his sons—Sons, if can execute without recognition by the Court which passed the decree.

Where a decree has been transferred to sons by operation of law on the death of their father, O. 21, r. 16 of the Code of Civil Procedure is applicable and the sons are not "decree-holders" who can execute the decree without recognition, by the Court which passed the decree, of the devolution upon them of the decree.

Ramsewak Prasad v. *Saran Singh*, A.I.R. 1937 Pat. 607, dissented from.

Appeal against the order of the District Court of West Tanjore, dated the 14th April, 1937 and passed in E. P. No. 4 of 1936 (in O. S. No. 93 of 1925, Sub-Court, Tanjore.)

T. R. Venkatarama Sastri and *C. A. Seshagiri Sastri* for Appellants.

N. Sivaramakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—We cannot accept the contention on behalf of the appellants, that they are decree-holders who can execute the decree without recognition by the Court which passed the decree of the devolution upon them of the decree. The appellants are not "decree-holders" as defined in S. 2 of the Code of Civil Procedure. Their father was the sole decree-holder, and although the sons may well have been entitled along with him to the

1. (1938) 1 M.L.J. 216: I.L.R. 1938 Mad. 696.

* A. A. O. No. 31 of 1938. 1st September, 1939.

Narayanan Chetti v. Panchanathan Chettiar.

benefits of the decree a thing which has yet to be investigated—it is impossible to say that they were, or are "decree-holders". The decree has been transferred to them by operation of law on the death of their father and O. 21, r. 16 of the Code of Civil Procedure is applicable. With respect we are not able to agree with the learned Judge who decided the case of *Ramsewak Prasad* v. *Saran Singh*[1]. The decision of the learned District Judge on this point is in our opinion correct. This appeal is accordingly dismissed with costs.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Rm. Pl. S. Sivaswami Chettiar.. *Appellant** (*Petitioner-Assignee of the Decree*)

v.

Marudaiya Goundan and others .. (*Respondents, Respondents-Defendants*).

Sivaswami Chettiar v. Marudaiya Goundan.

Civil Procedure Code (V of 1908), S. 146 and O. 22, r. 10—Suit filed by benamidar—Release executed in favour of real owner subsequently—Right of real owner to prefer appeal—Transfer of Property Act (IV of 1882), S. 6 (e).

A person can be allowed to file an appeal against the dismissal of a suit instituted by his benamidar, the latter having released his rights in the property claimed in the suit by a deed which recites that the person seeking to prefer the appeal was the real purchaser of the property. It cannot be said that the release deed offends S. 6 (e) of the Transfer of Property Act. And though O. 22, r. 10 of the Civil Procedure Code may not in terms apply the Court has ample powers under S. 146 of the Code to permit the person in whose favour the plaintiff has released his rights in the property to file the appeal.

Appeal against the order of the District Court of Coimbatore dated 18th October, 1935 and made in I. A. No. 273 of 1935 (O. S. No. 89 of 1933, District Munsif Court, Tiruppur).

P. S. Ramachandran for Appellant.

P. J. Kuppanna Rao for Respondents.

The Court delivered the following

JUDGMENT.—I see no reason why the appellant should not with reference to the terms of S. 146, Civil Procedure Code, be allowed to file an appeal against the dismissal of the suit instituted by his benamidar, the latter having released his right in the property claimed in the suit by a deed which recites that the

1. A.I.R. 1937 Pat. 607.

* A. A. O. No. 278 of 1936. 7th August, 1939.

Sivaswami Chettiar v. Marudaiya Goundan.

appellant was the real purchaser of the property. Whatever may be said regarding the superfluous deed of assignment subsequently executed, it cannot be contended that the release deed offends against S. 6 (*e*) of the Transfer of Property Act. And though O. 22, r. 10, Civil Procedure Code, does not in term apply, the Court has ample powers under S. 146, Civil Procedure Code, to permit the person in whose favour the plaintiff has released his rights in the property to file the appeal. The appeal is therefore allowed with costs and there will be a direction to the learned District Judge to permit the appellant to file the appeal as a person claiming under the plaintiff.

B. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUNHI RAMAN.

Kanujnakkal Thayikkandiyil Moossan Kunhi Kalandan .. *Petitioner* (2nd Defendant)*

v.

Kaniyarakkal Thayikkandiyil Kunhi Kattyali and others .. *Respondents (Plaintiff and Defendants 1 and 2).*

Kunhi Kalandan v. Kunhi Kattyali.

Negotiable Instruments Act (XXVI of 1881), S. 98—Payee of promissory note—Fraud practised in endorsing note—Notice of dishonour if necessary—Liability of endorser—When arises.

Where the payee of a promissory note practises a fraud by endorsing the note to another after it became barred by limitation and with a fabricated endorsement of payment, he is not entitled to notice of dishonour.

Wirth v. Austin, (1875) L.R. 10 C. P. 689 and *Terry v. Parker*, (1837) 6 Ad. and E. 502: 112 E.R. 192, relied on.

The liability of the endorser of a promissory note arises only on the date of endorsement.

Jagannadha Reddiar v. Lakshmana Reddiar, (1924) 47 M.L.J. 475, relied on.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Cannanore in S.C.S. No. 25 of 1936.

O. T. G. Nambiar and *C. K. Kerala Varma* for Petitioner.

A. Achutha Nambiar and *K. Govindan* for Respondents.

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* C. R. P. No 1355 of 1936. 3rd August, 1939.

Kunhi Kalandan v. Kunhi Kattyali.

The Court delivered the following

JUDGMENT.—The third defendant is the petitioner. He was the payee of the suit promissory note and he had endorsed the note to the plaintiff. The suit note was executed by defendants 1 and 2 in favour of the third defendant on the 22nd September, 1932. An endorsement of payment of Rs. 5 which appears on the suit promissory note and which bears date 15th September, 1935, was relied on for saving limitation as against defendants 1 and 2. The date of endorsement of the suit promissory note by the third defendant to the plaintiff was 9th December, 1935. The learned District Munsif who tried the case has held that the endorsement of payment of Rs. 5 which was relied on for saving limitation was fabricated by the third defendant and that the suit was barred by limitation as against defendants 1 and 2. Regarding the third defendant the trial Court has held that he is liable because he has admittedly endorsed the promissory note to the plaintiff and it was not shown at the trial how he could escape liability.

The learned Advocate for the third defendant-petitioner puts forward the following contentions: (1) that the trial Court should have held that the suit was barred by limitation against the third defendant also, because it is Art. 73 of the Indian Limitation Act that applies to the case, and (2) that the suit against the third defendant should have been dismissed, because there was no evidence of notice of dishonour.

In my view both these contentions are not well-founded. As pointed out in the decision reported in *Jagannadha Reddiar* v. *Lakshmana Reddiar*[1], the liability of the endorser of a promissory note arises only on the date of endorsement. In the present case the date of endorsement was clearly a few months prior to the date of the institution of the suit. Therefore the suit as against the third defendant was not barred by limitation.

Regarding the contention that the third defendant was entitled to notice of dishonour, as argued by the learned Advocate for the plaintiff-respondent, in view of the fraud practised by the payee in endorsing the promissory note to the plaintiff after it became barred by limitation and with a fabricated endorsement of payment of Rs. 5, there was no necessity to give notice of dishonour to the third defendant. (*See* S. 98

1. (1924) 47 M.L.J. 475.

Kunhi Kalandan v. Kunhi Kattyali.

of the Negotiable Instruments Act and *Wirth* v. *Austin*[1] and *Terry* v. *Parker*[2].)

In these circumstances I hold that the view taken by the trial Court is correct and dismiss this Civil Revision Petition with costs of the plaintiff-respondent.

B.V.V. —— *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD ROMER, LORD PORTER, SIR LANCELOT SANDERSON, LORD NORMAND (LORD PRESIDENT OF THE COURT OF SESSION) AND SIR GEORGE RANKIN.

Kunwar Surendra Bahadur Singh and others .. *Appellants**

v.

Thakur Behari Singh and others .. *Respondents.*

P.C.

Surendra Bahadur Singh v. Thakur Behari Singh.

Transfer of Property Act (IV of 1882), S. 59—Executant being marks-woman—Mode of attestation of mortgage—Registration endorsement-Whether can amount to attestation—Registration Act (XVI of 1908), Ss. 58, 59 and 60.

Where a mortgage is sought to be executed by a marks-woman it can be effected only by a registered instrument to which she attaches her mark and which is attested by at least two witnesses each of whom must have seen her affix her mark to the instrument or received from her a personal acknowledgment of her mark and each of whom must have signed the instrument in the presence of the executant. It cannot be said that the signatures of the registering officer and the identifying witnesses affixed to the registration endorsement constitute a sufficient attestation within the meaning of S. 59 of the Transfer of Property Act when it is not shown that, the endorsement was made on the same day and that the registrar and the identifying witnesses affixed their signatures in the presence of the executant.

Veerappa Chettiar v. *Subramania Aiyar*, (1928) 55 M.L.J. 794: I.L.R. 52 Mad. 123 (F.B.), considered.

A. G. P. Pullan for Appellants.

Respondents not represented.

17th March, 1939. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by the plaintiffs in the suit against a judgment and decree of the High Court of Allahabad dated the 28th of November, 1933, whereby the appeal of one of the present respondents, namely,

1. (1875) L.R. 10 C.P. 689.
2. (1837) 6 Ad. and E. 502: 112 E.R. 192.

* P. C. Appeal No. 22 of 1937. 17th March, 1939.
Allahabad Appeal No. 3 of 1934.

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Lachman Singh, was allowed and the suit as against the said Lachman Singh and his share of the mortgage property was dismissed. The plaintiffs are Kunwar Surendra Bahadur Singh and his two minor sons and the suit was brought for foreclosure of a mortgage dated the 23rd of June, 1909, purporting to be executed by Himmat Singh (now deceased), Mulu Singh and Musammat Jamna Kunwar, mother and certified guardian of the said Lachman Singh, who was then a minor, in favour of Surendra Bahadur Singh in respect of certain zemindari property to secure a loan of Rs. 18,000 and 4½ per cent. interest in order to pay off prior mortgages at a higher rate of interest. The defendant-respondents Nos. 1-9 are heirs of Himmat Singh, No. 10 is Lachman Singh, Nos. 11, 12 and 13 are Mulu Singh, and his two sons and Nos. 14 to 24 are various transferees.

Before the execution of the mortgage, Musammat Jamna Kunwar obtained the permission of the District Judge to borrow Rs. 4,500 (one-fourth of Rs. 18,000) by hypothecation of the one-fourth share of the minor Lachman Singh in the said property.

The principal and interest were payable on the 23rd of June, 1916.

The mortgage-deed was presented for registration on the 24th of June, 1909, at the office of the Sub-Registrar of Etawah by Himmat Singh and it was duly registered.

It will be necessary to refer later in more detail to the proceedings of the registration.

The suit was brought for principal and interest amounting to Rs. 41,400-14-6 on the 25th May, 1928.

Written statements were filed by Lachman Singh and by two of the transferees. The plea to which it is necessary to refer is that which is contained in paragraph 9 of Lachman Singh's written statement, namely: "The contesting defendant does not admit the execution and completion of the document sued on, nor is receipt of any consideration of the same admitted." There were other pleas in the written statements but the above-mentioned plea is the only one which is material to the decision of this appeal.

The mortgage-deed purported to be signed by Himmat Singh and Mulu Singh and to be executed by the thumb impression of Jamna Kunwar, the mother of Lachman Singh and it

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bore on the face of it the names of five persons who purported to sign as witnesses to the execution of the deed. At the trial, Himmat Singh's heirs and Mulu Singh did not dispute the execution of the deed, but it was contended on behalf of Lachman Singh that the execution and due attestation of the mortgage bond so far as his mother was concerned had not been proved.

One only of the five alleged witnesses, namely, Badri Prasad, was called to give evidence on behalf of the plaintiffs as to the execution and attestation of the mortgage-deed on the 23rd of June, 1909. The plaintiff's mukhtaram and the scribe, who wrote out the mortgage, also gave evidence, but they were not attesting witnesses. In consequence of contradictory statements made by the above-mentioned persons, the Subordinate Judge came to the conclusion that he could not rely upon their evidence.

The learned Judge, however, relying on a Full Bench decision of the Madras High Court (*Veerappa Chettiar v. Subramania Aiyar*1) held that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement were sufficient attestation within the meaning of the Transfer of Property Act and its subsequent amending Acts. He therefore made a decree against the representatives of Himmat Singh, Mulu Singh and Lachman Singh, declaring their several liabilities to pay their proportionate shares of the amount due under the mortgage for principal, interest and costs which he assessed at Rs. 44,229-0-0.

Lachman Singh appealed to the High Court at Allahabad, and the learned Judges who heard the appeal referred to a Full Bench the following questions:—

"1. When a mortgagee sues to enforce his mortgage, and execution and attestation of the deed are not admitted what must the mortgagee prove in order to obtain a decree?

2. Whether the signatures of the Sub-Registrar and of the witnesses identifying the executant at registration are a sufficient attestation of the deed for the purposes of the Transfer of Property Act, assuming that the Sub-Registrar and identifying witnesses did receive from the executant a personal acknowledgment of his signature or mark, and that they did sign in the executant's presence?"

The Full Court on the 26th June, 1932, answered the first question as follows:—

"Where a mortgagee sues to enforce his mortgage and the execution and attestation of the deed are not admitted, the mortgagee need prove only this

1. (1928) 55 M.L.J. 794: I.L.R. 52 Mad. 123 (F.B.).

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much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document; provided the document on the face of it bears the attestation of more than one person;

But if the validity of the mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage-deed was attested by at least two witnesses."

As to the second point the learned Judges of the Full Court were of opinion that as there were conflicting decisions, they should decide the matter on principle alone, and came to the conclusion that the answer to the second question must be in the negative.

It appears from the judgment of the Division Bench, delivered on the 10th of November, 1932, that when the appeal came before the Division Bench for further hearing it was conceded that on the record as it stood the plaintiffs had failed to prove due attestation of the mortgage-deed so far as Musammat Jamma Kunwar was concerned; and application was made on behalf of the plaintiffs to produce two further witnesses and for permission to cross-examine the said Badri Prasad and Kundan, the scribe, who were alleged to have turned hostile.

The ground of the application was that the plaintiffs had been misled by certain rulings of the Calcutta and Madras High Courts. The learned Judges made an order remanding the case to the Trial Court for taking the evidence of the two further witnesses and for the cross-examination of Badri Prasad and Kundan.

It was provided that Lachman Singh should have the opportunity of cross-examining the witnesses or producing evidence in rebuttal.

The High Court further directed that the Trial Court after taking such evidence should record a finding on the evidence as a whole, including the fresh evidence, on the question whether the mortgage deed had been duly executed and attested as far as Musammat Janina Kunwar was concerned.

Their Lordships express no opinion as to whether the order remitting the matter to the Trial Court was in the proper form or whether the ground for the said order was sufficient. The order was made at the instance of the plaintiffs, it was acted upon, and the Trial Court made its finding in accordance with the said order. It appears that the plaintiffs did not take the

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opportunity of producing any fresh witnesses but Badri Prasad and Kundan were cross-examined. The Subordinate Judge held that as far as Musammat Jamna Kunwar was concerned the execution and attestation of the mortgage bond had not been duly proved.

The appeal was further considered by the Division Bench of the High Court and on the 28th November, 1933, the learned Judges agreed with the finding of the Subordinate Judge that the plaintiffs had failed to prove due attestation of the bond so far as Musammat Jamna Kunwar was concerned. They therefore held that the mortgage was invalid so far as the share of Lachman Singh was concerned, allowed the appeal, and dismissed the suit as against Lachman Singh and his share of the mortgage property. It is against that judgment and the decree made in pursuance thereof that the plaintiffs have appealed to His Majesty in Council.

It is necessary to refer to certain sections of the Indian Evidence Act (I of 1872) and of the Transfer of Property Act (IV of 1882); the most material are S. 68 of the Evidence Act and Ss. 3 and 59 of the Transfer of Property Act.

S. 68 of the Evidence Act is as follows:—

"68. If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

"Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

S. 59 of the Transfer of Property Act provides that:—

"Where the principal money secured is one hundred rupees or upwards a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

What is meant by the word "attested" is stated in S. 3 of the Transfer of Property Act.

The definition was inserted in the Interpretation clause by Act 27 of 1926 and made retrospective by Act 10 of 1927. It runs as follows:—

" 'Attested', in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some

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other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary; ".

It is therefore clear that the mortgage in this case, so far as Musammat Jamna Kunwar was concerned, could be effected only by a registered instrument to which she had attached her mark and which was attested by at least two witnesses, each of whom must have seen her affix her mark to the instrument or received from her a personal acknowledgment of her mark, and each of whom must have signed the instrument in the presence of Musammat Jamna Kunwar.

Their Lordships have examined the evidence relating to the alleged execution of the mortgage on the 23rd of June, 1909, and they agree with the findings of the Courts in India that the plaintiffs failed to prove by any reliable evidence that the mortgage deed, so far as Musammat Jamna Kunwar was concerned, was duly attested in accordance with the provisions of the statute. They are satisfied that Musammat Jamna Kunwar did execute the mortgage deed by affixing her mark thereto but they are not satisfied that the so-called attesting witnesses saw her make her mark or received her personal acknowledgment thereof or that they signed the instrument in her presence.

Learned Counsel for the appellants relied upon the terms of S. 68 of the Evidence Act and especially upon the proviso, and submitted that it was not necessary for the plaintiffs at the trial to call an attesting witness, inasmuch as the mortgage-deed had been registered and the execution thereof by Musammat Jamna Kunwar had not been specifically denied by Lachman Singh.

Their Lordships cannot accept that contention. It is clear that Lachman Singh in his written statement pleaded that he did not admit the execution of the mortgage deed, and it appears from the judgment of the Subordinate Judge that at the trial the pleader who appeared for Lachman Singh "hotly contended that the execution and due attestation of the mortgage bond in suit was not proved against his client."

In these circumstances, in their Lordships' opinion, it must be held that the execution of the mortgage deed by Musammat Jamna Kunwar was in fact specifically denied by Lachman Singh.

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Then it was urged that at least one attesting witness, namely, Badri Prasad, was called at the trial and therefore the provisions of S. 68 of the Evidence Act were complied with, and no further evidence of the due execution and attestation of the mortgage deed was necessary.

This further contention cannot be accepted by their Lordships, for although Badri Prasad purported to have been an attesting witness, and although he was called at the trial for the purpose of proving the execution of the mortgage-deed, his evidence has not been accepted as evidence upon which any reliance could be placed.

It was then urged that having regard to the terms of S. 71 of the Evidence Act, the execution of the mortgage deed might be proved by other evidence. That section is applicable only where the attesting witness "denies or does not recollect the execution of the document."

Their Lordships are doubtful whether that description is applicable to the case of Badri Prasad, but for the purpose of this appeal they will assume that the discrepancies in his evidence, which resulted in it not being accepted as reliable evidence were due to deficient recollection.

Upon that assumption it becomes necessary to consider the proceedings relating to the registration of the mortgage-deed, for it was argued that those proceedings showed that the provisions of S. 59 of the Transfer of Property Act had been complied with both as regards registration and attestation of the mortgage-deed.

It was in connection with this part of the case that reliance was placed by the learned Counsel for the appellants on the decision of the Full Bench of the Madras High Court in *Veerappa Chettiar* v. *Subramania Aiyar*1. In that case it was held that the signatures of the registering officer and the identifying witnesses affixed to the registration endorsement under Ss. 58 and 59 of the Registration Act (XVI of 1908) were a sufficient attestation within the meaning of S. 59 of the Transfer of Property Act and its subsequent amending Acts.

It is to be noted that when the appeal in that case was originally before the Division Bench the Subordinate Judge

1. (1928) 55 M.L.J. 794: I.L.R. 52 Mad. 123 (F.B.).

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was required by the said Bench to consider further the case and record findings upon certain questions of fact stated by the High Court before the questions of law were considered.

The Subordinate Judge in compliance with the order, found the following facts.

1. That the sub-registrar who registered the Exhibit A made his signature in the registration endorsement referring to the admission of execution by the executants in the presence of the executants.

2. That the witnesses who identified the executants of exhibit A before the sub-registrar were present when the admission of execution of that document was made by the executants.

3. That both the identifying witnesses made their signatures in the presence of the executants of exhibit A.

In view of these findings the Division Bench referred two questions to the Full Bench, the second of which was as follows:—

> "2. Whether the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement under Ss. 58 and 59 of the Indian Registration Act amount to sufficient attestation within the meaning of S. 59 of the Transfer of Property Act read with the aforesaid amending Acts?"

The Full Bench answered that question in the affirmative.

It is material to notice that the Court recognised how necessary it was to have the above-mentioned findings of fact before holding that the provisions of S. 59 of the Transfer of Property Act and its amending Acts had been complied with.

The Full Bench of the Allahabad High Court in the case now under consideration declined to follow the above-mentioned decision in *Veerappa Chettiar* v. *Subramania Aiyar*[1] and their reasons for their conclusion are set out in their judgment delivered on the 21st of June, 1932. It is not necessary to recite such reasons in detail. The main reason was that the Transfer of Property Act required three distinct things, (1) due execution by the mortgagor, (2) due attestation by two witnesses of such execution, (3) due registration of the deed.

The learned Judges were of opinion that if it were held that registration and what might happen at the time of registration might take the place of execution and attestation, which

1. (1928) 55 M.L.J. 794: I.L.R. 52 Mad. 123 (F.B.).

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according to the language of the Act must precede registration, the entire spirit of the enactment would be broken. They further held that neither the registrar nor the identifying witnesses at the time of registration purported to sign as attesting witnesses of the execution of the mortgage deed.

The learned Counsel for the appellants drew their Lordships' attention to several cases in the Indian Law Reports which showed that there is a conflict of authority in India on this question; their Lordships do not consider it necessary to examine them in detail or to express any opinion on this occasion whether the decision in *Veerappa Chettiar* v. *Subramania Aiyar*[1] or that of the Full Bench in the present case was correct for the following reasons.

In the first place the respondents in this appeal were not represented, and though their Lordships are confident that the learned Counsel for the appellants drew their attention to all the sections of the Acts and all reported decisions which he considered material, their Lordships have not had the benefit of any argument on behalf of the respondents and they are loth to express an opinion on such an important question as the one under consideration upon an appeal which is presented *ex parte* unless it is really necessary.

Secondly their Lordships are of opinion that in this appeal it is not necessary for them so to do.

This case differs from the case reported in *Veerappa Chettiar* v. *Subramania Aiyar*[1] in that there are no findings of fact as to what occurred at the time of registration, such as there were in the Madras case. There is no evidence except that which appears on the mortgage bond and the endorsement of the registration thereon.

That endorsement shows that on the 24th June, 1909, between 1 and 2 p.m., Himmat Singh presented the document at the office of the departmental sub-registrar at Etawah.

That endorsement was signed by the sub-registrar and Himmat Singh.

Next the endorsement records that Himmat Singh and Mulu Singh admitted the completion and execution of the document and that they were identified by Genda Lal and Narain

1. (1928) 55 M.L.J. 794: I.L.R. 52 Mad. 123 (F.B.).

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Singh. The registering officer further recorded the fact that one of the witnesses was known to him.

Then appear the signatures and thumb impressions of Himmat Singh and Mulu Singh; and the signature of Genda Lal and the signature and thumb impression of Narain Singh as witnesses.

Then there is a further endorsement that Mussammat Jamna Kunwar admitted the completion and execution of the document in a loud voice from behind the door of the room in which she was: it was then stated that she was identified by Narain Singh and by Ajodhia Singh.

Both these witnesses apparently went behind the purdah to identify the lady.

Then appears the signature of the sub-registrar. These witnesses were identified by Genda Lal who was said to be known to the sub-registrar.

The endorsement then records that the mark and thumb impression of Mussammat Jamna were obtained in the presence of the identifying witnesses after she had extended her hand beyond the purdah; and the signatures and thumb impressions of Ajodhia Singh and of Narain Singh and the signature of Genda Lal are attached as witnesses.

Their Lordships are prepared to assume that the proceedings in connection with the registration were rightly and duly conducted by the sub-registrar: but even upon that assumption there is no evidence that he affixed his signature to the endorsement in the presence of Mussammat Jamna Kunwar.

It is provided by S. 59 of the Registration Act that he must affix his signature "on the same day" and in the absence of any evidence as to the time when he signed it cannot be assumed that he signed the endorsement in the presence of Mussammat Jamna Kunwar.

Further there is no evidence which would entitle their Lordships to hold that the witnesses who identified her signed the endorsement in Mussammat Jamna Kunwar's presence, or that they heard her admit the completion and execution of the mortgage deed.

S. 60 (2) of the Registration Act of 1908 provides that the certificate of the registering officer shall be signed, sealed and dated by the registering officer and shall then be admissible

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for the purpose of proving that the document has been duly registered in manner provided by the Act and that the facts mentioned in the endorsement referred to in S. 59 have occurred as therein mentioned. But the particulars which are to be endorsed on documents which are admitted for registration, under S. 58, do not include statements as to the above-mentioned facts, which, in their Lordships' opinion, are necessary for proving the due attestation of the mortgage deed according to the provisions of the Transfer of Property Act. Ss. 58, 59 and 60 of the Registration Act, therefore, are of no avail to the appellants in this respect.

Reading the endorsements made at the time of the registration as a whole, and giving to them their natural meaning, they appear to be relevant to the matter of registration only, and the witnesses appear to have been present for the purpose of identifying Mussammat Jamna Kunwar and for that purpose only.

If it had been intended to rely on the proceedings of the registration as showing that the provisions of the Transfer of Property Act as to due execution and attestation of the mortgage-deed were complied with, evidence should have been given on behalf of the plaintiffs to prove the necessary and material facts.

Assuming then, but not deciding, that it would be legitimate to look at the proceedings relating to the registration of the mortgage-deed for the purpose of proving the due execution and attestation thereof by Mussammat Jamna Kunwar their Lordships are of opinion that the plaintiffs failed to prove the above-mentioned material facts which were necessary in order to comply with the provisions of the Transfer of Property Act.

For these reasons their Lordships are of opinion that the appeal should be dismissed and they will humbly advise His Majesty accordingly.

Solicitors for Appellants: *Douglas, Grant and Dold.*

Respondent not represented.

R. C. C. —— *Appeal dismissed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

Doraikannu Ammal .. *Appellant** (*Defendant*)

v.

T. Ramaswami Mudaliar .. *Respondent* (*Plaintiff*).

Doraikannu Ammal v. Ramaswami Mudaliar.

Transfer of Property Act (IV of 1882), S. 108, cls. (o) and (p)—Lease for laying out a flower garden—Erection of cattle sheds and huts—If to be required to be demolished by injunction.

Where land in Madras was leased out by temple trustees for the purpose of laying out a flower garden and the lessee contrary to the terms in the lease erected some huts, a firewood depot, and a two-storied dwelling house,

Held, the lessee should be required by an injunction to demolish all the structures, as the maintenance of the buildings on the land would alter its character and would prevent the land being used as a flower garden.

Richard Wheeler Doherty v. *James Clagston Allman and W. C. Dowden*, (1878) 3 A.C. 709 and *Hyman* v. *Rose*, (1912) A.C. 623, distinguished.

If the erections were allowed to remain, at the end of the lease there would be a claim by the lessee for the benefit of the Madras City Tenants Protection Act, 1921 and to allow that would be unjust to the lessor.

Appeal under cl. 15 of the Letters Patent against the decree and judgment of the Hon'ble Mr. Justice Somayya dated 19th April, 1939 and made in C. C. C. A. Nos. 33 and 44 of 1938 preferred to the High Court against the decree of the Court of the Principal City Civil Judge, Madras, dated 5th May, 1938 and made in O. S. No. 557 of 1935.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Appellant.

A. S. Nataraja Aiyar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This is an appeal under cl. 15 of the Letters Patent from a judgment granting the respondent a mandatory injunction for the removal of certain buildings on land leased to the appellant. The land belongs to the Sri Kasi Viswanatha Devasthanam, G. T., Madras, of which the respondent is the trustee. Before 1920 the land was leased to one Chinna Venkatesa Devar, who on the 27th September, 1920, transferred his interest therein to P. L. Natesa Mudaliar. After he had acquired the interest of Chinna Venkatesa Devar, Natesa Mudaliar entered into an agreement with the then trustee of the temple for a new lease. The agreement was executed on the 19th February, 1921 and was duly registered. It stated:—

* L. P. A. No. 24 of 1939 5th September, 1939.

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"I have agreed to pay you a rent of Rs. 2 (Rupees Two) per month for laying out a flower garden in the said land, and paid you this day an advance of Rs. 25 (Rupees Twenty-five). As I have taken on lease the said land for a period of 30 years from this date, myself or my heirs shall pay you or order the rent of every month before the 10th of the next month and obtain a receipt. If the rent remain unpaid, you shall recover the same by proceeding against my property. You shall yourself pay the quit rent of the above land. I shall myself pay the tax that may be levied by the municipality. If we again require the site after the expiry of the said 30 years you are at liberty to get a fresh rental agreement according to the rent prevailing then in respect of other similar sites. If you want me to vacate the land without there being a renewal of the rental agreement after the said period of 30 years, the cost of the said compound wall that may be fixed by the mediators according to the then market rate, and the said advance amount shall be taken from you and the said site together with plants therein and the compound walls will be delivered to you."

At that time there was nothing on the land except the compound wall referred to in the agreement. It is quite clear from the wording of the agreement that the lease was granted to Natesa Mudaliar merely for the purpose of laying out a flower garden, but in breach of the agreement he erected on the land a cattle shed made of zinc sheets. On the 31st August, 1931, he assigned his interest in the new lease to the appellant. At the time of the assignment no other structure had been erected on the land. In 1935 the appellant demolished the cattle shed and erected in its place a two-storied masonry dwelling house. On another part she built a firewood depot, also of masonry. She then erected two huts made of zinc sheets. The appellant is living in the house and she rents out the two huts to "Boyees", which I understand is a term used to denote a certain class of Telugu coolies. The respondent as trustee of the temple objected to the erection of these buildings and filed a suit in the City Civil Court for an injunction requiring their demolition. The City Civil Court Judge held that the respondent was entitled to an injunction in respect of all the buildings except the house. He did not grant an injunction in respect of the house because it was built on the site of the cattle shed which was on the land when the appellant became the assignee of the lease. Both the parties appealed to this Court. Their appeals were heard by Somayya, J., who allowed the appeal of the respondent and rejected that of the appellant. The result was that an injunction was issued requiring the demolition of the house as well as the other buildings. The appellant asks the Court to dissolve the injunction in its entirety.

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I have no hesitation in concurring in the judgment of Somayya, J. The lease having been granted for the laying out of a flower garden the appellant was not entitled to erect these buildings on the land. It is admitted that if the land is to be regarded as agricultural land the injunction which has been ordered is right, but it is said that it is not agricultural land and therefore the lease falls within S. 108 of the Transfer of Property Act. The provisions of that section do not help the appellant; in fact they provide a complete answer to her case. Cl. (*o*) of that section provides that the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage building belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious to the property. There is no ambiguity in the language used. While the lessee may use the property as a person of ordinary prudence would use it, he is expressly prohibited from using it or permitting another person to use it for a purpose other than that for which it was leased. Cl. (*p*) says that he must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purposes. It is not suggested that the temple authorities have granted any permission.

Mr. Rajah Aiyar in support of the appeal has stressed two English cases dealing with the rights of lessees where there are no negative covenants. The first of these is *Richard Wheeler Doherty* v. *James Clagston Allman and W. C. Dowden*[1], in which a building which had been used as a store was converted into dwelling houses. There was no covenant prohibiting this and the House of Lords held that the landlord was not entitled to an injunction restraining the conversion. The building could be re-converted into a store at the end of the lease. The second case is *Hyman* v. *Rose*[2], in which relief from forfeiture for breach of covenant was sought. There a building was being used as a cinematograph theatre. The land on which the building stood had been leased for the purpose of erection of a chapel. A chapel was erected and was used as a place of religious worship for 60 years. The lease was then sold with the consent

1. (1878) 3 A.C. 709. 2. (1912) A.C. 623.

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of the charity Commissioners and the premises were adapted for a cinematograph theatre. It was held that in view of the fact that the lease did not prohibit the contemplated user of the premises the alterations did not constitute a breach of covenant. Those cases are entirely different from the case which we have now before us. Moreover, we have got to decide this case on the provisions of an Indian Statute, and, as I have shown, the statute clearly prohibits the appellant from using the land for the purposes for which she has used it. The respondent was fully justified in instituting the suit and I consider that the proper relief is the injunction which Somayya, J., has granted.

As the learned Judge has pointed out if these erections were allowed to remain on the land, at the end of the lease there would no doubt be a claim preferred by the appellant or the appellant's successor in title for the benefit of the Madras City Tenants' Protection Act, 1921 and a demand made on the trustee to convey the land at a value to be fixed by the Court. To allow such a position to arise here would certainly be unjust to the respondent. I may mention that there is another reason why the injunction should not be dissolved. Cl. (*o*) of S. 108 of the Transfer of Property Act says that a lessee shall not be allowed to commit an act which is destructive or permanently injurious to the land. The maintenance of the buildings on the land would certainly alter its character and would prevent the land being used as a flower garden.

The appeal will be dismissed with costs.

K. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor .. *Appellant**

v.

Amirtham Servai and others .. *Respondents (Accused).*

Public Prosecutor v. Amirtham Servai.

Indian Penal Code (XLV of 1860), Ss. 147 and 352—Police Officers arresting gamblers—Resistance—Attempt by persons to rescue accused—Guilty under S. 147—Arrest strictly legal under S. 352.

Where a Sub-Inspector of Police and a head constable found accused 1 to 6 gambling on an open platform used by villagers like a chavadi and the other accused were watching the game, and when the officers arrested accused 1 and 2 in good faith under colour of their office in a public place, on the question whether the arrest of accused 1 and 2 was legal and whether the attempt by the other persons to rescue the accused was legal,

* Crl. Appeal No. 142 of 1938. 25th August, 1938.

Public Prosecutor *v.* Amirtham Servai.

Held, (1) that those who attempted to resist the police by use of criminal force would unquestionably be guilty under S. 147 of the Indian Penal Code;

(2) that accused 1 and 2 would be guilty under S. 352 of the Penal Code and the arrest by the officers was legal.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the City First Class Magistrate, Madura, in Crl. Ap. No. 59 of 1937 on his file (C. C. No. 1293 of 1937 on the file of the Court of the Sub-Magistrate, Nilacottai).

Appellant in person.

V. S. Chandrasekaran for Respondent (accused).

The Court delivered the following

JUDGMENT.—This is an appeal by the Public Prosecutor against an appellate order of acquittal and the undisputed facts are that on their way to investigate a case of house-breaking and theft, P. Ws. 1 and 11, the Sub-Inspector and Head Constable of Sambatti found accused 1 to 6 gambling with dice and money in the Silvathinnai an open platform with roof used by the villagers like a village chavadi at Karisalpatti. Accused 7 to 10 were watching the game and the police officers hurried to the spot. The accused got down the Silvathinnai and P. W. 1 asked accused 1 to 6 to stop. P. W. 11 seized the dice and some cash from the Silvathinnai and accused 1 and 2 were asked their names. They refused to give their names and P. Ws. 1 and 11 caught them saying that they had been arrested. Accused 1 assaulted P. W. 1 and he struck accused 1 on the head with a lathi in self-defence. The other accused then attempted to rescue accused 1 and 2 by use of criminal force but P. Ws. 1 and 11 held them firm, and P. Ws. 2, 3, 4, 5, 7, the villagers intervened. Accused 1 and 2 were then taken to the school building about fifty feet away and accused 3 to 10 assembled near the school. The Sub-Inspector apprehended a breach of the peace and information was sent to the Village Munsif and Police Station. The Village Munsif and four constables arrived soon after and accused 3 to 10 ran away.

Accused 1 and 2 were arrested by the Police Officers in good faith under colour of their office and it is immaterial whether the Silvathinnai is a public place and the arrest was strictly legal. There is no right of private defence against such an act of a public servant, and accused 3 to 10 who attempted to

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rescue accused 1 and 2 by use of criminal force will unquestionably be guilty under S. 147 of the Indian Penal Code. Accused 1 and 2 will be guilty under S. 352 of the Indian Penal Code and the acquittal of the accused on the ground that the arrest was not legal is unsustainable. The order of acquittal is therefore set aside and the accused are convicted, accused 1 and 2 under S. 352 of the Indian Penal Code and accused 3 to 10 under S. 147 of the Indian Penal Code.

As regards sentence the occurrence was not premeditated and it is unnecessary to send the accused to prison at this distance of time. The accused are therefore sentenced to pay a fine of Rs. 25 each and in default to rigorous imprisonment for one month.

K. C. —— *Order of aquittal set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Chelikani Kondayya Rao and others .. *Appellants** (*Plaintiffs*)

v.

Vuppalapati Naganna and others .. *Respondents* (*Defendants*).

Kondayya Rao v. Naganna.

Madras Estates Land Act (I of 1908), Ss. 77, 181 and 185—Home-farm land—Landholder having no kudiwaram right—Character of holding—Suit for recovery of rent—Proper forum—Revenue Court.

It is well settled that 'home-farm land is land' regarding which the landholder at least retains an expectation that he will at some not too distant date use it for his own cultivation and enjoyment. Vide *Zamindar of Chellapalli* v. *Somayya*, (1914) 27 M.L.J. 718: I.L.R. 39 Mad. 341 at 347; and *Raja Yerlagadda Mallikarjuna Prasad* v. *Somayya*, (1918) 36 M.L.J. 257: L.R. 46 I.A. 44: I.L.R. 42 Mad. 400 at 405 (P.C.).

If land does not fall within this definition, if the landholder has alienated his right in kudivaram with such permanence as to preclude the probability of its ever again coming into his personal enjoyment, then quite clearly that land, whatever it was in the past, is no longer the home-farm land of the landholder and the mere fact that it continues to go by the name of *kambattam* land would not restore it to the privileges which it has ceased to enjoy. Apart from the presumptions to be drawn under S. 185 of the Act and even in the absence of any express intention to convert land which was once home-farm land, under S. 181 into ryoti land, it seems to be apparent that land which has ceased to be in fact 'home-farm land' of the landholder cannot be treated in law as retaining a character which it has lost. If the land is no longer the private land of the landholder, then by the definition of 'ryoti' land' it will automatically be treated as ryoti land to which all the incidents of ryoti tenure will apply. One of these incidents is that a suit for rent in respect of that land will fall under S. 77 of the Act and will be cognisable only by the Revenue Court.

* A. A. O. No. 202 of 1938. 19th July, 1939.

Appeal against the order of the Court of the Subordinate Judge of Masulipatam dated 11th October, 1937 and made in O. S. No. 11 of 1934.

V. Rangachari for Appellants.

K. Kameswara Rao and *B. S. Ramachandradu* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of an order returning a plaint for presentation in a Revenue Court. The land in respect of which this suit for rent arose is admittedly situated within a mukhasa village which according to the trial Court's judgment was admitted to be an 'estate' falling under cl. 2 (*d*) of S. 3 of the Madras Estates Land Act. It is common ground that the land in question was formerly the *kambattam* land of the plaintiffs and that it was demised to the defendant in 1920 under Ex. A which is described as a "permanent khat, relating to the sale of kudivaram right for Rs. 33,492." This instrument recites that the lands demised form part of the plaintiff's private *kambattam* land in which they have a permanent kudivaram right as well as melwaram right and that the plaintiff have sold to the defendant all the rights possessed by them in the lands excepting the melvaram right thereto, the consideration being the payment of a substantial cash premium and future payments of rents at rates specified. The trial Court applied the provisions of the Amending Act (XVIII of 1936) and held that the suit related to land which was ryoti land within the terms of the Act and that therefore the suit to recover arrears of rent in respect of that land fell under S. 77 of the Madras Estates Land Act and it could only be entertained by a Revenue Court.

It seems to me unnecessary to go into the question whether Act XVIII of 1936 which had not been passed when the suit was instituted governs the forum in which the suit should be decided, for I am of opinion that the suit was *ab initio* filed in the wrong Court even under the statute in force at the time when the litigation started. Under the Madras Estates Land Act as amended up to 1934 'ryoti land' means cultivable land in an estate other than private land and 'private land' means the domain or home-farm land of a land-holder by whatever designation known. The argument of the appellants is that because this land was admittedly at one time the home-farm

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land and is designated as ***kambattam***, it retains for all time its character as home-farm land regardless of the use to which it is put and of the tenure upon which it is granted, provided there is no explicit conversion of that land into ryoti land. It seems to me that this contention runs quite contrary to the scheme of the Madras Estates Land Act. The Act contemplates lands of various categories. There is poramboke land not suitable for assignment and there is 'oldwaste' with neither of which we are here concerned. Cultivated land is for all practical purposes divided into ryoti land in which the ryot has an occupancy right and in which the conditions of his tenure are governed by the Act and home-farm land which the landholder retains in his own occupation for his private use though he may for convenience of enjoyment make temporary arrangements for its cultivation by others. In my opinion it is not in accordance with the scheme of the Act to recognise another category of land, namely, land which was initially the home-farm land of the landholder but which he has no intention to retain for his own use and in which he has transferred the occupancy right to a cultivating tenant for cash consideration as a permanent measure. It is contended that the demise in favour of the defendant contains terms which are inconsistent with the provisions of the Act regarding the tenure of an occupancy right, particularly in that there is a permanently fixed rent, that there is a rate of interest on arrears different from that prescribed by the Act, that the landholder retains the right to existing trees on the land demised and that there is a provision for variation in the amount of premium to be paid in accordance with any survey excess or deficiency which may be found on accurate measurement of the land demised. It seems to me that all these terms are matters of minor importance and the question whether all of them would be of binding force in view of the provisions of the Act, is a matter on which I am not now called upon to express an opinion. The fact however remains that by this demise of 1920 the plaintiffs divested themselves for all time of any right in the kudivaram of the land in question other than the right to receive a recurring rent and an interest in the trees then standing on the land. It cannot be said that this land any more partook of the character of the private domain of the landholder, kept for his own use and enjoyment, or that there was any intention on the part of the

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landholder that it should ever revert to the condition of private home-farm land. What the landholder clearly intended to do was to transfer the kudivaram permanently for a cash consideration, while reciting in the conveyance the fact that it was the *kambattam* land presumably in the hope that thereby he would be able to evade the provisions of the Estates Land Act designed for the protection of occupancy ryots.

The Estates Land Act does not define what is meant by "home-farm land", but the term has been defined by the Courts and the definition is now well settled. Sir John Wallis, C. J., in the case of *Zamindar of Chellapalli* v. *Somayya*[1] adopted the definition of similar land in a case from North India as:

"Land which a Zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season."

This definition was approved by the Privy Council in *Raja Yerlagadda Mallikarjuna Prasad* v. *Somayya*[2] and it has been followed in subsequent cases. We may therefore take it as settled that home-farm land is land regarding which the landholder at least retains an expectation that he will at some not too distant date use it for his own cultivation and enjoyment. If land does not fall within this definition, if the landholder has alienated his right in the kudivaram with such permanence as to preclude the probability of its ever again coming into his personal enjoyment, then quite clearly that land, whatever it was in the past, is no longer the home-farm land of the landholder and the mere fact that it continues to go by the name of *kambattam* land would not restore it to the privileges which it has ceased to enjoy. Apart from the presumptions to be drawn under S. 185 of the Act and even in the absence of any express intention to convert land, which was once home-farm land, under S. 181 into ryoti land, it seems to me to be apparent that land which has ceased to be in fact home-farm land of the landholder cannot be treated in law as retaining a character which it has lost. If the land is no longer the private land of the landholder, then by the definition of "ryoti land" it will automatically be treated as ryoti land to which all the incidents of ryoti tenure will apply. One of these

1. (1914) 27 M.L.J. 718: I.L.R. 39 Mad. 341 at 347.
2. (1918) 36 M.L.J. 257: L.R. 46 I.A. 44: I.L.R. 42 Mad. 400 at 405 (P.C.).

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incidents is that a suit for rent in respect of that land will fall under S. 77 of the Act and will be cognisable only by the Revenue Court. I am clearly of opinion that the land in this cause is no longer the private land of the landholder but has become ryoti land and that the suit for rent falls under S. 77 and has to be brought in the Revenue Court. In this view it seems to me to be unnecessary to go into the question of the effect of S. 127, sub-S. (2) of Madras Act VIII of 1934 on the course of this litigation in the trial Court or to consider the question whether the Amending Acts of 1936 in terms apply.

The appeal is therefore dismissed with costs.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Namasivaya Mudaliar and others .. *Appellants* in Appeal (Petitioners-Defendants 4 to 6) Petitioners in C. M. P.*

v.

A. Srinivasa Aiyangar and others .. *Respondents (Plaintiffs and Defendants 1 to 3).*

Namasivaya Mudaliar v. Srinivasa Aiyangar.

Civil Procedure Code (V of 1908), S. 47—Settlement of terms of proclamation—When an order, on which an appeal lies under S. 47—Agriculturists Relief Act, Madras Act IV of 1938, S. 4 (d)—Vacant ground in the compound of house mortgaged—If prevents application of S. 4 (d).

It is well established that the mere settlement of the terms of a proclamation, when no dispute between the parties as to their rights or liabilities is decided judicially, cannot be deemed to be an order under S. 47, Civil Procedure Code, from which an appeal would lie. But it is equally well settled that when at the stage of settling the terms of the proclamation the parties put into issue a question affecting their relative rights and liabilities with regard to execution and this matter is heard and decided, then that decision is a judicial decision and the parties will not be allowed in the Court of execution to canvass the same matter again.

Vedavyasa Aiyar v. *Madura Hindu Labha Nidhi, Ltd.*, (1923) 45 M.L.J. 478, followed.

When the vacant ground included in the mortgage is a part of the compound of the house property which the mortgage covers and there is a compound wall round the vacant ground and the well serving the houses included in the mortgage, the mortgage is a debt contracted on the security of house property alone. The mere fact that the land originally bore two

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* A. A. A. O. No. 100 of 1938 and C. M. P. No. 2492 of 1939. 17th August, 1939.

paimash numbers does not suffice to separate the compound from the house to which it is attached.

Ponnambalam Chetti v. *Ambalam Raman Chetti*, (1939) 2 M.L.J. 233, distinguished.

Namasivaya Mudaliar v. Srinivasa Aiyangar.

Appeal against the order of the District Court, Chingleput, dated 5th April, 1938 and made in C. M. A. No. 196 of 1936 (E. A. No. 858 of 1936, in O. S. No. 73 of 1931, District Munsif Court, Poonamallee) and petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the scaling down of the decree-debt in O. S. No. 73 of 1931 on the file of the Court of the District Munsif of Poonamallee which is the subject matter of the above Civil Miscellaneous Second Appeal in accordance with the provisions of the Madras Agriculturists Relief Act (IV of 1938).

P. R. Ganapathy Aiyar and *K. S. Ramabhadra Aiyar* for Appellants.

K. E. Rajagopalachariar for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against an order in execution of a mortgage decree. The mortgage covered three houses with ground attached thereto and in the property the present appellants were entitled to a half share. The appellate decree made the half share of the appellants liable only to the extent of a portion of the mortgage amount with interest theron, the half share of the other defendants being liable for the full amount of the mortgage decree. In execution of the decree the decree-holder sought to bring to sale the hypotheca and asked for leave to sell the whole property in one lot owing to the difficulty of selling an undivided share. Notice of this application was sent to the appellants and they filed a counter-affidavit in which they pleaded that the whole property could not be brought to sale for the total liability of all the defendants together, but that only their half share in the property should be brought to sale to recover the limited amount for which the appellants were liable under the decree. There was also a contention that the three houses should be sold in separate lots. After a commissioner had been appointed, the Court passed an order on 17th January, 1936, in which it observes:

"In order to avoid further disputes it is better that the properties are sold as one lot,"

and after considering the question of the value the order concludes, "the properties will be sold as one lot." The appel-

lants thereafter asked for time to discharge the decree, waiving fresh proclamation. But on the date to which the sale was adjourned, they filed an application in which they in effect renewed the prayer put forward in their counter-affidavit to the notice to settle the terms of proclamation, pointing out that the proposal to sell the entire property for the amount due under the decree would throw a greater burden upon the half share of the appellants. In fact the object of the executing Court in approving this arrangement was to get the best price possible and to adjust the relative liabilities of the different sets of defendants out of the sale proceeds instead of taking the risk of a piecemeal sale. Though the order may be attacked as not being in accordance with the letter of the decree, it is, in my opinion, in accordance with the spirit of the decree. However, that may be, the application which the appellants put forward after they had taken time to discharge the debt has been rejected on the ground that it was barred on the principle of *res judicata*.

It is strenuously contended that the former order was not an order under S. 47, Civil Procedure Code, determining the rights of the parties but a mere administrative order prescribing the manner of sale, against which there would be no appeal. Therefore it is contended that the order cannot operate as a bar to a subsequent application to adjudicate upon the right of the appellants to have their share sold only for a portion of the decree amount for which they have been held liable. It seems to me that if the order dated 17th January, 1936, is not an order falling under S. 47, Civil Procedure Code, then the later order on the application of the appellants to agitate once more the contention which they had put forward at an earlier stage, must equally be held to be one not falling under S. 47 and no appeal against it would lie. I am however definitely of opinion that the order dated 17th January, 1936, is one which falls under S. 47, Civil Procedure Code. It is well established that the mere settlement of the terms of a proclamation, when no dispute between the parties as to their rights or liabilities is decided judicially, cannot be deemed to be an order under S. 47, Civil Procedure Code, from which an appeal would lie. But it is equally well settled that when at the stage of settling the terms of the proclamation the parties put into issue a question affecting their relative rights and liabilities with regard to execution and

this matter is heard and decided, that decision is a judicial decision and the parties will not be allowed in the course of execution to canvass the same matter again. The point is covered by the authority of *Vedaviasa Aiyar* v. *Madura Hindu Labha Nidhi, Ltd.*[1] and subsequent decisions to the same effect.

Now in the present case the decree-holder proposed to bring to sale the whole of the rights of the defendants in one lot, and, dividing the sale proceeds into two shares, to adjust the relative liabilities of the defendants under the decree against those shares. The appellants filed a counter-affidavit contesting the right of the decree-holder to sell the properties in this way and asking for an adjudication on the question whether their share should not be sold separately and their several liabilities realised by these separate sales. On this counter-affidavit there was a definite judicial decision as to the way in which the decree should be worked out by sale of the properties. That was clearly a determination of the liability of the interests of the judgment-debtors to be sold collectively, so that their liability under the decree could be worked out by a division not of the property itself, but of the sale proceeds after the property had been sold. Assuming that that decision was a wrong decision and it went against the letter of the decree, the appellants should have taken it up in appeal and not having done so they cannot be heard to raise the matter at a later stage. It follows therefore that the appeal must be dismissed with costs. (Leave to appeal is refused.)

There is also an application filed under the Madras Act IV of 1938 (C.M.P. No. 2492 of 1939) based on certain passages in a judgment of my own in *Ponnambalam Chetti* v. *Ambalam Raman Chetti*[2]. In that case I was dealing with the position in which there was a mortgage covering two quite separate plots of land, one of which contained buildings and the other did not and I held that the mere fact that the unoccupied site was destined to be built upon at some future date would not bring it within the term "house property" used in S. 4 (*d*) of the Act. It seems to me that this decision has no bearing whatever on the facts of the present case, for it is apparent from the Commissioner's report and plan that the vacant ground included in the present mortgage is a part of the compound of the house property

1. (1923) 45 M.L.J. 478. 2. (1939) 2 M.L.J. 233.

Namasivaya Mudaliar v. Srinivasa Aiyangar.

which the mortgage covers. There is a compound wall round the vacant ground and the well serving the houses is included in it. The mere fact that this and originally bore two paimash numbers does not suffice to separate the compound from the houses to which it is attached; and as I observed in the case quoted, the term "house property" will normally include the site on which the building stands and the garden, compound or yard attached thereto. In this view it must be held that this mortgage is a debt contracted on the security of house property alone and therefore it is saved from the operation of Act IV of 1938 by the provisions of S. 4 (*d*) of that Act. The petition is therefore dismissed with costs.

S.V.V. —— *Appeal and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Vallabhaneni Parandamayya .. *Appellant** (*Respondent—Judgment-debtor*)

v.

Kosaraju Surayya .. *Respondent* (*2nd Petitioner*).

Paranda-mayya v. Surayya.

Provincial Insolvency Act (V of 1920), S. 37—Attachment pending on date of adjudication—Annulment of adjudication—Effect on attachment—Dismissal of execution petition on adjudication—If raises attachment.

When there is an attachment at the time of the adjudication and the insolvency is not prosecuted with the result that an order of annulment is passed, the effect of the order of annulment will be that which is laid down in S. 37 of the Provincial Insolvency Act, that is, subject to the contingencies contemplated by S. 37 the property will go back to the debtor with any burdens which existed upon it at the time of the adjudication. His interests in the property is still bound by the attachment at the date of the annulment. An order of dismissal of an execution petition did not raise the attachment.

Appeal against the order of the District Court of Guntur dated the 21st day of September, 1936 and made in A. S. No. 332 of 1935 (E. P. No. 76 of 1935 in O. S. No. 452 of 1930, District Munsif's Court, Repalle).

K. Kameswara Rao for Appellant.

A. Lakshmayya for Respondent.

The Court delivered the following

JUDGMENT.—The appellant is a judgment-debtor and appeals against an order permitting execution without any fresh

* C. M. S. A. No. 60 of 1937. 24th August, 1939.

Paranda-mayya v. Surayya.

attachment, the learned District Judge having held that an attachment before judgment did not come to an end by the adjudication of the judgment-debtor as an insolvent which was subsequently annulled. In 1930 a decree was obtained against the appellant and there was an attachment before judgment which was enforced in an execution petition of 1931. Just before the date to which the sale was posted, the judgment-debtor was adjudged an insolvent and on this fact being intimated to the executing Court the order passed was "judgment-debtor is adjudged insolvent. Sale stopped. Dismissed". The last word is not very clearly decipherable, but I accept the interpretation of the learned District Munsif's handwriting which has appeared correct to the Courts below. On 16th August, 1934, the adjudication was annulled. On 4th January, 1935, the decree-holder having died, his legal representative filed a fresh execution petition 76 of 1935 praying for recognition of the applicant as the legal representative of the decree-holder and for sale of the properties by virtue of a subsisting attachment before judgment. The District Munsif held that there was no attachment. On appeal the learned District Judge came to the contrary conclusion. To my mind the learned District Judge's decision is correct.

My attention has been drawn to three decisions *Gobind Das* v. *Karan Singh*[1], *Dambar Singh* v. *Munawar Ali Khan*[2] and *Balakrishna Menon* v. *Rangan Pattar*[3], all of which really do nothing more than point out that the practical effect of an adjudication is to put an end to an attachment. These decisions do not purport to lay down as a proposition of law that an adjudication automatically raises an attachment so that there will be no attachment subsisting if and when the adjudication is annulled. An attachment may be raised either by the completion of the sale with a view to which the attachment has been imposed, or by an express order raising the attachment, or by the operation of O. 21, r. 57 of the Civil Procedure Code whereunder when an execution petition is dismissed for the decree-holder's default, the attachment shall cease. Now, though the learned District Munsif on being informed of the insolvency erroneously passed an order dismissing the execution petition

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1. (1917) I.L.R. 40 All. 197. 2. (1917) I.L.R. 40 All. 86.
3. (1921) 41 M.L.J. 334.

Paranda-mayya v. Surayya.

which was then pending, instead of staying the proceedings as he should have done with reference to S. 29 of the Provincial Insolvency Act, it cannot, I think, be said that this order of dismissal was an order of dismissal for default of the petitioner. Whatever be the legal effect of this dismissal, it will not have the effect of automatically terminating the attachment as would be the case had it been a dismissal under O. 21, r. 57. It is true that when there is an adjudication of the judgment-debtor the attachment will not operate to prevent the Official Receiver from realising the property attached and selling it for the purpose of satisfying the creditors. Nor will it operate against any transferee from the Official Receiver who acquires an interest in the process of realisation. But I see no reason why we should read into the Insolvency Act a provision which is not there, to the effect that on adjudication all attachments shall be raised. There is no reason why an attachment should not notionally continue subject to the superior power of the Official Receiver to ignore the attachment for the purpose of realising the assets of the judgment-debtor and distributing the proceeds to his creditors.

In a case such as the present when there is an attachment at the time of the adjudication and the insolvency is not prosecuted with the result that an order of annulment is passed, the effect of the order of annulment will be that which is laid down in S. 37 of the Provincial Insolvency Act. That is to say, subject to any changes in the title to the property due to the acts of the Court or the receiver, the property will revert to the debtor to the extent of his right or interest therein on such conditions as the Court may declare. There is nothing in S. 37 to justify the conclusion that the order of annulment will enlarge the right of the debtor in the property as compared with the right as it subsisted on the date of the adjudication. To my mind the natural conclusion is that on annulment, subject to the special contingencies contemplated in S. 37, the property will go back to the debtor with any burdens which existed upon it at the time of the adjudication.

I have held that the order of dismissal of the pending execution petition did not automatically raise the attachment. There is no order subsequently raising the attachment. The order of adjudication to my mind merely makes the attachment ineffective so long as the property is in the hands of the receiver. When the adjudication is annulled, the property will re-vest in

the debtor to the extent to which he had a right therein at the time of the adjudication. At that time his right was clearly subject to the attachment and I am of opinion that his interest in the property is still bound by the attachment on the date of the annulment. To hold otherwise would be to allow a fraudulent judgment-debtor to go through the pretence of insolvency and take advantage of the order of annulment resulting from his own default, to make alienations before the creditor has time to levy a fresh attachment.

Paranda-mayya *v.* Surayya.

In the result therefore the appeal is dismissed with costs. Leave to appeal is refused.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Jonnalagadda Ramaswami Chetti .. *Petitioner** (*Respondent*)

v.

T. K. Ramachandra Rao .. *Respondent* (*Petitioner*).

Ramaswami Chetti *v.* Rama-chandra Rao.

Madras Debt Conciliation Act (XI of 1936), S. 17—Creditors representing more than fifty per cent. of applicant's debts not agreeing to settlement—Procedure.

Respondent claiming to be an agriculturist filed an application under S. 4 (1) of the Madras Debt Conciliation Act, 1936, before the Debt Conciliation Board. Three debts were shown all of them due to the petitioner. The Board decided that the debts should be scaled down under Madras Agriculturists Relief Act though the petitioner objected. In an application for issue of a writ of *certiorari* against the Debt Conciliation Board for quashing the order,

Held, S. 4 provides that a debtor may make an application for the "settlement of his debts". But if creditors representing more than 50 per cent. of the applicant's debts do not agree the Board is bound under S. 17 of the Act to dismiss his application.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in D. C. B. Case No. 1 of 1939 on the file of the Court of the Debt Conciliation Board, Dhone and to quash the order passed by the said Board on 28th May, 1939.

Kasturi Seshagiri Rao for *Ramanujam* and *Venkataseshayya* for Petitioner.

D. R. Krishna Rao for Respondent.

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* C. M. P. No. 2543 of 1939. 27th September, 1939.

Ramaswami Chetti v. Rama-chandra Rao.

Leach, C.J.

The order of the Court was made by

The Chief Justice.—The petitioner filed the application before us for the issue of a writ of *certiorari* against the Debt Conciliation Board of Dhone, Kurnool District, and for the quashing of an order of the Board dated the 28th May, 1939. A rule *nisi* was issued, and we have heard the arguments. It is clear that the rule must be made absolute. The facts are these. On the 6th February, 1939, the respondent, who claims to be an agriculturist filed an application purporing to be an application to the Debt Conciliation Board under S. 4 (1) of the Madras Debt Conciliation Act, 1936. In this petition the respondent set out three debts all of which were shown to be due to the petitioner. The respondent apparently had only one creditor. Having set out the debts payable to the petitioner the respondent's petition proceeded as follows:—

> "I hereby declare that I am an agriculturist and the debts shown above are liable to be scaled down under the provisions of the Madras Agriculturists Relief Act, 1938."

The Board entertained the petition and served notice on the petitioner in these proceedings. In due course the Board went into the question whether the respondent was in fact an agriculturist, and came to the conclusion that he was. The petitioner contended that as the debts were secured on house property they were excluded from the scaling down sections of the Madras Agriculturists Relief Act by virtue of S. 4 (*d*) of that Act. The Board decided against the petitioner and held that the respondent's debts should be scaled down under the provisions of the Madras Agriculturists Relief Act. It is this order which the petitioner asks the Court to quash.

Although the petition which the respondent filed on the 6th February, 1939, purported to be a petition under S. 4 of the Madras Debt Conciliation Act, 1936, what he was in effect asking the Board to do was to scale down his debts under the provisions of the Madras Agriculturists Relief Act which the Board had no power to do. But treating the respondent's application to the Board as an application under the Madras Debt Conciliation Act, 1936, it is manifest from the provisions of that Act that the petition should have been dismissed. S. 4 provides that a debtor may make an application "for the settlement of his debts". S. 14 (1) says that if the creditors to whom more than fifty per cent. of the total amount of the debtor's debts is

owing come to an amicable settlement with the debtor, such settlement shall be reduced to writing in the form of an agreement recording the amounts payable to such creditors and the manner in which, the assets from which, and the times at which they are to be paid. But if the creditors representing more than fifty per cent. of the applicant's debts do not agree the Board is bound under S. 17 of the Act to dismiss his application. As I have already pointed out, there is here only one creditor and he has not agreed to a settlement of his debts. There having been no settlement the proper and only course for the Board to follow was to dismiss the application filed by the respondent.

Narasimhi Chetti v. Ramachandra Rao. — Leach, C.J.

The respondent has entirely misconceived the object of the Madras Debt Conciliation Act and has misread its provisions. If he is an agriculturist and the debts which he owes to the petitioner are debts which do not fall within the provisions of S. 4 (*d*) of the Madras Agriculturists Relief Act, 1938, he is entitled to have the debts scaled down in accordance with the provisions of that Act, and if the petitioner asks a Court to enforce the payment of a larger sum than is allowed by the Act the Court will have no power to do so.

The Board having acted without jurisdiction in passing the order of the 28th May, 1939, that order must be quashed, and there will be an order accordingly. The petitioner having succeeded is entitled to his costs which we fix at Rs. 50.

K. S. — *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

Jupalli Narasimha Nayanim Varu .. *Petitioner** (*Petitioner*)

v.

Rao Bahadur K. Venkatarama Naidu Garu .. *Respondent* (*Respondent*).

Madras Agriculturists Relief Act (IV of 1938), S. 15—Whether cl. (3) subject to cl. (1) of the section.

Narasimha Nayanim Varu v. Venkatarama Naidu Garu.

Cl. (3) is subject to cl. (1) of S. 15 of the Act and to get the benefit of that section the rent due for fasli 1347 should be paid on or before 30th September, 1938.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Special Deputy

* C. R. P. No. 871 of 1939. 16th October, 1939.

Narasimha Nayanim Varu v. Venkata-rama Naidu Garu.

Collector, Chandragiri, dated 14th March, 1939 and made in J. P. No. 150 of 1347 (Fasli).

P. Srikantan for Petitioner.

R. Karunakaran and *U. Lakshmanna* for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner is an agriculturist. He owed no rent for fasli 1345 or for any previous fasli but he did on the 3rd December, 1938, owe for faslis 1346 and 1347. On that date he made a payment declaring it to be in respect of fasli 1346 (S. 64 of the Madras Estates Land Act). The respondent sought to bring the property to sale in respect of fasli 1347 before the Special Deputy Collector. The petitioner claimed that, notwithstanding his declaration, the rent should be credited to fasli 1347 under S. 15 (3) of Act IV of 1938. The petition was rejected by the Special Deputy Collector. I think his order was right. S. 15 (3) no doubt exempts from consideration any agreement or any payment under S. 64 of the Madras Estates Land Act and enacts that "any payment of rent made by a tenant after the commencement of this Act shall be credited towards the rent due by him for fasli 1347." But sub-S. (3) is necessarily part of the main S. 15 and the proviso to sub-S. 1 of S. 15 quite clearly states that "no tenant shall have the benefit of this section", which must include in my judgment sub-S. (3), "unless he has paid in respect of his holding the rent due for fasli 1347 on or before the 30th September, 1938."

That had not been done in this case because the rent was paid on the 3rd December, 1938. It was argued that sub-S. (3) was a self-contained enactment and must be read by itself disregarding the rest of the section. It seems to me a strange proposition that when the beginning of a section expressly excludes from the whole operation of the section a person who has not satisfied a certain condition it should afterwards be argued that a sub-section of that section should be read entirely by itself. For this reason I consider that the order of the Special Deputy Collector was right and this petition must be dismissed with costs.

It has been further argued that the petitioner is not entitled to the benefit of this Act at all because he does not come under the conditions in S. 15 (1) there being no arrears

for 1345 fasli or before; but I do not consider it necessary to decide this point in view of my decision on the main point argued.

Narasimha Nayanim Varu v. Venkatarama Naidu Garu.

K. S. —— *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ROMER, LORD PORTER AND SIR GEORGE RANKIN.

Jugal Kishore Narain Singh, since deceased (now represented by Ram Chandra Prasad Singh and others) .. *Appellants**

v.

Charoo Chandra Sur and others .. *Respondents.*

P.C.

Jugal Kishore Narain Singh v. Charoo Chandra Sur.

Pardanashin lady—Execution of lease deed—Knowledge of contents—Burden of proof—Lady having derived advantage—Avoidance by reversioner.

It is of course true that the onus is upon one who sets up the validity of a lease granted by a pardanashin lady to prove that she understood the nature and effect of her act. But where no plea challenging the validity of the lease is made in the written statement the Court would be loth to entertain such a plea in a case where no complaint was made by the lady during her lifetime and where she had received and enjoyed the benefit of the rent for a number of years before her death. The contention that the lease was neither prudent nor for the benefit of the estate would not avoid the lease but merely make it voidable at the option of the reversioners on the determination of the life interest.

Appeal from a judgment and decree of the High Court of Judicature at Patna.

S. Hyam for Appellants.

W. Wallach for Respondents.

21st March, 1939. Their Lordships' judgment was delivered by

Lord Porter.

LORD PORTER.—The question for determination in the present case is whether a lease of a certain village in the district of Gaya in Behar is binding on the respondents.

The land involved had been the property of one Nebaran Chandra Biswas who died without issue leaving a widow Mussamat Srimati Kiransasi Dasi who had a Hindu widow's estate in the property after his death. On her death the respondents who were the reversioners of the estate to her late husband were entitled to the property.

* P. C. Appeal No. 18 of 1937. 21st March, 1939.
Patna Appeal No. 75 of 1931.

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The husband died in 1895. His widow was then about 24 years of age. On the 7th April, 1919, she executed a lease for 11 years of the village of Chokti Amarwan, Thana Nawaba in favour of the predecessor of the appellants at a yearly rent of Rs. 3,350 payable in five annual instalments. The lease provided that the tenant should deposit a sum of Rs. 3,350 to be held by the lessor without interest and that this sum should be restored to the tenant by a deduction from the three last instalments payable in each of the two last years of the lease. It also contained a number of covenants by the tenant imposing upon him obligations as to the cultivation, management and improvement of the land together with a liability to meet the outgoings except Government dues and to undertake the expense of certain costs of litigation.

The lease contains a statement signed by Amulya Krishna Mitra, pleader, Howrah Court, that it was read over and explained to the lessor, and it further bears an endorsement signed presumably by the Registrar of Calcutta or his representative to the effect that the lessor admitted the execution and that the Registrar was satisfied that the document had been executed voluntarily by her. The lease did not come to an end until May, 1930, and the widow died on the 12th September, 1924, some six years before its termination. After her death the appellants' predecessor admittedly remained in possession of the property until December, 1926, when the respondents dispossessed him.

Meanwhile on the 20th December, 1924, two of the respondents, namely, Prasanna Kumar Sur and Charoo Chandra Sur, executed a power of attorney in favour of Narendra Nath Neogi, the fourth defendant. The power of attorney is a limited one but at any rate entitled the grantee to collect money and give a receipt for it. The third defendant was not a party to this document but it appears from the evidence that he also gave a power of attorney which however was returned to him about a year after its execution and was not acted upon after that time.

Whatever the effect however of the powers of attorney, the fourth defendant appears to have managed the affairs of his co-defendants, including all that had to be done under the lease now in dispute, and to have received the rent payable under it. He so stated in evidence and was not contradicted and receipts

dated the 4th November, 1925, and in March, June, July, September and October, 1926, were produced by him in corroboration of his story.

Shortly after the appellants' predecessor was dispossessed, a ryot of certain land in the village the subject-matter of the lease, instituted proceedings before the Sub-divisional Officer of Nawadah against the respondents asking for the division of the produce of the land between himself and the landlords under S. 69 of the Bengal Tenancy Act, 1885. About the same time the appellants' predecessor began proceedings under the Code of Criminal Procedure alleging that he feared a breach of the peace by the respondents in connection with his possession of the village. In both these proceedings the respondents filed petitions in opposition alleging that the lease had terminated on the death of the widow, that they had thereafter orally granted two successive yearly leases to the appellants' predecessor, and that on the termination of the second had taken peaceful possession of the said village.

Thereafter on the 1st September, 1929, the appellants' predecessor instituted the present suit claiming mesne profits from the date of dispossession until the termination of the lease and a return of the deposit made in respect of rent at the beginning of the lease. In answer to that claim the respondents asserted that the widow did not act as a prudent manager in making the lease nor was it for the benefit of the estate, denied that they ever conferred any power or authority to the fourth defendant to ratify or grant leases, denied that they had themselves ever ratified the lease in question and said that they had withdrawn the powers of attorney, whatever their effect, by the 6th June, 1927. The defence contained no allegation that the widow had not properly understood or had not voluntarily executed the lease.

At the hearing of the suit the Subordinate Judge framed certain issues of which the following may be quoted:—

(2) Was the lease in question for justifying necessity and for the benefit of the estate ?

(3) Did the respondents grant yearly leases to the plaintiff during the years 1332, 1333—that is, 1925 and 1926?

(4) Did the respondents 1 to 3 ratify and affirm the lease?

(5) Was the appellants' predecessor wrongly dispossessed from the year 1927 ?

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(7) Was the appellants' predecessor entitled to mesne profits?

(8) To what relief, if any, was the appellant's predecessor entitled?

To these issues he answered that in the circumstances the lease was for justifying necessity and for the benefit of the estate, that the respondents had not granted yearly leases but had ratified and affirmed the original lease, that the appellants' predecessor was wrongly dispossessed from the year 1927 and that he was entitled to mesne profits and the return of three-quarters of the deposit.

On the 16th June, 1928, and before the date of the suit, the fourth defendant had sold his quarter share in the village to the appellants' predecessor. After the hearing he died and his name has been deleted from the record.

From the decree of the Subordinate Judge the other three defendants appealed to the High Court at Patna. Pending the hearing of the appeal the first defendant Prasanno Kumar Sur settled his differences with the appellants' predecessor and filed a compromise petition. The appeal was then proceeded with by the second and third defendants only.

The High Court allowed the appeal on two grounds. By the judgment which was delivered by Varma, J., it was held in the first place that the lease had not been ratified. That judgment did not in terms deal with the question whether the respondents had, as found by the Subordinate Judge, orally ratified the lease. The decision on this point was based solely on the fact that the only power of attorney produced was signed by two and not three of the respondents and that in any case it gave no power to grant or ratify leases and therefore, although the appellants' predecessor continued in possession for about two years after the death of the lessor, there was no ratification.

In the second place it was held that upon the evidence produced there was nothing to show that the lessor who was a purdanashin lady understood the nature of the transaction into which she was entering, and that amongst other things she had never been informed that in the lessee's view the property was capable of yielding an increased income of 50 to 100 per cent. as a result of a relatively small expenditure. It was therefore

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held that the lease was not only voidable as against the reversioners under the first ground, but void even as against the widow under the second.

So far as this latter ground is concerned their Lordships do not think it was open to the respondents to rely upon it in the High Court or before the Board. Such a plea if successful would avoid the lease *ab initio*. It is of course true that the onus is upon one who sets up the validity of a lease granted by a purdanashin lady to prove that she understood the nature and effect of her act. See *Farid-un-nisa* v. *Mukhtar Ahmad*1. But no plea challenging the validity of the lease was made in the defendants' written statement and their Lordships would be loth to entertain such a plea in a case where no complaint was made by the lady during her lifetime, and where she had received and enjoyed the benefit of the rent for a number of years before her death.

The contention that the lease was neither prudent nor for the benefit of the estate would not avoid the lease but merely make it voidable at the option of the reversioners on the determination of the life interest.

Their Lordships have therefore first to determine whether the lease was prudent and beneficial, and secondly, if it was not proved to be so, whether the reversioners avoided or affirmed it.

The appellants urged that the lease was both prudent and beneficial. The evidence, they maintained, proved that the lady, being purdanashin and living in Calcutta whereas the estate was in the heart of Behar, would herself have great difficulty in managing it, that she had no relations competent to look after it, that the village was in fact not properly managed and the irrigation neglected, that the tenants were in many cases refractory, and that some half dozen litigious cases were pending between them and their landlady.

On the other hand the respondents contended that the evidence showed no exceptional difficulty in managing the estate, that the pending suits were mere assertions of the tenants' legal rights to have the produce of their holdings equitably apportioned between them and the lessor, and that even if it were true that the irrigation was somewhat neglected, much better terms could have been obtained from a lessee more

1. (1925) 49 M.L.J. 758: L.R. 52 I.A. 342: I.L.R. 47 All. 703 (P.C.).

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especially as the appellants' predecessor by an expenditure of some eight or nine hundred rupees was able, on his own evidence, to increase the rent which he in his turn received from the occupiers to a sum of 9,000 to 12,000 rupees yearly. Moreover they said the lady had received Rs. 3,350 which in effect was advance rent and as a result her successors in each of the last two years of the tenancy would receive not Rs. 3,350 but that sum less Rs. 1,675, that is, Rs. 1,675 only.

Their Lordships are not convinced that the lease was either prudent or beneficial to the estate. In their view the management of the estate was not so difficult as to warrant the granting of a lease which after the expenditure of a relatively small sum left so large a profit in the hands of the grantee, and they are also influenced by the fact that the widow had received a sum of Rs. 3,350 which under the terms of the lease would diminish the rent receivable by that amount in the last two years during which it would run.

There remains however the question of confirmation. As to this the appellants submitted that though the power of attorney given to the fourth defendant which was produced bound only two of the three other defendants, yet a similar power of attorney was proved to have been given by the third defendant, and though these powers of attorney did not authorize the fourth defendant to grant or confirm leases yet they did authorize him to receive rent, that in fact the respondents left the fourth defendant to manage the estate for two years and must have known of the lease and that their manager was permitting the appellants' predecessor to continue to occupy the estate and receiving rent under it, and that the evidence established that all four defendants had orally confirmed the lease.

Out of the three defendants in question the first alone gave evidence, but it was maintained on their behalf that the Board should accept his statement that those three defendants never knew of or received any rent under the lease and that the lessee continued to hold not under the lease but under an oral agreement for a yearly tenancy.

Their Lordships are not prepared to accept the view that there was a specific affirmation of the tenancy either by the four defendants or indeed by the fourth defendant alone, nor do they place credence on the evidence that there was any agreement for a yearly tenancy. In their view the true inference is that *the*

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defendants were content to permit the fourth defendant to manage the estate and receive the rent with full knowledge of the existence of the tenancy, and that it was only when the lease was running to its end that, realizing the diminution in the rent which they were about to receive, they determined to put an end to the lease and dispossess the tenant. Their Lordships cannot accept the view that the tenant would without protest have accepted a yearly tenancy for so long as the respondents chose to grant one thereby foregoing all the advantage of the deposit which he had made.

It is said that this was not the case originally presented on behalf of the appellants, that the only contention was that the lease had been specifically affirmed and that their Lordships' Board should hold them strictly to the wording of the plaint. In their Lordships' opinion however an affirmation by conduct is not inconsistent with the contention and is implicit in the claim.

In support of his case the appellants' predecessor, in addition to producing the receipts for rent given him by the fourth defendant, put before the Court a wasilbaki account dated the 2nd April, 1925, and purporting to be a settlement of accounts in respect of the years 1923, 1924 and part of 1925. This document contains credits for payment of rent in respect of periods before and after the death of the widow and treats them as part of one running account. It is therefore said to show a recognition and affirmation of the lease. Their Lordships are not however prepared to accept this evidence. There is force in the argument presented by the respondents that if this account had been as it purported to be, in existence at the time of the proceedings before the Sub-divisional Officer it would then have been produced in support of the appellants' predecessor's claim that he was entitled to possession of the village. But even if it was then in existence, the fourth defendant did not write it himself nor did he fully understand the language in which it was written, and it is by no means clear that it was prepared with the assent of the other three defendants.

Apart from the support of this document however, their Lordships take the view that the evidence sufficiently established that the defendants were content to treat the lease as binding upon them and to receive the rent due under it. The High Court in coming to their conclusion do not appear to have con-

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sidered the question of affirmation by conduct. In terms, at any rate, all they purported to decide was that the power of attorney or powers of attorney gave no authority to the fourth defendant to confirm the lease. That finding no doubt is accurate, but for the reasons given it is not conclusive of the matter.

If then, as their Lordships think, the appellants' predecessor was entitled to enjoy the lease until the end of the term, there remains the question as to how the mesne profits are to be calculated. The learned Subordinate Judge has passed a decree for a refund of three-quarters of the deposit of Rs. 3,350 and for mesne profits for the years 1927 to 1930, crediting, however, the first three defendants with any collection of rent made by the plaintiff for the year 1927.

In substance this decree is right but in form it is wrong. The appellants are not entitled to a return of the deposit or any portion of it. They are, however, entitled in taking an account of the mesne profits to the difference between the rent the respondents would have received had their predecessor been left in possession, and the amount which those respondents in fact received whether in money or kind or otherwise by reason of their possession of the estate. The rent which they would have received from the appellants' predecessor, however, would not have been Rs. 3,350 in each of the last two years, but Rs. 1,675 only.

Upon this basis the appellants are entitled to mesne profits for the period beginning with the date at which their predecessor was dispossessed and ending with the termination of the lease together with interest on such mesne profits—Interest should be at 5 per cent. and calculated yearly. But they are not entitled to the whole 16 anna share since the first and fourth defendants have now compromised the matter. They should therefore receive only an 8 anna share of the total amount ascertained as aforesaid.

In substance the appellants have succeeded in their appeal and should receive costs both before their Lordships' Board and in the High Court.

In accordance with the views they have expressed their Lordships will humbly advise His Majesty that the appeal be allowed, the decree of the High Court be reversed, the decree of the Subordinate Judge be varied, that the suit be decreed against the second and third defendants for half of the mesne

profits accruing to the respondents by reason of the dispossession of the appellants' predecessor from the beginning of the *fasli* year 1334 to the end of the *fasli* year 1337 together with interest thereon at 5 per cent. calculated yearly—half the collection of rent (if any) made by the appellants' predecessor for the *fasli* year 1334 to be calculated in favour of the respondents.

The decree of the Subordinate Judge as to costs will be restored and the respondents must pay the appellants' costs in the High Court and before their Lordships' Board.

Solicitors for Appellants: *Barrow, Rogers & Nevill.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

R. C. C. —— *Appeal allowed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

A. R. A. N. Thyagarajan Chettiar, Trustee of Sri Koppudayanayagi Amman Temple, Karaikudi .. *Petitioner**

v.

The Secretary to Government of Madras, Revenue Department, Fort St. George, Madras and others .. *Respondents.*

Madras District Municipalities Act (V of 1920), S. 36—Power of Provincial Government to control the action of Municipal Councils—If Courts have power to issue writ of certiorari against the Government exercising the power.

A Municipal Council decided to reduce the size of a tank opposite a temple which they considered insanitary; the trustees of the temple moved the Provincial Government to interfere under S. 36 of the Madras District Municipalities Act and direct the tank to be restored to its original size. The Government varied the order of the Municipal Council and directed the reduction of the tank to a smaller extent. Then the Government after hearing the Municipality cancelled its previous order. In an application for the issue of a writ of *certiorari* against the Government to quash the order cancelling the first order,

Held, the Provincial Government has full power under S. 36 of the Madras District Municipalities Act to control the action of a Municipal Council. All executive action of the Government of a Province are, by virtue of S. 59 of the Government of India Act, 1935, required to be taken in

* C. M. P. Nos. 2506 and 2507 of 1939. 31st July, 1939.

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the name of the Governor and the order in question being an executive order lawfully passed and issued in the name of the Governor, it becomes his order. It is impossible to differentiate between the Governor and the Provincial Government and the Court has therefore no power to issue a writ of *certiorari*.

Penugonda Venkataratnam v. *Secretary of State for India in Council*, (1929) 60 M.L.J. 25: I.L.R. 53 Mad. 979, followed.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to direct the issue of writ of *certiorari* calling upon the first respondent herein to submit to the High Court the proceedings relating to the order dated 5th June, 1939 made in G. O. No. M. 1380 and to quash the said order and to restrain the second and third respondents herein by an injunction from further filling up the tank referred to in the said G. O. No. 1380 and demolishing the structure and steps therein and etc.

L. S. Veeraraghava Aiyar and *N. Srinivasa Aiyangar* for Petitioner.

The Government Pleader (*B. Sitarama Rao*) for the Government.

K. Bhashyam Aiyangar and *V. P. Chakravarthi Aiyangar* for Respondents.

The order of the Court was made by

Leach, C.J.

The Chief Justice.—The petitioner is the trustee of the Sri Koppudayanayagi Amman temple, Karaikudi. In front of this temple and vested in the Municipal Council of Karaikudi is a tank, measuring 266 feet by 272 feet. The tank was in insanitary condition and the cost of putting it into a proper condition and of so maintaining it was said to be too costly. Consequently the Municipal Council decided to reduce the size of the tank to 125 feet by 125 feet. The petitioner objected, and moved the Provincial Government to interfere under the powers conferred upon it by S. 36 of the Madras District Municipalities Act, 1920. He asked for a direction that the tank be maintained at its original size. As the result of the petitioner's representations the Government decided that the Municipal Council should only reduce the size of the tank to 218 feet by 208 feet. The Municipal Council had not been given an opportunity of stating its case and it applied to the Government to revise its order. After hearing what the Municipal Council had to say the Government, by an order dated the 5th June, 1939, cancelled its previous order and allowed the Municipal

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Council to reduce the size of the tank to 125 feet by 125 feet, as it had proposed. The petitioner now asks the Court to issue a writ of *certiorari* against the Government and quash its order of the 5th June, 1939. The order, as required by S. 59 of the Government of India Act, 1935, was issued in the name of the Governor of the Province. In *Penugonda Venkataratnam* v. *Secretary of State for India in Council*[1], a Bench of this Court held that the Court had no jurisdiction to issue a writ against the Governor under S. 106 (1) of the Government of India Act, 1915, and no jurisdiction to issue a writ against the Governor "acting with the Ministers," which was the application in that case. The petitioner says that inasmuch as he is not asking for a writ to issue against the Governor, but only against the Provincial Government, his application does not fall within that decision and that it lies by reason of the provisions of the Government of India Act, 1935. He contends further that the Government has no power to revise its own order.

The position under the Government of India Act, 1935, is not here different from the position under the Government of India Act, 1915, and it is abundantly clear that this Court has no power to issue a writ of *certiorari* in this case. By virtue of S. 223 of the Government of India Act, 1935, this Court possesses just the same powers as it had before that Act came into force. By virtue of S. 106 (1) of the Government of India Act, 1915, it had the jurisdiction and powers vested in it by the Letters Patent. In order to ascertain what those powers were we have got to go back to the provisions of the Charter of the Supreme Court, which was granted on the 26th December, 1800. The Charter of the Supreme Court expressly provided that it was not competent for the Court to hear or determine, or entertain or exercise jurisdiction in a suit or action against the Governor-General or Fort William, or the Governor, or any member of the Council for or on account of anything done by them in their public capacity or " acting as Governor-General, or Governor and Council." The Supreme Court was replaced by the High Court after the passing of the Indian High Courts Act, 1861. S. 9 of that Act provided that the High Courts established under the Act should have and exercise such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and such

1. (1929) 60 M.L.J. 25: I.L.R. 53 Mad. 979.

powers and authority for and in relation to the administration of justice in the Presidency for which it was established as Her Majesty might grant and save as the Letters Patent might otherwise direct and, subject and without prejudice to the legislative powers of the Governor-General of India in Council in relation to such matters, should have and exercise the jurisdiction of the Courts in the same Presidency abolished by the Act. The Letters Patent granted to this Court under that Act did not enlarge the powers of the Court by taking away the restrictions imposed by the Charter of the Supreme Court. The restrictions consequently remained. S. 110 of the Government of India Act, 1915, expressly provided that the Governor-General, each Governor, and the members of their respective executive councils should not be subject to the jurisdiction of a High Court by reason of anything counselled, ordered or done by any of them in his public capacity only. The corresponding section in the Act of 1935 is S. 306 which states that no proceedings whatsoever shall lie in and no process whatsoever shall issue from any Court in India against the Governor-General, against the Governor of a Province or against the Secretary of State whether in a personal capacity or otherwise. There are these statutory provisions and the prohibition in the Supreme Court Charter a prohibition which was not removed by the Letters Patent of the High Court. The position in this respect is therefore the same as it was in 1800.

While accepting this to be the case so far as the Governor is concerned the learned Advocate for the petitioner says that by virtue of S. 49 of the Government of India Act, 1935, he is entitled to the issue of the writ against the Provincial Government. S. 49 says that the executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him, but nothing in the section shall prevent the Federal or the Provincial Legislature from conferring functions upon subordinate authorities or be deemed to transfer to the Governor any functions conferred by any existing Indian Law on any Court, Judge, or officer or any local or other authority. It is argued that this section expressly prevents the Governor from issuing an order under S. 36 of the Madras District Municipalities Act, 1920, and that the Provincial Government alone can issue it. This is a far-fetched argument. The Provincial Government has full

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power under S. 36 of the Madras District Municipalities Act, 1920, to control the actions of a Municipal Council. S. 59 requires all executive action of the Government of a Province to be taken in the name of the Governor and the order in question, being an executive order lawfully passed and lawfully issued in the name of the Governor and therefore his order, the Court has no power to interfere with it. It is impossible to differentiate between the Governor and the Provincial Government in a matter of the nature of the one now before us. S. 49 has no bearing on the question.

Even if this Court has power to issue a writ of *certiorari* in this matter—I am firmly of the opinion that it has not—this is not a case in which it should exercise it. The order was within the limits of authority and it cannot be said with reason that the Government has no power to cancel or vary its own executive order. If it had not this power a wrong would be without a remedy, which is contrary to all principle.

For the above reasons this application must be dismissed with costs, two sets, one set in favour of the first respondent and the other set in favour of the other two respondents.

Pending the hearing of this application an interim injunction was issued restraining the Chairman and the Commissioner of the Municipality, the second and the third respondents, from further filling up the tank. As the result of the dismissal of this application the injunction will be dissolved. The second and third respondents are entitled to their costs in the injunction application.

Memo. of costs will follow.

S.V.V. —— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Akuthota Byra Goudu .. *Appellant* (1st Defendant)*

v.

Muniammal and another .. *Respondents (Plaintiff and 2nd Defendant).*

Byra Goudu v. Muniammal.

Hindu Law—Adoption—Authority to adopt—Power given to two co-widows—Mode of exercise—Preferential right of senior widow.

A Hindu testator provided by his will as follows: "If after my lifetime both of you (that is, his two wives) do not agree to live together dividing the properties into two equal halves, you shall separately make adoptions. . . . ."

* S. A. No. 95 of 1936. 25th April, 1939.

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Held, that the proper inference to be drawn was that the testator authorised each of the widows to adopt, the procedure contemplated being that prescribed by the ordinary rules of Hindu law, namely, that the senior widow should have the right to adopt which would pass to the junior widow only if the senior widow refused to adopt or consented to an adoption by her co-widow.

Akhoy Chunder Bagchi v. *Kalapahar Haji*, (1885) L.R. 12 I.A. 198: I.L.R. 12 Cal. 406 (P.C.); *Bijoy Krishna Karmakar* v. *Ranjit Lal Karmakar*, (1911) I.L.R. 38 Cal. 694; *Ranjit Lal Karmakar* v. *Bijoy Krishna Karmakar*, (1912) I.L.R. 39 Cal. 582 and *Rajah Venkatappa Nayanim Bahadur* v. *Ranga Rao*, (1915) 29 M.L.J. 18: I L.R. 39 Mad. 772, considered.

Appeal against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 9 of 1935 preferred against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 103 of 1933.

D. R. Krishna Rao for Appellant.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the validity of an adoption. The properties in question formed part of the estate of one Sampanghi Rame Gowdu who had a son, Byre Gowdu. The father and the son separated and it was agreed as one of the terms of the partition that the father's estate should be held during his lifetime by his second wife Lakshmakkal and on her death should go to Byre Gowdu, the son by the first wife. Lakshmakkal during her lifetime transferred those properties to her nephew the first defendant. Byre Gowdu had two wives, the first was the plaintiff and the second was one Ramakkal. Neither of them had any children. Byre Gowdu died in 1909 leaving a will which concludes with the following sentence:

"..... if after my lifetime, both of you (that is, the two wives) do not agree to live together dividing the said properties into two equal shares, you shall separately make adoptions. ......"

Apparently this was regarded as giving each of the widows power to adopt without regard to the other. At any rate in 1909 shortly after the death of Byre Gowdu, the junior widow, Ramakkal adopted the second defendant. There is no doubt about the fact of the adoption, which is embodied in a deed, Ex. II. At the time of the adoption, the two wives who are sisters were living together. The plaintiff made no objection to the adoption; but it has been found as a fact that she did not

consent to it. The adopted son lived with the two widows for many years without his status being questioned. However, after the first defendant got a transfer of Lakshmakkal's property, he also got a surrender from the second defendant of the latter's interest thereon. Ramakkal died in 1930 and Lakshmakkal died in 1932. Byre Gowdu's father had died long before. So that at the time of the suit there were living, the plaintiff who is the senior widow of Byre Gowdu, the second defendant adopted by the junior widow Ramakkal and the first defendant, the nephew and transferee of Byre Gowdu's father's second wife.

We are no longer concerned with the plaintiff's right to the half of Lakshmakkal's property which goes to her as the widow of her husband. The appeal relates only to the right of the plaintiff to the half of the property which would have devolved upon Ramakkal had she been alive when Lakshmakkal died and is now claimed to have devolved upon the first defendant by reason of the surrender by the second defendant, the adopted son of Ramakkal.

The main question in the appeal is whether this adoption was valid. Fortunately there is no longer any difficulty about the facts and the only trouble relates to the effect of the provision in Byre Gowdu's will, Ex. B, which has already been extracted authorising each of the widows to adopt. It seems to me that this difficulty can be resolved by reference to authorities. The Privy Council in *Akhoy Chunder Bagchi* v. *Kalapahar Haji*[1], dealing with a case in which two widows were each authorised to make adoptions and in pursuance of that authority made simultaneous adoptions, held firstly that the instrument should be construed on the assumption that the person giving the authority intended his widows to do that which the law allowed and not to do something which was if not absolutely illegal, very unusual and not practiced among Hindus. Secondly, their Lordships held that simultaneous adoptions by two widows were contrary to law.

Next there is the case of *Bijoy Krishna Karmakar* v. *Ranjit Lal Karmakar*[2], the decsion being confirmed in appeal by the Bench whose judgment is reported in *Ranjit Lal Karmakar* v. *Bijoy Krishna Karmakar*[3]. That case concerned an instrument

1. (1885) L.R. 12 I.A. 198: I.L.R. 12 Cal. 406 (P.C.).
2. (1911) I.L.R. 38 Cal. 694.
3. (1912) I.L.R. 39 Cal. 582.

Byra Goudu v. Muniammal.

which authorised two widows to act according to their religious tenets by adopting three sons successively. It was held following the Privy Council decision just cited that the instrument must be read not as authorising an illegal simultaneous adoption but as giving power of adoption to the widows successively and that this being so the elder widow had the prior right to exercise the power of adoption and that the younger widow had no right to adopt before the elder widow had exhausted her right or refused to use it. The reasoning is that such a construction is not contrary to the terms of the instrument and is in accordance with the ordinary rule of Hindu law, which may be assumed to have been in the mind of the person giving the authority at the time when the instrument was drafted. The confirming decision has been quoted with approval in a Madras case *Rajah Venkatappa Nayanim Bahadur* v. *Ranga Rao*[1], though the point actually arising in that case was rather different.

It seems to me that these decisions dispose of the contention that the adoption of the second defendant by Ramakkal was valid. Ex. B on its face might be read as authorising each of the widows to make an adoption either simultaneously or one after the other, in which case there might be living contemporaneously two adopted sons to one man, a notion repugnant to Hindu law. Similarly it is contrary to the ordinary rule of Hindu law that when there are two widows they should be permitted to indulge in an unseemly scramble for priority in adopting a son to their deceased husband, the rule being that in such a case the senior widow should have the right which will only pass to the junior widow if the senior widow refuses to adopt or consents to an adoption by her co-widow. Applying this rule to the construction of Ex. B, we must, I think, infer an intention to authorise each of the widows to adopt, the procedure contemplated being that prescribed by the ordinary rules of Hindu law whereby the refusal to adopt by the senior widow or her consent would be a necessary preliminary to a valid adoption by the junior widow. On the findings of fact it must be held that there was no such refusal to adopt by the plaintiff nor was there any consent to the adoption. It follows that the adoption is invalid.

1. (1915) 29 M.L.J. 18: I.L.R. 39 Mad. 772.

It has also been contended that the second defendant would be entitled to the property if not as an adopted son at least as a *persona designata.* There is no force in this contention. The deed of adoption Ex. II makes it clear that the rights thereby conferred upon the second defendant are conferred solely and only by virtue of the adoption made under it. It is not the case of a gift to an individual with an erroneous description of that individual but a case of the performance of a formal act by virtue of which, the rights in the property would accrue. The formal act being invalid no rights can pass under it.

In the result therefore the appeal is dismissed with costs of the first respondent (plaintiff).

Leave to appeal is refused.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR, JUSTICE PATANJALI SASTRI.

Rekanti Chinna Govinda Chettyar and others .. *Appellants** (*Plaintiffs*)

v.

S. Varadappa Chettyar and others .. *Respondents* (*Defendants*).

Civil Procedure Code (V of 1908), O. 47, r. 1—Misapprehension of counsel in not urging all his arguments in support of a finding and consequent erroneous decision of Subordinate Judge that there were no arguments to meet points urged on other side—If error apparent on the face of the record—Review.

The misapprehension owing to which respondent's counsel did not urge all his arguments in support of the finding recorded in favour of his clients by the first Court and the consequent erroneous decision on the part of the Subordinate Judge that the counsel had no arguments to urge to meet the points raised by the appellant's counsel are analogous to errors apparent on the face of the record so as to be a sufficient reason for review under O. 47, r. 1, Civil Procedure Code.

Kyone Hoe Tsee v. *Kyon Soon Sun,* (1925) I.L.R. 3 Rang. 261 at 267 and *Nagabhushanam* v. v. *Jagannaikulu,* (1925) 49 M.L.J. 671, applied.

Appeal against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 52 of 1933 preferred against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 264 of 1931.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellants.

K. S. Sundaram for Respondents.

* S. A. No. 494 of 1936. 15th August, 1939.

Govinda Chettyar v. Varadappa Chettyar.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit brought by the appellants for a declaration of their title to the wall existing between their house and the house belonging to the respondents and for an injunction restraining the respondents from letting the water from the terrace of their house into the appellants' property.

The trial Court dismissed the suit and on appeal the parties filed a joint memo. agreeing to a certain arrangement regarding the disposal of the water falling from the terrace of the respondents' house and this arrangement was directed to be incorporated in the decree and no question now arises as to that part of the case. As regards the wall in dispute, the learned Subordinate Judge found that it belonged to the appellants and accordingly decreed that part of the appellants' claim. This was on the 23rd September, 1935. After the judgment was signed and the decree also was issued in accordance with the judgment, the respondents filed I. A. No. 68 of 1935 on the 15th of October, 1935, in which they prayed for a re-hearing of the appeal. The ground of the prayer was that though the trial Court had found that the wall belonged to the respondents, their advocate represented to the Court that they would have no objection to the wall being held to be a common wall and that under the impression that the Court would, in consequence of this concession, give a finding accordingly, he did not meet the points mentioned by the appellants' advocate, though he had arguments to urge in support of the finding of the trial Court. The respondents having denied the allegations in the appellants' affidavit in support of the prayer for re-hearing, the lower appellate Court apparently called for a statement from the Counsel on both sides as to what exactly happened at the previous hearing and a joint statement was filed on the 30th of October, 1935, and this was supplemented by a further explanatory statement by the respondents' Counsel. Thereupon, the Court below passed the following order on I. A. No. 68 of 1935 on the 31st of October, 1935:—

"In view of the joint statement filed by the learned Advocates that appeared for the parties and of the explanatory statement filed by the learned Advocate for the applicant, I think it fair and just that he should be given an opportunity to argue his case fully. The appeal will therefore be posted for re-hearing on 21st November."

The appeal was thus re-heard and the learned Subordinate Judge came to the conclusion that the wall in dispute was a

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common wall belonging to both the parties and passed a decree accordingly in supersession of his earlier decree.

The present appeal is directed against the decree passed on re-hearing and the only point urged by the learned Counsel for the appellants is that the lower appellate Court had no jurisdiction after it delivered and signed the judgment on the 23rd September, 1935, to alter it in any manner, in view of the provisions of O. 20, r. 3, Civil Procedure Code, and that therefore the revised decree passed by the lower appellate Court as a result of the re-hearing on the 21st November, 1935, is one passed without jurisdiction and cannot stand. The appellants' Counsel has relied upon several decisions showing that after a judgment has been signed by the Judge, he has no authority to alter it except as provided by S. 152 or O. 47 of the Code of Civil Procedure. But it is unnecessary to discuss these decisions as, in my view, the respondents' contention that the present case could be regarded as coming within the provisions of O. 47 and that though this provision was not referred in the respondents' application for re-hearing, I. A. No. 68 of 1935, the decree of the Court below can be sustained as one made on review, is correct and must be accepted in the circumstances of the case.

The appellants' counsel objects that having regard to the Privy Council decision in *Chhaju Ram* v. *Neki*[1], holding that the expression "any other sufficient reason" in O. 47, r. 1 must be taken as meaning "a reason sufficient on grounds at least analogous to those specified immediately previously," the power of review conferred by that provision cannot appropriately be invoked in this case. I am unable to agree. I cannot see why the facts disclosed in the statements of the learned Counsel who appeared for the parties in the Court below which were accepted and acted upon by that Court should not be held to be a sufficient reason for reviewing the judgment delivered on 23rd September, 1935, even according to the restricted interpretation placed upon r. 1 of O. 47 in *Chhaju Ram* v. *Neki*[1]. There was of course no mistake or error apparent on the face of the record in this case. If there were, that would obviously be a sufficient ground by itself for a review. But the misapprehension owing to which the learned Counsel for the respondents says he did not urge all his arguments in support of the finding recorded in favour of his clients by the first Court, and the

1. (1922) 43 M.L.J. 332: L.R. 49 I.A. 144: I.L.R. 3 Lah. 127 (P.C.).

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consequent erroneous impression on the part of the learned Subordinate Judge for which, of course, he was not at all to blame but the Counsel was alone responsible—that the latter had no arguments to urge to meet the points raised by the appellants' Counsel seem, to my mind, to be analogous enough to an error apparent on the face of the record to be a sufficient reason for review under O. 47, r. 1, Civil Procedure Code. The decisions in *Kyone Hoe Tsee* v. *Kyon Soon Sun*[1] and *Nagabhushanam* v. *Jagannaikulu*[2], which recognise a power of review in cases of mistake of Counsel or mistake of the Judge leading to errors in the judgment though not apparent on the face of the record, seem to support this conclusion.

The appeal therefore fails and is dismissed with costs.

No leave.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUNHI RAMAN.

Maddali Tirumala Ananta Venkata Veeraraghavaswami .. *Petitioner** (*Plaintiff*)

v.

Srimat Kilambi Mangamma and another .. *Respondents* (*Defendants*).

Veeraraghavaswami v. Mangamma.

Negotiable Instruments Act (XXVI of 1881), S. 78—Beneficial owner of amount due on promissory note—Whether entitled to a decree on the promissory note.

Where the plaintiff claimed to be the beneficial owner of the amount for which a promissory note was executed by the second defendant in favour of the first defendant and claimed a decree against the second defendant,

Held, that S 78 of the Negotiable Instruments Act should be strictly construed and a valid discharge can be given only by the payee of the promissory note or the holder thereof, there being no such thing for this purpose as a *benami* promissory note taken in the name of one person but really meant for another. The plaintiff cannot have a decree.

Subba Narayana Vathiar v. *Ramaswami Aiyar*, (1906) 16 M.L.J. 508: I.L.R. 30 Mad. 88 (F.B.) and *Chinna Kushandai* v. *Kushandai Veeraswami*, (1934) 68 M.L.J. 713: A.I.R 1935 Mad. 312, followed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Razole in S. C. S. No. 769 of 1935.

Valluri Parthasarathy for Petitioner.

V. Viyyanna and *Jiddu Lakshmayya* for Respondents.

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1. (1925) I.L.R. 3 Rang. 261 at 267.
2. (1925) 49 M.L.J. 671.

* C. R. P. No. 1567 of 1938. 18th August, 1939.

Veeraraghavaswami v. Mangamma.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner. He claimed to be the beneficial owner of the amount for which a promissory note was executed by the second defendant in favour of the first defendant. The trial Court has disbelieved the plaintiff's case against the first defendant. The finding of the trial Court is recorded in these terms:

"I find disbelieving the evidence on behalf of plaintiff that the arrangement set up by plaintiff with reference to the suit pronote, Ex. B is not true, that first defendant had nothing to do with it, that she was not a trustee in respect thereof, and that she cannot be in any manner made liable for the amount due on the pronote Ex. B."

This finding so far as the first defendant is concerned cannot be seriously questioned, seeing that it is a finding of fact which is based upon the evidence placed before the trial Court.

At the trial, the plaintiff wanted a decree against the second defendant on this promissory note. The trial Court has held following certain decisions of this High Court that in view of the provisions of S. 78 of the Negotiable Instruments Act, since the plaintiff was neither the payee nor the holder of the promissory note in question, a decree could not be passed in plaintiff's favour and against the maker of the promissory note. This finding of the trial Court is attacked by the learned Advocate for the plaintiff-petitioner. He relies upon the decisions reported in *Surajman Prasad Misra* v. *Sadanand Misra*[1], *Sewa Ram* v. *Hoti Lal*[2], *Brojo Lal Saha Banikya* v. *Budh Nath Pyarilal & Co.*[3] and argues that, although a valid discharge in respect of a promissory note can be given only by the payee or the holder thereof, yet when the maker of the note, the holder of the note and the person who alleges that he is beneficially entitled to the amount of the note are all before Court, there is nothing wrong in the Court deciding the question of *benami* raised by the parties and passing a decree in favour of the beneficial owner, if it is satisfied that his version is really true. It is not possible for me to accept these contentions in view of the observations contained in the Full Bench decision of this High Court reported in *Subba Narayana Vathiar* v. *Ramaswami Aiyar*[4], and the decision reported in *Chinna*

1. (1932) I.L.R. 11 Pat. 616. 2. (1930) I.L.R. 53 All. 5.
3. (1927) I.L.R. 55 Cal. 551.
4. (1906) 16 M.L.J. 508: I.L.R. 30 Mad. 83 (F.B.).

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Kushandai v. *Kushandai Veeraswami*[1]. This High Court has consistently taken the view that S. 78 of the Negotiable Instruments Act should be strictly construed and that a valid discharge can be given only by the payee of a promissory note or the holder thereof, there being no such thing for this purpose as a *benami* promissory note taken in the name of one person but really meant for the benefit of another. In these circumstances especially in view of the frame of the suit I am not satisfied that the decision of the trial Court is wrong. The Civil Revision Petition is accordingly dismissed with costs, one set.

K. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Thanammal and others .. *Petitioners** (*Accused*)

v.

Alamelu Ammal .. *Respondent* (*Complainant*).

Thanammal v. Alamelu Ammal.

Indian Penal Code (XLV of 1860), Ss. 323 and 352—Trial for offence under—Conviction under City Police Act (Madras Act III of 1888), S. 75—If a bar.

The conviction under S. 75 of the City Police Act is no bar to the trial for an offence under Ss 323 and 352 of the Indian Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Special Honorary Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, in C. C. No. 1637 of 1938.

K. V. Rajagopalan and *S. V. Rama Aiyangar* for Petitioners.

K. M. Balasubramaniam for Respondent.

The Crown Prosecutor for the Crown.

The Court made the following

ORDER.—The conviction under S. 75 of the City Police Act is no bar to the trial for an offence uuder Ss. 323 and 352 of the Indian Penal Code and the evidence justifies the conviction of the petitioners. The fines are not excessive and the revision is dismissed.

K. S. —— *Petition dismissed.*

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1. (1934) 68 M.L.J. 713: A I.R. 1935 Mad. 312.

* Crl Rev. Case No. 407 of 1939. 10th October, 1939.
Crl. R. P. No. 376 of 1939.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Commissioner, Municipal Council, Vellore .. *Petitioner** (*Complainant*)

v.

K. N. Damodara Mudaliar .. *Respondent* (*Accused*).

Commissioner, Municipal Council, Vellore *v.* Damodara Mudaliar.

Madras District Municipalities Act (V of 1920), S. 347—Affixing cinema advertisements on vehicles and roadsides—Failure to obtain licence—Continuing offence—Launching of prosecution—Time limit.

In the case of a prosecution for affixing cinema advertisements on vehicles and roadsides vested in a Municipal Council without licence no period is specified under the proviso to S. 347 of the Madras District Municipalities Act, and the offence being a continuing offence the complaint may be made within twelve months of the commencement of the offence.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the First Class Bench of Magistrates, Vellore Town, dated 1st November, 1937 and made respectively in S.C. Nos. 1336 to 1339 of 1937.

N. Gopala Menon and *V. Karunakara Menon* for Petitioner.

P. Viswanatha Aiyar for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The prosecution was for affixing cinema advertisements on vehicles and roadsides vested in the Municipal Council of Vellore without licence, for which no period is specified and under the proviso to S. 347 of the District Municipalities Act, the offence has to be deemed to be a continuing offence and the complaint may be made within twelve months from the commencement of the offence. The acquittal of the accused on the ground that the complaint is barred by limitation under S. 347 of the Act which requires complaints in other cases to be filed within three months is therefore untenable and it cannot be sustained. It is therefore set aside but the Municipal Council has its remedy in the Civil Court for the licence fee and a retrial is not called for.

B. V. V. —— *Petitions allowed.*

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* Crl R C. Nos. 189, 209, 210 and 211 of 1938. Crl. R. P. Nos. 183, 203, 204 and 205 of 1938. 17th August, 1938.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

K. A. Mahammad Sheriff Sahib .. *Appellant** (*Plaintiff-Petitioner*)

v.

Hussain Ghouse .. *Respondent* (*Surety-Respondent*).

Mahammad Sheriff Sahib *v.* Hussain Ghouse.

Surety bond—Small cause suit—Third party guaranteeing appearance of defendant—Plaint returned for want of jurisdiction—Plaint re-presented to same Court on original side—Surety's obligation—Whether continues.

The appellant filed a small cause suit and applied for the arrest of the defendant before judgment. The respondent gave a surety bond in order to secure the release of the defendant. The essential terms of the bond were that the respondent undertook that the defendant would appear at every hearing until the case was finished, and if there was any decree in the case the respondent undertook that the defendant would appear whenever required until the decree was settled and that if he failed to appear the respondent would produce him under the orders of the Court, and that if he failed to produce him he would be liable for any decree which might be passed. The Court trying the small cause suit held that it had no jurisdiction and returned the plaint for presentation as an original suit. The plaint was re-presented on the original side of the same Court and the trial proceeded without any fresh bond being taken from the surety.

Held, that the bond given by the respondent could not be taken to cover the subsequent original suit into which the small cause suit became transmuted.

It cannot be taken as in the contemplation of the surety when he guarantees the appearance of the defendant in a particular case that the bond will also cover the appearance of the defendant in another case in a different Court though on the same cause of action. And it makes no difference that the plaint is re-presented on the original side of the same Court in which it was first of all filed as a small cause.

Appeal against the order of the District Court of South Arcot dated 25th April, 1936 and made in A. S. No. 11 of 1935 preferred against the order of the Court of the District Munsif of Chidambaram dated 22nd November, 1935 and made in M.P. No. 148 of 1935 in O. S. No. 748 of 1931.

K. S. Rajagopala Aiyangar for Appellant.

Basheer Ahmed Sayyed for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises the question how a surety bond given by a third party for the appearance of the defendant, is affected by the return of the plaint for presentation in

* C.M.S.A. No. 163 of 1936. 4th August, 1939.

another Court having jurisdiction. The appellant filed a small cause suit and applied for the arrest of the defendant before judgment. The respondent gave a bond in order to secure the release of the defendant. The essential terms of this bond are that the respondent undertakes that the defendant will appear at every hearing till the case is finished, that if there is a decree in this case against the defendant the respondent undertakes that the defendant will appear whenever required until the decree is settled, that if he fails to appear the respondent will produce him under the orders of the Court and that if he fails to produce him, he will be liable for any decree which may be passed. Both the Courts below have agreed that no special significance is to be attached to the use of the word 'நம்பர்' (number) in the bond and that it does not mean anything more than "case" and has no reference to the precise number given to the case. That view of the local use of the word 'number' in Tamil with reference to a litigation is undoubtedly correct.

The Court trying the small cause suit held that it had no jurisdiction and returned the plaint for presentation as an original suit. The plaint was accordingly re-presented on the original side of the same Court and the trial proceeded without any fresh bond being taken from the surety. The only question is whether this bond given by the respondent to guarantee the appearance of the defendant in the case can be taken to cover the subsequent original suit into which the small cause suit became transmuted.

There is no direct authority. Cases have been quoted in which it has been held that when a suit is dismissed and restored to file by the Court which dismissed it or when a suit is dismissed and restored by the appellate Court, the bond of a surety for the satisfaction of the decree enures to the benefit of the plaintiff in the restored suit—*Veeraswami* v. *Ramanna*[1] and *Irangauda* v. *Irbasappa*[2]. In both these cases it is apparent that the restored suit is a continuation of the original proceedings and that when a party gives a bond for the performance of any obligation which may result from a pending suit, he will normally be taken to contemplate the possibility of that suit undergoing various vicissitudes in the Court in which it has been filed and the Court to which an appeal lies. The position is

1. (1934) 68 M.L.J. 444: I.L.R. 58 Mad. 721 (F.B.).
2. (1926) I.L.R. 51 Bom. 31.

Mahammad Sheriff Sahib v. Hussain Ghouse.

to my mind, quite different when a third party gives a bond guaranteeing the appearance of a defendant in a particular action and in proceedings in execution of the decree in that action and the action is terminated by a finding that the Court has no jurisdiction with a direction to the plaintiff to seek his remedy in another Court having jurisdiction. The return of the plaint terminates the litigation and the re-presentation of the plaint in a different Court in effect starts a fresh litigation on the same cause of action. It cannot be taken as in the contemplation of the surety when he guarantees the appearance of the defendant in a particular case that the bond will also cover the appearance of the defendant in another case in a different Court though on the same cause of action; and I do not think it makes any difference that the plaint is re-presented on the original side of the same Court in which it was first of all filed as a small cause. There has been a change in the proceedings in which the defendant is required to appear. The change in the present case is a change from the more or less summary proceedings of a small cause into an action under the ordinary procedure with all the elaborations which that procedure entails. On the principle of S. 133 of the Contract Act, this change, to my mind, discharges the surety. In this view, I dismiss the appeal with costs.

B.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

The District Board of West Tanjore represented by its President .. *Petitioner* (Plaintiff-Counter-Petitioner)*

v.

Ponnuswami Pallavarayar .. *Respondent (Defendant-Petitioner).*

District Board of West Tanjore v. Ponnuswami Pallavarayar.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (c)—Applicability—Chatram managed by District Board—Arrears of rent payable to Board in respect of Chatram property—Protection under Act—Whether can be invoked by agriculturist debtor.

Cl. (*c*) of S. 4 of the Madras Agriculturists' Relief Act is worded as comprehensively as possible and comprehends any money due to a local authority. Where the administration of a Chatram is made over by the

* C. R. P. No. 306 of 1939. 21st July, 1939.

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Board of Revenue to a District Board under S. 63 of the Madras Local Boards Act, the identity of the Chatram is for all relevant purposes merged in the Local Authority and the income from the Chatram is part of the District fund. Consequently an agriculturist owing money to the Board by way of arrears of rent in respect of Chatram property leased to him by the Board is placed outside the protection of the Act because of S. 4 (*c*) of the Act.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Pattukottai dated 19th September, 1938 and made in E. A. No. 197 of 1938 in E. P. No. 290 of 1938 in S. C. S. No. 293 of 1937.

T. R. Venkatarama Sastriar for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition raises a nice question under S. 4, cl. (*c*) of the Madras Agriculturists' Relief Act of 1938 read with certain provisions of the Madras Local Boards Act. The respondent has unfortunately not been represented but I have the advantage of hearing Mr. T. R. Venkatarama Sastriar who has placed before me all the relevant provisions of the Acts relating to the matter under consideration.

The only facts that need be stated are that under S. 63 of the Madras Local Boards Act the administration of the Mukthambalpuram Chatram at Orathanad was made over by the Board of Revenue to the District Board. The defendant is a lessee of certain properties, part of the trust, and a decree has been obtained against him by the District Board of West Tanjore in respect of arrears due under the lease. The defendant calls in aid the provisions of the Madras Agriculturists' Relief Act. It is conceded that he is an agriculturist within the meaning of that Act but the petitioners rely upon the provisions of S. 4, cl. (*c*) which, they say, places the respondent outside the protection of the Act. S. 4 reads as follows:—

"Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads:—

(*c*) any tax or cess payable to any local authority or any other sum due to them, by way of loan or otherwise."

It will be seen that cl. (*c*) of S. 4 is worded as comprehensively as possible and seems to me to comprehend any money due to a local authority, but the learned District Munsif has taken the view that the respondent is entitled to the protection of the Agriculturists' Relief Act because, to put it shortly, the

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amount due from him is not money due to a local authority but money due to this Chatram itself. The learned Munsif has dealt with the matter with the utmost care but I am unable to share the view which he has taken of this question.

The relevant provisions of the Madras Local Boards Act are as follows:—S. 63 provides for the Board of Revenue making over to Local Boards the management and superintendence of any charitable endowment in respect of which powers and duties attach to the Board of Revenue under the provisions of the Madras Endowments and Escheats Regulation, 1817. "Thereupon" says the section, "all powers and duties which attach to the Board of Revenue in respect thereof shall attach to the Local Board as if it had been specially named in the said Regulation, and the Local Board shall manage and superintend such endowment". S. 64 says:

"A Local Board may accept trusts relating exclusively to the furtherance of any purpose to which its funds may be applied."

So it would seem that under S. 63 there is power given to the Board of Revenue to make over to the Local Board the management and superintendence of any charitable endowment. Under S. 64, a Local Board can accept trusts relating exclusively to the furtherance of any purpose to which its funds may be applied. S. 112 sets out the purpose to which local funds may be applied and under cl. (*iii*), sub-S. 1 of that section one of those purposes is for the construction and maintenance of choultries. S. 114 says:

"There shall be constituted for each district a district fund and for each village a village fund."

S. 115 states:

"The rules embodied in Sch. V regarding. . . . . . district funds respectively, and regarding the administration of those funds, shall be read as part of this chapter."

The provisions of the schedule are of the utmost importance in arriving at a decision in this petition. It will be seen at the top of Sch. V that first the words appear "it shall be the duty of every Local Board to provide for the payment of" and then a number of matters are set out. Under I-B:

"A District Board shall have power to make such provision as it thinks fit for carrying out the requirements of the District in respect of the following matters. . . . . . (*c*) the establishment and maintenance of choultries in the District classified as District choultries."

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And it is well to recall that S. 112, as I have pointed out, states that the funds received under the Act may be applied for the purpose of choultries among others. Under the heading "District funds" is found item 9 "Income from endowments and trusts under the management of the District Board"; and Mr. Venkatarama Sastriar has naturally relied very strongly on that provision because obviously if these charitable funds are made part of the income of the District Board, it should necessarily follow that all the provisions for the recovery of that income should be opened to the District Board itself.

Now those are the provisions and of course at this stage there has yet been no decision on the matter at all. The only decision that has been referred to is in *Neelayathakshi Ammal* v. *The Taluk Board, Mayavaram*[1], which is of interest because it will be seen that the Bench consisting of Benson and Krishnaswami Aiyar, JJ., took the view that when a charity was handed over to a local authority the local authority was absolved from the actual provisions of the deed dedicating the charity. That of course is no direct authority but it seems to convey to my mind the notion that when these charities are handed over they to a large extent lose their identity and become part of the local authority at least to this extent that it was held it was not necessary that accounts should be made accessible to all persons as would have been the case if it had not been handed over. At p. 336, the Bench uses these words:

"The duty to keep and give inspection of accounts is part of the function of management. When it is transferred by a special law to a statutory body, we must look to that law and not to the instrument of trust for the duties of the manager."

The reason why the lower Court in this case decided against the petitioner can, I think, be shortly stated. The learned Judge takes the view in paragraph 9 that there is a distinction between funds receivable under S. 64 of the Local Boards Act and S. 63. The learned Judge also takes the view that:

"Under S. 64 of the Local Boards Act, a Local Board can accept a trust if its income can be utilised exclusively for the purposes laid down in the Act. If the donor wants to endow the Local Boards with an endowment with the object of utilising its funds for purposes other than the purposes for which the Local Board's own income can be utilised, then the Local Board cannot accept such an endowment There the case laid down under S 63 is different from the one in S. 64."

1. (1910) 20 M.L.J. 885: I.L.R. 34 Mad. 333.

District Board of West Tanjore v Ponnuswami Pallavarayar.

I have endeavoured to indicate that in my view the only difference between Ss. 63 and 64 is that S. 63 provides for the transfer of trusts by the Board of Revenue; S. 64 enables the local authority to accept trusts provided that they relate exclusively to the furtherance of any purpose to which its funds may be applied. Of course, a choultry would come under that provision because one of the things which the Local Board may do is to provide choultries. But the learned Judge has distinguished between funds derivable under transactions under these two sections although he seems to concede that if the funds, the subject of this case, come under Schedule V (9) then the respondent would have been unable to invoke the Agriculturists Relief Act. It seems to me clear that income from endowments and trusts under the management of a District Board comprise income from endowments and trusts whether derived by reason of the operation of S. 63 or S. 64. That income is the District fund. It is recoverable and must be recoverable only by the local authority. I cannot see how it can be possibly said that that is not a sum due to them, namely, the local authority. It seems to me that for all relevant purposes the identity of the chatram is merged in the local authority and I can imagine nothing more inconvenient than that the position should be that for the purpose of recovering this particular item of the Board's funds the Board should be placed in one position but in respect of amounts due to them from the public in another. In view of the facts I think that the order of the lower Court should not be allowed to stand. The learned Munsif obviously withheld jurisdiction vested in him and in consequence his order will be set aside.

The petition is allowed with costs.

B. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE GENTLE.

Diravyam Pillai and another .. *Appellants**

v.

Veeranan Ambalam and others .. *Respondents.*

Diravyam Pillai v. Veeranan Ambalam.

Hindu Law—Joint family of brothers and their sons—Insolvency of brothers alone—Contract to sell entered into by brothers prior to insolvency—

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* A. S. No. 101 of 1935. 10th January, 1939.

Attachment of son's interests by money decree-holder after insolvency—Later application by contractee for specific performance—Insolvency Court ordering Official Receiver to execute sale deed—Sale thereon by receiver after attachment—Sale if contrary to attachment—Sale under orders of Court if differs for this purpose from voluntary sale—Rule in Nanomi Babnasin v Modhun Mohun—*Proper interpretation of—Claim petition by Official Receiver in execution of money decree—If precludes purchaser from claiming rights under the sale.*

The suit properties belonged to a joint Hindu family which consisted of five brothers and the sons of four of them *D* and another had obtained a decree for money payable by the five brothers personally and from out of the family properties in the hands or the five brothers and their sons. In execution of that decree, they attached only the interests of the *sons* in the joint family properties on 15th March, 1933, as by that time in June, 1927, itself the brothers had been adjudicated insolvents. Before the insolvency petition was filed, three of the brothers had, on 24th July, 1926, entered into a contract to sell the suit properties to *V* and under orders of the Insolvency Court passed on the application by *V* claiming specific performance, the sale deed was executed by the Official Receiver only on the 6th November, 1931. The decree-holders contended that the sale was invalid as by virtue of the attachment of the son's interest before the sale deed was executed the power of the brothers and of the Official Receiver as representing their estate to convey the son's shares must be deemed to have come to an end.

Held, (1) that as there was in existence in this case, prior to the attachment, a contract of sale entered into by the brothers at the time when the family was joint and they had the power to sell also the son's interests in the properties, the sale in pursuance thereof is not one contrary to the terms of S. 64 of the Civil Procedure Code and is not therefore affected by the attachment. The right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation. Therefore a sale by the contracting parties in pursuance of a pre-existing contract to sell cannot be said to prejudice the attaching creditor. There is no distinction for this purpose between a conveyance voluntarily executed by the judgment-debtor and one executed by him under an order of Court.

(2) The proper interpretation of the rule in *Nanomi Babuasin* v. *Modhun Mohun*, (1885) L.R. 13 I.A. 1: I.L.R. 13 Cal. 21 (P C.), is that to the extent required to satisfy the father's proper debts, the father and his creditors are entitled to ignore the son's coparcenary rights in the family property.

Mr. Justice Chandavarkar's observation in *Subraya* v. *Nagappa*, (1908) I.L.R. 33 Bom. 264, discussed and doubted.

At one stage of the execution of the money decree, the Official Receiver had intervened with a claim petition claiming the proceeds of sale of the shares of the sons himself on behalf of the creditors but the claim was dismissed. It was contended that that precluded *V* from contending to the contrary as he derives his title from a sale deed by the Official Receiver.

Held, that in the claim proceedings the Official Receiver acted for the general body of creditors and not *V*, who claims under a contract which, if held binding on the estate will be binding on the Official Receiver as well and include the whole interest in the suit items. Further the Official Receiver is here only carrying out an obligation incurred by the insolvent prior to insolvency.

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Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 90 of 1932.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar* for Appellants.

V. Ramaswami Aiyar, S. Kuppuswami and *A. Bhujanga Rao* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal arises out of a suit instituted by the predecessor-in-title of respondents 1 to 5 for obtaining a declaration that he was the full owner of the suit properties and for setting aside an order passed on 14th September, 1931, dismissing a claim petition that he had filed. The suit properties belonged to a joint Hindu family which consisted of five brothers and the sons of four of them. Defendants 3, 4, 5 and 6 in the present suit are four of the brothers; another brother Sundararaja Aiyar had died before suit. Defendants 7 to 12 are the sons of four of the brothers. The appellants who were defendants 1 and 2 in the lower Court had obtained a decree for money payable by the five brothers personally and from out of the properties of the joint family in the hands of the five brothers and their sons. In execution of that decree, the appellants attached the interests of the sons in the joint family properties. This attachment which was made on 15th March, 1930, was advisedly limited to the interests of the sons, because, in the meanwhile, the five brothers had been adjudicated insolvents and their interests were being administered in insolvency. The present plaintiff's claim as against the attachment made by the appellants was based upon an alleged contract for the sale of the suit property to him for Rs. 30,000; it was stated that this contract had been entered into by defendants 3 and 4 and their deceased brother on 24th July, 1926. It was the plaintiff's case that in pursuance of this contract a sum of more than Rs. 28,000 had been paid to the vendors even before 12th April, 1927, the date fixed for the completion of the contract, that after the expiry of the time fixed, the vendors had been delaying the execution of the sale deed on account of certain domestic reasons, that in June, 1927, a creditor of the vendors presented a petition to adjudicate them insolvents, that accordingly the execution of the sale deed was further delayed and that finally under orders of the Insolvency Court passed on an application filed by the plaintiff claiming specific performance, a sale deed was executed by the

Official Receiver on 6th November, 1931. The plaintiff further alleged that, even before he became aware of the presentation of the insolvency petition, he had paid to the vendors the balance still remaining due, that he had already been put in possession of the property and had been in enjoyment thereof, that the moneys received by the vendors in pursuance of the contract of sale had been utilised by them for paying off family debts binding on the sons as well and that therefore the contract of sale and the sale-deed subsequently executed by the Official Receiver were operative to vest in the plaintiff the whole interest of the joint family in the suit properties.

The appellants, who were the contesting defendants, disputed the truth of the alleged contract of sale and the payment of consideration therefor and the binding character of the sale as against the sons. This question of fact was made the subject of the first issue in the case. The appellants further contended that in any event the sale-deed executed by the Official Receiver on 6th November, 1931, could not affect the rights of defendants 7 to 12 and that the plaintiff could not accordingly object to the appellants' right to attach the interests of these defendants in the suit properties. This contention of law was raised by the 3rd issue in the case. Two further questions arose in the course of the discussion of the rights of the parties in the lower Court as to the exact position of defendants 7, 8 and 9 and their interests in the suit properties. Defendants 7 and 8 had been impleaded in the insolvency proceedings and the creditor sought to have them also adjudicated insolvents, but by a consent order they were exonerated on their agreeing that their interests in the properties of the family might be vested in the Official Receiver appointed in the insolvency. The plaintiff contended that in any event the interests of defendants 7 and 8 must be held to have passed under the sale-deed executed by the Official Receiver. The ninth defendant instituted a suit for partition in 1928 but subsequently withdrew it, though the papers relating to the withdrawal are not on record. It has been contended on behalf of the appellants that, as a result of the filing of the plaint by the ninth defendant, he became separated in status from the rest of the family and that thereafter neither his father nor the Official Receiver in the insolvency had any right to convey his interest to the plaintiff. In answer to this contention, it has been urged

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that the admitted withdrawal of the partition suit must in the circumstances be deemed to have left the ninth defendant a member of the joint Hindu family and that accordingly his interest was effectually conveyed by the Official Receiver. The learned Subordinate Judge upheld the plaintiff's contention on all the points above set out and passed a decree in the plaintiff's favour. Hence this appeal by defendants 1 and 2.

The question of fact raised by the first issue may be very briefly disposed of. The agreement of sale is evidenced by Ex. A which is a contract written in a note book of the plaintiff and signed by the three brothers. Before the lower Court, the contesting defendants took up the extreme position that no moneys had at all been paid by the plaintiff to the brothers and that the entries in the insolvents' books acknowledging the receipt of such payments were fictitious entries made with a view to enable the insolvents to secrete moneys for their own benefit. The lower Court on a careful examination of the evidence overruled this contention and it has not been repeated before us. The learned Counsel for the appellant confined himself to the contention that the payments by the plaintiff must have been made only as loans to the brothers and that the suggestion of a contract to sell was only an afterthought. In effect, the appellants impeach Ex. A, as a later fabrication. Beyond putting forward this contention, the learned Counsel for the appellants was not in a position to advance any serious argument against the correctness of the finding of the lower Court on this point. The direct evidence as well as the probabilities are clearly in favour of the truth of the plaintiff's story. We accordingly confirm the finding of the lower Court on issue 1.

The finding of the lower Court on the third issue was challenged by the learned Counsel for the appellants on the ground that according to a long course of decisions in this Court, the power of the brothers and of the Official Receiver as representing their estate to convey the interests of the sons in the joint family estate must be deemed to have come to an end, when the interests of the sons were attached by the present appellants in execution of their decree. In support of this contention, reliance was placed upon the decisions in *Gopalakrishnayya* v. *Gopalam*[1], *The Official Receiver, Coimbatore* v.

1. (1926) 54 M.L.J. 674: I.L.R. 51 Mad. 342.

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Arunachalam Chettiar[1], *Kanyaka Parameswaramma* v. *Venkataramayya*[2], *Palaniappa Chettiar* v. *Palani Goundan*[3], *Official Receiver, East Godavari* v. *Imperial Bank of India*[4] and the observations in an unreported judgment of Reilly and Anantakrishna Aiyar, JJ., which has been filed as Ex. XXIV in this case. Reference was also made to the decision of the Allahabad High Court in *Allahabad Bank, Ltd., Bareilly* v. *Bhagwan Das Johari*[5], of the Bombay High Court in *Subraya* v. *Nagappa*[6] and of the Calcutta High Court in *Kamala Bala* v. *Surendra Nath*[7]. Before considering the effect of these decisions and the reasoning on which they rest, we may point out that the present case differs from all of them in one important respect, namely, that there was in existence in this case, long prior to the attachment, a contract of sale entered into by the brothers at a time when the family was joint and they had the power to sell the full interest of the joint family in the suit properties. That this circumstance makes a very material distinction will appear when the authorities are examined.

The rights of a promisee under a prior contract of sale as against a subsequent attachment and the rights of a Court auction purchaser under that attachment have been considered in several decisions in this Court beginning as early as in *Savithri Ammal* v. *Ramasami*[8] and going down to *Veerappa Thevar* v. *Venkatarama Aiyar*[9]. See *Bapineedu* v. *Venkayya*[10], *Venkata Reddi* v. *Yellappa Chetti*[11], *Veeraraghavayya* v. *Kamala Devi*[12], *Sunkari Sitayya* v. *Mudaragaddi Sanyasi*[13]. See also *Karalia Nanubhai* v. *Mansukhram*[14], *Madan Mohan Dey* v. *Rebati Mohan Poddar*[15], *Deoki Nandan* v. *Sayad Jawad Hussain*[16] and *Lakshman* v. *Ramchandra*[17]. It was contended by Mr. Krishnaswami Aiyar the learned Counsel for the appellants that the course of decisions beginning with *Savithri Ammal* v. *Ramasami*[8], cannot be regarded as laying down good law in view of recent pronouncements of the Judicial Committee

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1. (1933) 66 M.L.J. 412 2. (1936) 71 M.L.J. 294.
3. (1936) 71 M.L.J. 541.
4. (1935) 69 M.L.J. 898: I.L.R. 59 Mad. 296.
5. (1925) I.L.R. 48 All. 343. 6. (1908) I.L.R. 33 Bom. 264.
7. I.L.R. (1937) 2 Cal. 675. 8. (1898) 8 M.L.J. 266.
9. (1935) 69 M.L.J. 678: I.L.R. 59 Mad. 1.
10. (1910) 21 M.L.J. 82. 11. (1916) 5 L.W. 234.
12. (1934) 68 M.L.J. 67. 13. (1924) 46 M.L.J. 361.
14. (1900) I.L.R. 24 Bom. 400. 15. (1915) 21 C.W.N. 158.
16. A.I.R. 1928 Pat. 199. 17. (1931) 34 Bom.L.R. 117.

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as to the effect of the last paragraph of S. 54 of the Transfer of Property Act. He also contended that if as laid down in the Madras decisions relating to the effect of the attachment on the father's power to sell the sons' interest, the father's power was at an end, the decisions dealing with the effect of an antecedent contract to sell can have no bearing on the decision of the present case. It accordingly becomes necessary to examine at some length the two sets of authorities above referred to. Though the sale deed was executed by the Official Receiver in this case, it must be taken that he had no larger power than the insolvents themselves would have had, and if, for any reason, the insolvents had lost the power to sell their sons' interests, the conveyance executed by the Official Receiver could have no greater effect. See *Sat Narain* v. *Sri Kishan Das*[1]. The point for consideration therefore is whether as a result of the attachment placed by the appellants on 15th March, 1930, on the interests of the sons, the power of the fathers to sell the joint family property including the sons' interests for the satisfaction of debts binding on the sons *came to an end.*

It may be conceded that in some of the Madras decisions very general language has been used which almost seems to lay down the proposition contended for by Mr. Krishnaswami Aiyar; but on examination it will be found that in all those cases the question arose between the attaching creditor and the Official Receiver and all that was intended to be laid down by the learned Judges was that the attaching creditor was entitled to proceed to bring the sons' interest to sale and that the Official Receiver could not claim the proceeds of the sons' shares for the benefit of the general body of creditors. In *Gopalakrishnayya* v. *Gopalan*[2], where this question was considered for the first time in this Court, the learned Judges referred to *Allahabad Bank, Ltd., Bareilly* v. *Bhagwan Das Johari*[3] as supporting their conclusion. The Allahabad decision only dealt with the question whether the interests of the sons in the joint family properties vested in the Official Receiver, on the insolvency of the father.

The learned Judges did not address themselves to the question whether apart from the vesting of the sons' interest, the *power* to sell which the father has under the Hindu law

1. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
2. (1926) 54 M.L.J. 674: I.L.R. 51 Mad. 342.
3. (1925) I.L.R. 48 All. 343.

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passed to the Official Receiver and if so, what the effect on it was of the attachment of the sons' interest. In the later decisions of this Court which purported to follow *Gopalakrishnayya* v. *Gopalan*[1] and repeated the language used in that case, reference has also been made to the decision of the Bombay High Court in *Subraya* v. *Nagappa* and we think we are justified in holding that the Madras decisions though using general language only intended to adopt the view laid down in *Subraya* v. *Nagappa*[2].

The judgment of Chandavarkar, J., in *Subraya* v. *Nagappa*[2] was based upon the effect of S. 276 of the old Civil Procedure Code corresponding to S. 64 of the Code of 1908. The learned Judge observed that as the effect of the attachment was to prevent the sons from alienating their shares, it must also be held to prevent the father from alienating the sons' share for the satisfaction of the father's debts. With all respect, we venture to think that this reasoning is not reconcilable with the basis on which the father's power to sell joint family property for the discharge of his own proper debts is supported in the decisions of the Judicial Committee. Chandavarkar, J., regarded the father in such cases as merely exercising the power of alienation which the sons would have exercised in the discharge of their pious duty which they owed to him. He went on to add that the father "is virtually alienating the property for them (the sons) and on their behalf" and it was on this view that he based the further proposition that as the attachment prevented the son from alienating his (son's) interest, it must equally be held to prevent the father from alienating the son's interest. The basis of the Privy Council decisions, if we may take *Nanomi Babuasin* v. *Modhun Mohan*[3] as typical of them, seems to us to be somewhat different. They observed that the recognition of the father's power to sell the son's interest for the discharge of his own debts was destructive of the principle of independent coparcenary rights in the sons; they then proceed to state the position to be that the sons cannot set up their rights in the family property as against the father's alienation for antecedent debt or against his creditor's remedies for their debts if not tainted with immorality. The proper interpretation of this statement of the rule seems to us to be, that to the

1. (1926) 54 M.L.J. 674: I.L.R. 51 Mad. 342.
2. (1908) I.L.R. 33 Bom. 264.
3. (1885) L.R. 13 I.A. 1: I.L.R. 13 Cal. 21 (P.C.).

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extent required to satisfy the father's proper debts, the father and his creditors are entitled to ignore the son's coparcenary rights in the family property. If this is the true view of the father's right, it seems to us with all respect open to question whether it can be said, as Chandavarkar, J., said in the Bombay case, that the father when he sells the family property for the discharge of his debts is merely exercising the power of sale possessed by the son himself. Except on this theory, it will be difficult to limit the father's power by reason of the statutory disability imposed by S. 64, Civil Procedure Code, upon the son as a result of the attachment of the son's interest. We may also observe in this connection, that the provision in S. 53, Civil Procedure Code, declaring that the property in the hands of a son which under the Hindu law is liable for the payment of the debts of the deceased father shall be deemed to be the property of the deceased which has come to the hands of the son is more consistent with the view we have above indicated as to the basis of the decisions of the Judicial Committee relating to the father's power to sell joint family property. It is not however necessary for the purposes of this case to decide whether the view enunciated in *Subraya* v. *Nagappa*[1] is to be followed or not. We have therefore thought it unnecessary to refer the case to a Full Bench and we propose to deal with the case on the footing that *Subraya* v. *Nagappa*[1] was rightly decided.

The result of the Bombay decision as well as of the decision of the Calcutta High Court in *Kamala Bala* v. *Surendra Nath*[2] is only to impose on the father in a case like the present the disability imposed upon the son by S. 64, Civil Procedure Code. We are not aware of any other rule of law which sets a limitation either on the son's power or on the father's power in circumstances like those of the present case. All that S. 64 of the Code provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read S. 64 as *putting an end* to the power of sale, because as between the transferor and the transferee, the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienee's

1. (1908) I.L.R. 33 Bom. 264.
2. I.L.R. (1937) 2 Cal. 675.

title will be unassailable. The only effect of S. 64 is that such transfer shall not prejudice the rights of the attaching creditor.

If the above is the true position, the question arises whether when a sale is made in pursuance of a contract entered into prior to the attachment, such conveyance is one contrary to the terms of S. 64 at all. We cannot agree with Mr. Krishnaswami Aiyar that the uniform course of decisions on this point referred to already is in any way opposed to the recent decisions of the Privy Council as to the effect of S. 54 of the Transfer of Property Act. The argument based on S. 54 has been considered in many of the cases referred to. The question is not whether any *interest* has passed under the contract to sell. An attaching decree-holder attaches not the physical property but only the rights of the judgment-debtor in the property. As explained in the decisions and recognised in S. 40 of the Transfer of Property Act, the right of the judgment-debtor in the Property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. Nor can it be said that the sale by the contracting parties executed in pursuance of a pre-existing contract to sell prejudices the attaching creditor, because the sale is merely the fulfilment of the obligation to which the judgment-debtor was already subject. The utmost that the attaching decree-holder will be entitled to, in such circumstances, is the payment of the balance of the purchase money, if anything remained due on the date of the attachment.

Mr. Krishnaswami Aiyar relied on the observations of Sir D. F. Mulla in the notes to S. 40 of the Transfer of Property Act to the effect that the attaching decree-holder will not be bound by a conveyance even in pursuance of a pre-existing contract to sell; but the learned author draws a distinction between a conveyance voluntarily executed by the judgment-debtor in pursuance of a pre-existing contract and a conveyance executed by him under an order of Court in pursuance of a pre-existing contract. In the latter case, the author seems to think that the attaching creditor cannot object to the conveyance. If this distinction is well-founded, it is sufficient to support the decision of the lower Court in this case because the sale-deed was executed in this case in pursuance of an order of Court.

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But we are inclined to agree with Mr. Krishnaswami Aiyar that there really ought to be no distinction between the two classes of cases, because in both cases, the conveyance is really not voluntary but is only the fulfilment of an obligation already incurred; only we would also hold that such a conveyance is not in reality contrary to the attachment within the meaning of S. 64 of the Civil Procedure Code.

Reliance was placed by the learned Counsel for the appellants on some observations of Cuming, J., in *Taraknath Mukherji* v. *Sanatkumar Mukherji*[1]. In one part of the judgment, the learned Judge seems to grant that the vendee will have a right to claim specific performance as against the Court auction-purchaser. If that be the position, it is difficult to see the justification for his differing from the other decisions referred to already including the decision of the Calcutta High Court in *Madan Mohan Dey* v. *Rebati Mohan Poddar*[2]. With all respect, we prefer to adopt the view of Pearson, J., the other learned Judge who took part in *Taraknath Mukherji* v. *Sanatkumar Mukherji*[1] and that is in accordance with the weight of authority as we have already observed. Our attention was drawn by Mr. Krishnaswami Aiyar to the decision of the Judical Committee in *Nur Mahomed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*[3]. We do not find anything in that judgment to help the appellants. Their Lordships merely leave the question open and they have not given any indication that may be said even to throw doubt on the correctness of the decisions of the several High Courts on the point.

In the view above stated, the position when the Official Receiver executed the sale deed in favour of the plaintiffs on 6th November, 1931, was that he merely carried out the contract entered into by the brothers on 24th July, 1926, that is, more than three years before the date of the attachment, and as the sale deed was executed in pursuance of an order of Court which was in effect a decree for specific performance, though passed by the Insolvency Court, the weight of authority is clearly in favour of its having all the effect which a conveyance by the five brothers would have had. On the finding that the contract to sell was binding on the sons and that the consideration received for the sale had been utilised for the

1. (1929) I.L.R. 57 Cal. 274. 2. (1915) 21 C.W.N. 158.
3. (1922) 45 M.L.J. 770 (P.C.).

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payment of antecedent debts, a sale by the five brothers would undoubtedly have been effective to convey the interest not merely of the brothers but also of all their sons who continued to remain joint with them.

In view of the dates of the various proceedings taken by the plaintiff a further question may arise, whether the attachment placed by the appellants on 15th March, 1930, could have any effect at all as against the plaintiff because though the sale deed was in fact executed on 6th November, 1931, its execution was asked for by a petition dated 21st December, 1928 and was ordered by the Court of first instance on 2nd December, 1929 (Ex. U). We are informed that the draft sale deed and the stamp paper for execution of the sale deed in accordance with this order was produced in Court as early as in January, 1930, but that in consequence of an order of stay, the sale deed was not immediately executed and was executed only after the decision of the appellate Court on 9th February, 1931. The question arises whether on these facts, the sale deed should not be treated as one executed, if not on the date of the agreement, at least on the date of the presentation of the petition or, in any event, on the date of the first Court's order. The respondent's Counsel relied in this connection on the observations in *Jahar Lal Bhutra* v. *Bhupendra Nath Basu*[1] and *Bhaskar* v. *Shankar*[2]. The learned Counsel for the appellants however rightly insisted that this point had not been raised in the lower Court and involved an examination of facts which do not appear on the record itself. We do not therefore pursue this question further.

We may here refer to one other contention of Mr. Krishnaswami Aiyar. At one stage during the execution of the money decree obtained by the appellants, the Official Receiver intervened with a claim petition. He contended that the appellants were not entitled to appropriate the proceeds of the sale of the shares of defendants 6 to 12 but that he himself was entitled to deal with those shares or with the proceeds thereof. This claim was dismissed by the Subordinate Judge's Court (*see* Exs. XXIII and XXIII-A) and that order was confirmed on appeal by this Court in Ex. XXIV. In the course of that judgment the learned Judges of this Court referring to a remark of the Subordinate Judge observed:

1. (1921) I.L.R. 49 Cal. 495.
2. (1924) 26 Bom.L.R. 418.

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"*If the learned Subordinate Judge means only that the Official Receiver's* right of sale is extinguished, it is unobjectionable."

Mr. Krishnaswami Aiyar contends that this decision of this Court precludes the plaintiff from contending to the contrary because the plaintiff's title was derived under a sale deed executed by the Official Receiver only subsequent to this date. We do not think that this contention is well-founded. In the proceedings above referred to, the Official Receiver cannot in any sense be said to have represented the present plaintiff. In those proceedings, he figured as representing the general body of creditors and claimed that the proceeds of the sons' shares should be made available for their benefit. The present plaintiff on the other hand claimed under a contract which, if held binding on the estate, will be binding on the Official Receiver as well and include the whole interest in the suit items. Further, when the Official Receiver executed the sale deed it is not in the capacity of the representative of the general body of creditors or even in the exercise of the power possessed by him or by the insolvent to satisfy the general body of creditors that he acted. He was merely carrying out an obligation which prior to the insolvency had been incurred by the insolvents. We see no justification for holding that the order in the claim proceedings instituted by the Official Receiver precludes the present contention of the plaintiff. The effect of an order in claim proceedings is declared by O. 21, r. 63, Civil Procedure Code. There is no justification for giving any greater effect to such an order.

In the above view, the decision of the learned Subordinate Judge on issue 3 must be affirmed and it will not be necessary to discuss the position of defendants 7 and 8 separately. We may however add that, even if a different view should be taken as to the power of the father or of the Official Receiver under the general law, it is no longer open to defendants 7 and 8, in view of the terms of the consent order, to assert that their interests in the family property did not vest in the Official Receiver. If they are precluded, the judgment creditor who seeks to attach their supposed interest in the family property must be held to be equally precluded.

As regards the position of the 9th defendant, the learned Counsel for the appellants contended that the observations in paragraph 42 of the lower Court's judgment must really be understood to be in his favour and he argued that the lower

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Varadachariar, J.

Court had somehow failed to give effect to them in framing its decree. We are unable to agree with this interpretation of the lower Court's observations. It is true that the learned Subordinate Judge set out the observations of their Lordships of the Judicial Committee in *Palani Ammal* v. *Muthu Venkatachala Moniagar*[1], but he was evidently of opinion that, in the circumstances of this case, the effect of the institution of the suit and its ultimate withdrawal was to leave the ninth defendant as a member of the joint Hindu family. It is unfortunate that we do not have the papers relating to the withdrawal. They were apparently not filed because the fact of withdrawal was not disputed. The appellant's learned Counsel argues that the observations in *Palani Ammal* v. *Muthu Venkatachala Moniagar*[1] throw on the plaintiff the onus of proving that the institution of the suit did not effect a severance and that, as the plaintiff has adduced no explanation for the institution of the suit, the ninth defendant must be held to have become divided in status. This seems to us to read too much into their Lordships' observations. Referring to *Kedar Nath* v. *Ratan Singh*[2], their Lordships said that they saw no reason to depart from the view there laid down and only added that the plaint so presented, even if withdrawn, would, unless explained, afford evidence that an intention to separate *had been entertained*. This can hardly be read as laying down any rule of law or even a presumption. It only seems to suggest a possible inference of fact. It is not unlikely, as observed by the learned Subordinate Judge, that in this case the ninth defendant instituted the suit at a time when he thought that he would get some benefit out of it but that when he found that there would be nothing left after payment of the debts due by the family he did not think it worthwhile to proceed with the suit. These circumstances do not seem to us to warrant the conclusion that he became divided merely by the presentation of the plaint.

We agree with the findings of the lower Court on all the points raised and dismiss the appeal with costs of respondents 1 to 5.

S.V.V. —— *Appeal dismissed.*

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1. (1924) 48 M.L.J. 83: L.R. 52 I.A. 83: I.L.R. 48 Mad. 254 at 258, 259 (P.C.).
2. (1910) 20 M.L.J. 900: L.R. 37 I.A. 161: I.L.R. 32 All. 415 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SARTRI.

Chebrolu Latchayya .. *Appellant* (Plaintiff)*

v.

Kucherlapati Venkatapatiraju and others .. *Respondents (Defendants 2 to 21).*

Latchayya *v.* Venkatapatiraju.

Res judicata—*Suit for redemption and possession of mortgaged properties—Previous suit and decision on the same question—Defendants in earlier suit same as in later—Additional parties impleaded in later suit as defendants —Substantial question for relief same—Principle of* res judicata *applicable.*

In a suit brought by the appellant as plaintiff for redemption of a mortgage and for recovery of possession of mortgaged properties against respondents 1 to 13 who were in possession of the properties the suit was dismissed by the two lower Courts on the ground of the appellant's title to redeem having been foreclosed as *res judicata* owing to an earlier decision in another suit raising the same question. The previous suit was brought by the appellant against the same respondents and others as defendants *pro forma* and it was held that the appellant had no title as the purchase from his vendors was not valid owing to the lack of title to the properties in the vendors themselves who were not the nearest relations of the original holder. In the present suit the appellant having impleaded other persons also who were not parties to the earlier suit as defendants, on the question whether there could be any application of the principle of *res judicata* since parties sued against were not altogether the same,

Held, that the appellant's suit was barred by *res judicata* by reason of the finding against him in the previous suit.

Since the really substantial reliefs prayed for in the present suit were only against the same respondents as in the previous suit, the two suits should be regarded as between the same parties.

Ganga Ram v. *Mohamed Hussain*, A.I.R. 1927 Lah. 900 (2); *Jagannadham* v. *Venkatasubba Rao*, (1927) 53 M.L.J. 864: I.L.R. 50 Mad. 877 and *Ramani Mohan Roy* v. *Jagubandhu Karmakar*, (1916) 37 I.C. 881, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Narsapur in A. S. No. 111 of 1935 preferred against the decree of the Court of the District Munsif of Tanuku in O.S. No. 197 of 1933.

K. Kameswara Rao for Appellant.

K. Bhimasankaram for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought by the appellant for redemption of a mortgage and recovery of possession of the mortgaged properties from respon-

* S. A. No. 469 of 1936. 15th September, 1939.

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dents 1 to 13 who were alleged to be in possession thereof as mortgagees and for other incidental reliefs. The suit was dismissed by both the Courts below on the preliminary ground that the question of the appellant's title to redeem is foreclosed as *res judicata* by reason of the decision in A. S. No. 62 of 1928 of the Subordinate Judge's Court of Narsapur. Hence the appeal.

The facts giving rise to this plea of *res judicata* may be briefly stated. The properties in question originally belonged to one Seshayya who died without issue in 1877. He executed the mortgage now sought to be redeemed in favour of one Subbaraju whose descendants are respondents 1 to 13. Seshayya's widow who succeeded to his properties died in April, 1921. In March, 1925, the appellant purchased the properties in suit from respondents 14 to 16 herein who were alleged to have inherited them on the widow's death as the sister's sons and nearest reversioners of Seshayya. Soon after this purchase, the appellant brought O.S. No. 320 of 1925 in the District Munsif's Court of Tanuku against respondents 1 to 13 and the deceased first defendant as mortgagees in possession for the same reliefs that are now claimed against them, impleading also his vendors, the respondents 14 to 16, as defendants *pro forma*. The respondents 1 to 13 then pleaded *inter alia*, as they do now, that the appellant was not entitled to redeem by virtue of his purchase from the sisters' sons of Seshayya, as one Perraju who was an agnatic relation of Seshayya was the nearest reversioner entitled to succeed on the widow's death. This plea was upheld by the first Court and was confirmed by the Appellate Court in A.S. No. 62 of 1928 referred to above. Perraju was not impleaded in that suit, and his sons applied in I. A. No. 1083 of 1931 in A.S. No. 62 of 1928 to implead themselves as respondents in that appeal but the application was dismissed. Thus neither Perraju nor his sons were parties to the previous litigation. In the present suit, however, they have been impleaded as defendants 18 to 21 and the appellant has asked for a declaration that they are not entitled to the properties of Seshayya as their father Perraju was not his heir. It has to be mentioned that respondents 1 to 13 have since obtained a transfer of all such rights as these defendants who are respondents 17 to 20 herein might have to the suit properties,

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The appellant's learned Counsel has raised two contentions before me. First, that the present suit is not barred by the principle of *res judicata* as the appellant has impleaded the sons of Perraju and prayed for the declaration referred to above against them and, further, the respondents 1 to 13 having also relied upon their purchase of the right, title and interest of the respondents 17 to 20 must now be regarded as litigating under a different title. In other words, there can be no *res judicata* as the parties are not the same and they are also not litigating under the same title. Secondly, the learned Counsel urged that, in any case, the question of the alleged adoption of the fourteenth respondent, one of the appellant's vendors, by one of the two sisters of Seshayya having been expressly left open by the appellate Court in the previous litigation, the appellant's title, in so far as it was claimed to have been derived from that respondent, cannot be said to be *res judicata.*

The latter contention can be dismissed in a few words. It is no doubt true that there was no adjudication as to the fourteenth respondent's alleged adoption in A. S. No. 62 of 1928, but that was because it was unnecesary to decide that question in view of the finding that Perraju was an agnatic sapinda of Seshayya and as such would exclude the fourteenth respondent who would only be a Bandhu even if his adoption was true. It cannot therefore be said that the appellant's title to a half share in the suit properties though based on that adoption was left open. The appellant's title to the whole of the suit properties was negatived as it was found that none of his vendors was entitled to succeed to any of the properties of Seshayya.

Turning now to the main contention, I find it difficult to appreciate how, by reason only of the addition of respondents 17 to 20 as parties to the present suit, the latter can cease to be a suit between the same parties so far as the respondents 1 to 13 are concerned. It is of course a suit between different parties as regards respondents 17 to 20 and it would be open to the appellant to proceed with it against these persons and obtain, if possible, the declaration he has prayed for against them, but it would be obviously futile for him to do so, as the respondents 1 to 13 are in actual possession of the properties, and I did not understand the appellant's Counsel to say that his client desired to prosecute the suit against the respondents 17 to 20 even if it

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were to fail against the other respondents. I am therefore clearly of opinion that the present suit must be regarded as one between the same parties as the prior suit, so far as the really substantial reliefs which are prayed for only against respondents 1 to 13 are concerned.

The learned Counsel for the appellant relied on a decision of the Lahore High Court, *Ganga Ram* v. *Mohamad Hussain*[1]. The facts of the case do not fully appear in the report but as far as they can be gathered, it is clear that the additional parties impleaded in the second suit were persons against whom the substantial, if not the entire, reliefs claimed in the suit were directed, the plaintiff in the previous suit having been impleaded apparently as a mere *pro forma* defendant. It was in those circumstances that the Court held that there was no *res judicata* as it could not be said that the later suit was between the same parties as the earlier one. That decision does not, in my opinion, assist the appellant here.

The appellant next urged that the principle of *res judicata* has no application here as respondents 1 to 13 must now be deemed to be litigating under a different title as they claimed to have since acquired the rights of the respondents 17 to 20. This argument appears, to my mind, to proceed upon a misconception of the true position. Respondents 1 to 13, as persons in possession of the properties, have the advantage of being able to resist the appellant's suit for possession, not necessarily by establishing their own title to the property but by merely putting the appellant to proof of his title and the latter can succeed in the suit only on the strength of his own title. It is thus unnecessary for the respondents 1 to 13 to rely upon the transfer which they have obtained from respondents 17 to 20 and their learned Counsel stated before me that they do not rely, in any manner or to any extent, upon such transfer and that it might be entirely ignored for the purposes of this suit. The position, therefore, is that the appellant has to establish his title to redeem the suit properties from the mortgage of the respondents 1 to 13, and it was precisely this that they failed to do in the previous suit. In other words, it was adjudged in the previous suit that as between the appellant and respondents 1 to 13, the appellant was not entitled to redeem these properties and I am unable to see

1. A.I.R. 1927 Lah. 900 (2).

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why the principle of *res judicata* should not operate to make that adjudication conclusive of the same question when it is sought to be raised again by the appellant against the same persons in the present suit.

The appellant's Counsel placed reliance on a decision of this Court in *Jagannadham* v. *Venkatasubba Rao*[1]. I confess that at first sight it might appear to lend some support to his contention for it is, in essential respects, the converse of the present case; that is to say, if the appellant herein had succeeded in the former suit and the respondents 1 to 13, having subsequently obtained a transfer from the representatives of Perraju had, on the strength of such transfer, sued the appellant for recovery of the same properties, the decision would be exactly in point and on its authority it would have to be held that the later suit in the case supposed would not be barred by *res judicata.* But the reversal of the position of the parties as in the present case, seems to my mind, to make an essential difference in the application of the principle. For, in the case supposed, it would be necessary for the respondents 1 to 13, as plaintiffs in the suit, to put forward and establish, in order to succeed, their title derived from Perraju's representatives and, in so doing, they would be litigating under a different title. In the present case, however, for the reasons I have already indicated, it is not necessary for them to rely upon such title as they occupy the position of defendants in the suit and it is clear, so far as the appellant is concerned, that he is litigating under the same title as before. It seems to me, therefore, that the decision in *Jagannadham* v. *Venkatasubba Rao*[1] has no application to the facts of the present case.

The appellant's learned Counsel next relied upon a decision of the Calcutta High Court in *Ramani Mohan Roy* v. *Jagubandhu Karmakar*[2]. That was a case where *A* sued and recovered certain properties from *B* as the son and heir of *C* who had gone abroad and not been heard of for many years. *C* turned up subsequently and sued *A* for recovery of the same properties but, pending this litigation, died, whereupon *B* was impleaded as his heir and representative which he now really was. It was

1. (1927) 53 M.L.J. 864: I.L.R. 50 Mad. 877.
2. (1916) 37 I.C. 881.

held, if I may say so, rightly, that *B* was litigating under a different title in the later suit brought by his father and there was therefore no bar of *res judicata*. I do not see how this decision supports the contention of the appellant here. Latchayya *v.* Venkatapatiraju.

For these reasons, I agree with the Courts below in holding that the question of the appellant's title is *res judicata* by reason of the finding in the previous litigation and dismiss the second appeal with costs of the respondents 1 to 13.

Leave granted.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

G. Abdul Khadir Saheb .. *Petitioner* (1st Defendant)*

v.

V. Pachaiyappa Chetti and another.. *Respondents (Plaintiff and 2nd Defendant).*

Abdul Khadir Saheb *v.* Pachaiyappa Chetti.

Civil Procedure Code (V of 1908), Ss. 24 and 151 and Madras City Civil Court Act, Ss. 3 and 5—Transfer of Small Cause Suit to Madras City Civil Court to be tried along with a suit on the file of the City Civil Court—If can be ordered.

Though Madras City Civil Court Act, S. 3 gives jurisdiction to the City Civil Court to try certain suits excluding suits cognizable by the Court of Small Causes, Madras, S. 5 of the Act provides that by virtue of his office, a Judge of the City Civil Court shall be a Judge of the Court of Small Causes, Madras, with respect to cases cognizable by the latter Court. Also a Court trying any suit transferred or withdrawn under S. 24, Civil Procedure Code, from a Court of Small Causes shall for the purposes of such suit be deemed to be a Court of Small Causes. A transfer of a Small Cause Suit to the City Civil Court under S. 24, Civil Procedure Code, can be ordered.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing transfer of S. C. No. 11852 of 1938 from the file of the Court of Small Causes, Madras, to the file of the City Civil Court, Madras, to be tried along with O. S. No. 157 of 1939 on the file of the City Civil Court, Madras.

P. K. Janakiram for the Petitioner.

N. Panchanatha Aiyar and *P. G. Krishna Aiyar* for the Respondents.

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* C. M. P. No. 1397 of 1939. 18th September, 1939.

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The Court made the following

ORDER.—This is an application made under Ss. 24 and 151 of the Civil Procedure Code for the transfer of S. C. S. No. 11852 of 1938 on the file of the Court of Small Causes, Madras, from that Court to the City Civil Court, Madras, to be tried along with O. S. No. 157 of 1939 on the file of the latter Court on the ground that the two suits are connected and that it is convenient that they should be tried by the same Court. A preliminary objection has been raised to the application on the ground that under S. 24, Civil Procedure Code, there could be no transfer of the kind asked for. Reliance is placed on S. 3 of the Madras City Civil Court Act which gives jurisdiction to the City Civil Court to try certain suits excluding suits cognizable by the Court of Small Causes, Madras. There is, however, a distinct provision in S. 5 of the same Act to the effect that every person appointed a Judge of the City Civil Court shall be by virtue of his office a Judge of the Court of Small Causes, Madras, with respect to cases cognizable by the latter Court. It cannot therefore be said that the City Civil Judge to whom the present case may be transferred would have no jurisdiction to try the suit. On the other hand there is a distinct provision in S. 24, Civil Procedure Code, which under S. 8 of the Code applies to a Small Cause Court, to the following effect. The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall for the purposes of such suit be deemed to be a Court of Small Causes. In view of S. 5 of the Madras City Civil Court Act this does not appear to be a case of conferring by the order of transfer itself jurisdiction on the Court to which the transfer is made, which it would not possess but for the transfer.

There can thus be no sound objection to the entertainment of the application in a case like this under S. 24, Civil Procedure Code. In the view we have taken of the preliminary objection it seems unnecessary to decide whether another remedy is not available to the petitioner by way of an application to the Chief Justice of the High Court under S. 5 of the Madras City Civil Court Act.

On the merits it is clear that the balance of convenience is in favour of the transfer asked for. It seems to us however that we cannot reject the complaint made by the second respondent that he may have, as a result of the transfer to be made, to

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pay additional court-fee in the City Civil Court. It is not proper that we should deal in advance with the question whether additional court-fee would be properly leviable in the circumstances. But assuming that such additional fee would be leviable, which question however we entirely leave to the City Civil Court to decide, it seems to us that the second respondent's complaint is one for which some redress should be provided. We therefore direct the transfer as prayed for but with the condition that the additional court-fee, if any, which may be required to be paid as a result of the transfer, should be paid by the petitioner in this application in the first instance, and that amount should be treated as the costs of the petitioner in the suit and provided for by the final decree in that suit. There will be no order as to costs of this petition.

K. S. —— *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE GENTLE.

In the matter of The Indian Companies Act, 1913

and

In the matter of The Travancore National and Quilon Bank, Ltd.

P. S. Tulajarama Rao .. *Applicant**

v.

Sir James Taylor, Governor of Reserve Bank of India, Central Office, Calcutta and two others .. *Respondents.*

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Tulajarama Rao v. Sir James Taylor.

Contempt of Court—Petition for winding up pending in Court—If opinion published that in the interests of creditors it should be proceeded with amounts to contempt—Bona fides *of parties—How far material.*

A discussion in a newspaper of the rights and wrongs of a case when pending before a Court is improper and constitutes contempt of Court. This does not mean that reference cannot at all be made to pending cases or that items of news which are concerned with pending cases should not be published; but what cannot be permitted is a discussion of the attitude which the Court should adopt when considering the scheme.

Where therefore pending an application for winding up of a Bank before the Court, the Reserve Bank investigated the affairs of the Bank at the instance of the Bank in question and the Government to satisfy itself about the stability of the Bank before rendering it any financial help, and as a

* Application No. 1854 of 1938 in O. P. No. 158 of 1938. 16th November, 1938.

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result of investigation the Governor of the Reserve Bank reported to the Government of Madras by a letter that "the only conclusion to be drawn from the material so far available was that the interest of the depositors would best be served by allowing the liquidation proceedings to take their course without further postponement," and that letter was released to the Press by the Governor of the Reserve Bank and the Prime Minister and published in the papers, such release and publication constitutes technically a contempt of Court, as it amounts to advising the acceptance of the petition for winding up, a matter which the Court was being called upon to decide. The motives of the parties in so releasing or publishing does not make it any the less contempt, though it will have a bearing on the question whether the Court should take action on the petition.

To comment on a case which is about to come before the Court with knowledge of the fact is just as much a contempt as comment on a case actually launched.

Application for committing for contempt in O. P. No. 158 of 1938.

K. Krishnaswami Aiyangar and *A. Seshachari* for Applicant.

Nugent Grant instructed by *King and Partridge, T. R. Venkatarama Sastri, P. R. Srinivasan, V. C. Gopal-ratnam, S. Parthasarathi, V. K. Thiruvenkatachari* and *K. R. Vepa* for Respondents.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) for the Provincial Government.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice. The petitioner in this case applies for the committal of Sir James Taylor, the Governor of the Reserve Bank of India, Mr. M. M. Bhargava, the Manager of the Madras Branch of that Bank, and Mr. G. A. Johnson, the acting Editor of the "*Madras Mail*" for alleged contempt of Court. The action of the first respondent complained of is that he procured the publication of a letter dated 22nd July, 1938, written by him to the Prime Minister of the Madras Government with reference to a petition then before this Court for the compulsory winding up of the Travancore National and Quilon Bank, Limited. The letter was published in the local press on the 9th August at the request of the first respondent conveyed in a letter by the second respondent to the Secretary for the Government of Madras, Development Department. The complaint against the acting Editor of the "*Madras Mail*" is that he published the letter and also published a leading article commenting on a scheme for reconstruction which was about to be placed before the Court and a letter from "a creditor" commenting on the same matter. The application came on for hearing before this Bench on the 19th October. In the course

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of the arguments it appeared that the first respondent's letter had been published in other Madras papers, namely, the "*Hindu*", "*Indian Express*", "*Dhinamani*", "*Swadesamitran*" and "*Andra Patrika*". As the petition which had been filed showed a *prima facie* case of contempt, the Court directed that the Editors of these newspapers should also be called on to show cause and the hearing was adjourned in order that notices might be served upon them. This has now been done and the Editors of these newspapers have entered appearances.

The Travancore National and Quilon Bank (which I shall hereafter refer to as "the Bank") suspended payment on the 21st June, 1938. The Head Office of the Bank was in Madras and it had many branches inside and outside the Presidency. The suspension of payment was therefore a matter of great public and private concern. On the 22nd June a petition for the winding up of the Bank was presented to the Bombay High Court and on the same day a similar petition was filed in the District Court of Quilon, which is in the State of Travancore. The next day, a petition for its winding up was also presented to this Court. A run on the Bank commenced on the 15th March, and as it continued to grow in intensity, the Bank was compelled to close its doors. Before suspending payment the Directors applied to the Reserve Bank of India for financial help. The Reserve Bank naturally wished to investigate the affairs of the Bank before committing itself and on the 20th June an investigation was commenced, but before it could be completed the suspension of payment took place. The Directors of the Bank then wanted the Reserve Bank to take charge of its assets and conserve them pending further investigation. Discussions took place between the Minister for Industries, the Officials of the Finance Department of the Government of Madras, and the Deputy Governor of the Reserve Bank on the 27th June and between the Prime Minister and the Deputy Governor on the 29th June. On the 30th June, the Government of Madras issued a communication to the Press stating that the Government had anxiously considered all possible steps that could be taken to meet the situation and, in consultation with the authorities of the Reserve Bank, it was suggested that the Bank should apply to the Reserve Bank to undertake an immediate and thorough investigation through competent auditors and accountants appointed by them into the affairs of

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the Bank and agree to act according to such advice as might be tendered, as a result of the investigation "for the continuation, reorganisation, or liquidation of the Bank," whichever course was finally suggested".

The Reserve Bank estimated that the expenses of the investigation would amount to Rs. 10,000 and intimated its willingness to undertake the investigation if this sum were forthcoming. On the 2nd July, the Bank asked the Court to appoint Provisional Liquidators and to sanction the payment of the Rs. 10,000 out of the assets of the Bank. The application was heard by Stodart, J., who granted the first part of the application the same day, but by an order delivered on the 5th July dismissed the application for the payment out of the Rs. 10,000 on the ground that he had no power to grant it. The hearing of the winding up petition was then adjourned to the 28th July.

On the 8th July, the Reserve Bank intimated its willingness to undertake the investigation at its own expense and the next day appointed a special officer for the purpose, but when he went to the premises of the Bank in Madras he met with some opposition from the Bank officials. It would appear that the opposition was subsequently withdrawn, because on the 17th July, the special officer was in a position to make a preliminary report. On the 18th July, the first respondent came to Madras and on his arrival the preliminary report of the special officer was handed to him. The first respondent remained in Madras for two days during which time he had an interview with the Prime Minister and received a deputation from a committee of creditors who were interested in the reconstruction of the Bank. On the 22nd July, the first respondent wrote to the Prime Minister the letter complained of in the petition. In it he expressed the opinion that the only conclusion to be drawn from the material so far available was that the interest of the depositors would best be served by allowing the liquidation proceedings to take their course without further postponement and it seemed to him that it would be in the best interest of the depositors that the liquidation should be carried out for the Bank as a whole, as from the preliminary figures furnished to him it would appear that the proportion of the assets to the liabilities was considerably larger in Travancore than in British India. The letter recommended that no further attempt should

be made to postpone liquidation proceedings and concluded with the statement that the writer had no objection to the publication of the contents of this letter if the Prime Minister so desired.

On the 27th July an application was made to the Appellate Side of this Court for an order staying the proceedings in the winding up petition pending the hearing of the appeal which had been filed against the order of Stodart, J., refusing to allow the Rs. 10,000 to be paid out of the assets of the Bank for the purposes of the investigation by the Reserve Bank. That this appeal should have been persisted in seeing that the Reserve Bank had agreed to undertake the investigation at its own expense is a matter of some surprise. The Court refused an order of stay, but heard the appeal itself on the 9th August and by an order dated 12th August dismissed it. On the 28th July by an order of Venkataramana Rao, J., the hearing of the winding up petition was further adjourned to the 18th August. On the 9th August the second respondent wrote a letter to the Secretary to the Government of Madras, Development Department, forwarding a copy of the preliminary report of the special officer appointed to investigate the affairs of the Bank together with other documents and in the course of this letter said :

"I am directed by the Governor of the Bank to intimate to you that we consider it would be very helpful if the Madras Government would release to the press the Governor's official letter dated the 22nd July, 1938, addressed to the Prime Minister."

As the result of this letter the Government of Madras issued to the Press for publication the first respondent's letter and it was published in the local press the same day. The petition for the winding up of the Bank was then pending and was not dealt with until the 5th September when Venkataramana Rao, J., passed an order for compulsory winding up. A scheme of reconstruction of the Bank had in the meantime been presented on behalf of certain creditors. In his order granting the winding up petition, the learned Judge directed the official liquidators to report on the scheme, and that is how the matter stands at present.

The petitioner complains that the letter of the first respondent constitutes contempt of Court inasmuch as it expresses an opinion that the winding up petition should be granted. There is much force in this contention. In asking the Government of Madras to release the letter for publication we are convinced that the first respondent had no intention to act in contempt.

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His intention was merely to inform the creditors and shareholders of the Bank what he considered should be the proper attitude to adopt with regard to the winding up petition. The intention of the first respondent and the *bona fide* nature of his action have an important bearing on the question whether the Court should take action on the petition, but good intention is not the deciding factor in a matter of contempt. To comment on a case which is *sub judice* or to suggest that the Court should take a cartain course in respect of a matter before it undoubtedly constitutes contempt and honesty of motive cannot remove it from this category. If this were to be allowed persons in a position to assist the Court by their evidence might be prevented from coming forward, and persons appearing as witnesses might be influenced in their testimony. The criterion is not whether the Court will be influenced, but whether the action complained of is calculated to prejudice the course of justice. In the present case it has been shown that one creditor at least was influenced by the letter of the first respondent. We refer to the letter which appeared in the *"Madras Mail"*. In this letter which is dated the 16th August, and was published on the 19th August, the writer says:

> "After reading that opinion (that of the first respondent expressed in his letter of the 22nd July) I am strongly for the immediate liquidation of the Bank and probably many other depositors have changed their minds after knowing the statement of the Reserve Bank,"

and concludes:

> "For the reconstruction of the bank it is necessary to create confidence and I fail to see how this can be done if the scheme is not backed by the Reserve Bank. I think that, in the absence of higher and more reliable authority, the creditors must believe the Reserve Bank, whose opinion is that 'no useful purpose would now be served by postponing liquidation proceedings'."

At the time when the first respondent's letter was published the reconstruction scheme had not been placed before the Court, but it was known that a committee of creditors proposed to put forward a scheme. The matter was in fact mentioned in the course of the arguments heard by Stodart, J., at the beginning of August. To comment on a case which is about to come before the Court with knowledge of the fact is in our opinion just as much a contempt as comment on a case actually launched. In *Rex* v. *Parke*[1], Wills, J., in the course of his judgment

1. (1903) 2 K.B. 432 at 437.

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observed :—

"Great stress has been laid by Mr. Danckwerts upon an expression which has been used in the judgments upon questions of this kind—that the remedy exists when there is a cause pending in the Court. We think undue importance has been attached to it. It is true that in very nearly all the cases which have arisen there has been a cause actually begun so that the expression, quite natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased."

The question whether there can be contempt of Court when proceedings are imminent but not yet launched was also discussed in *Rex* v. *Daily Mirror*: *Smith*, Ex parte,[1] but as the question did not call for a decision, no decision was given. Lord Hewart, C. J., however, quoted the passage which has just been cited from the judgment of Wills, J., and as there was no indication of disapproval it may, we think, be taken that the leaning was in the same direction.

As we have already indicated the Court does not in any way doubt that the first respondent was actuated by the best motives, but inasmuch as he publicly advised the acceptance of the petition for winding up, a matter which the Court was being called upon to decide, and as a reconstruction scheme was about to be put before the Court, we are constrained to hold that there was in law contempt of Court. The second respondent played a less important part in the matter and in writing to the Prime Minister on the 9th August, he was acting on the instructions of the first respondent. He, however, shared in securing the release for publication of the letter complained of and while the Court acquits him also of any intention to act in contempt and accepts that he acted in good faith, he did in fact share in the contempt.

We will now turn to the position of the Editors of the respective papers. As we have mentioned, they all published the first respondent's letter of the 22nd July, and the *"Madras Mail"* published a leading article on the proposed reconstruction scheme and the letter from 'A creditor'. The *"Hindu"* published a statement from the "Secretary, Central Committee of Creditors, Travancore National and Quilon Bank, Madras", and a statement from the Managing Editor of *"Indian Finance"* strongly recommending the acceptance of the scheme. The *"Indian Express"* published a leading article, and the statement

1. (1927) 1 K.B. 845

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from the Secretary, the Committee of Creditors. The *"Swadesamitran"* published a shorter statement from the Secretary of this Committee. The *"Dhinamani"* and the *"Andra Patrika"* merely published the first respondent's letter.

As the publication of the letter of the first respondent constitutes contempt of Court, the Editor of each paper in which it appeared must be deemed to share in the contempt. We do not think it is necessary to enter upon a detailed discussion of the other matters which appeared in these papers relating to the affairs of the bank. The Court regards the publication by the *"Madras Mail"* of the leading article of the 22nd July, and the letter from "A creditor" and the publication by the *"Hindu"* of the statement of the Managing Editor of the *"Indian Finance"* as also constituting contempt of Court, but will treat the other published statements as not being in contempt. As in the case of the first and second respondents, the Court accepts the statement that the Editors had no intention of acting in contempt and that their *bona fides* are not in any way in question. The fact that the first respondent's letter was sent to them by the Government led them to publish it without pausing to consider its effect. The Editor of the *"Andra Patrika"* states the position very well in his affidavit showing cause. He there says:—

"The very responsible and eminent character of the source from which the communique was issued, misled me into publishing the letter, without scrutinising its contents in a more searching manner than I did".

The Court has been asked to give an indication of what may and what may not be published in circumstances such as these. It is impossible for the Court to do so. It would mean traversing a very long distance and even then it would not lead to a complete statement. It is, however, fundamental that a discussion in a newspaper of the rights and wrongs of a case when pending before a Court is improper and constitutes contempt of Court. This does not mean that reference cannot be made to pending cases or that items of news which are connected with pending cases should not be published. No objection could, for instance, be taken to the publication in the Press of a statement that the creditors of a company in respect of which a winding up order has been passed have put forward a scheme for reconstruction, but what cannot be permitted is a discussion of the attitude which the Court should adopt when considering the scheme.

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The power to commit for contempt of Court is not to be lightly used and should be reserved for cases where the contempt is deliberate and of such a nature that committal is called for. In the present case all that can be said is that the respondents acted without due consideration. They have all expressed their regret to the Court and we think that the matter may be left there. Sufficient has probably been said to prevent a similar situation arising in future.

At the conclusion of the arguments the learned Advocate-General addressed the Court on behalf of the Government of Madras. He stated that the Government accepted the responsibility for the publication of the letter of the first respondent, and that the Government felt it would be failing in its duty to the shareholders and depositors scattered in different parts of India and Ceylon if it did not release the letter of the first respondent. There can be no duty to release for publication in the Press a letter advising on a matter which is *sub judice* and the release itself constituted a technical contempt, but no complaint has been made of this and we, of course, accept the learned Advocate-General's statement that the Government felt it its duty to publish the letter.

The learned Advocate for the petitioner has left the question of costs entirely to the Court. Had he pressed for costs, we should not have made an order for their payment. We consider that the petitioner who was obviously in possession of the full facts was not justified in proceeding against one newspaper alone. What his motives were it is unnecessary to inquire, but he was obviously not impartial in his action. In these circumstances, there will be no order for costs.

Application accepted but no order for committal passed.

S. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Muhammad Ibrahim .. *Appellant** (*Opposite Party*)

v.

S. Kamal Saheb .. *Respondent* (*Applicant*).

Muhammad Ibrahim v. Kamal Saheb.

Workmen's Compensation—Deceased incurring accident while travelling in a bus—Accident not while workman was employed—Evidence—Interference in appeal against Commissioner's order whether proper.

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* A. A. O. No. 370 of 1937. 31st August, 1939.

Muhammad Ibrahim v. Kamal Saheb.

Where from the evidence in the case it was clear that the accident to the deceased, who was a 'bus driver' no doubt, arose while he was travelling as a passenger in a bus and there was no evidence that he was actually going to or from his work or going to the bus for the purpose of his employment,

Held, that the accident to the deceased did not arise out of or in the course of his employment. Hence the claimant's application for compensation under the Workmen's Compensation Act was unsustainable.

Appeal against the order of the Court of the Commissioner for Workmen's Compensation, Madras, in W. C. Case No. 167 of 1936 dated the 23rd day of September, 1937.

One S. Kamal Saheb of Muddanur in Cuddapah district applied for compensation under the Workmen's Compensation Act from Muhammad Ibrahim, bus owner, Cuddapah town, on the ground that his (the applicant's) son Kamal Saheb had been employed on Bus No. CU. 256, the property of the opposite party, when it was travelling between Pulivendla and Vembuli on the 16th of July, 1936, when an accident happened and the bus capsized as a result of which Kamal Saheb was killed. The applicant alleges that the monthly wages of the deceased were Rs. 25 and he consequently claimed as compensation a lump sum of Rs. 810.

The opposite party denied liability on the ground that the deceased, although he had once been a driver employed by the opposite party, had left service 10 days prior to the accident as he was told that he would be dismissed on account of his drunken habits. The opposite party alleges that, on the day of the occurrence, the deceased was simply travelling in the bus to which the accident occurred, as an ordinary passenger, and he made the further allegation against the deceased that he was drunk at the time of his death.

Ch. Raghava Rao, S. Kothandarama Nayanar and *N. C. Subbiah* for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This appeal must be allowed. The learned Commissioner's finding that the deceased was in the employment of the opposite party is a finding of fact with which we cannot; and do not wish to interfere. But there was no evidence whatever on which the learned Commissioner could base his finding that the accident to the deceased arose out of and in the course of his employment. His employment was as a "bus driver" but at the time of the accident he was travelling as a *passenger*, standing on the foot board. There is no evidence that he was

going to or from his work, or that he was going in the bus for the purpose of his employment.

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This appeal is allowed with costs here and in the Court of the Commissioner.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Jami Venkatappadu and others .. *Petitioners** (*Respondents*)

v.

Kannepalli Ramamurthi and others .. *Respondents* (*Petitioners*).

Jami Venkatappadu *v.* Kannepalli Ramamurthi

Madras Agriculturists Relief Act (IV of 1938), Ss. 19 and 20—Decree of Berhampore Court—Berhampore included in a new Province—Execution continuing in Berhampore Court—Applicability of Madras Act IV of 1938—Jurisdiction of executing Court to hear applications under Ss. 19 and 20.

Petitions under Ss. 19 and 20 of the Madras Agriculturists Relief Act (IV of 1938) must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of the decree and therefore come within matters covered by S. 47 of the Civil Procedure Code and must be presented in the Court in which the execution petition was pending (here, the Berhampore Sub-Court) and not in the Court in whose jurisdiction some of the properties covered by the mortgage decree are situated.

Madras Agriculturists Relief Act has to be applied and its provisions enforced by the Berhampore Sub-Court (now in Orissa Province) in dealing with petitions under the Act so long as the execution application continues to be pending in that Court.

Petitions under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Berhampore dated 4th July, 1938 and passed in E. A. No. 28 of 1938 in E. P. No. 79 of 1934, etc., respectively, in O. S. No. 28 of 1929.

The Advocate-General (*Sir Alladi Krishnaswami Aiyar*) with *B. V. Ramanarasu* and *P. S. Raghavarama Sastri* for Petitioners in C. R. P. Nos. 372 to 375 of 1939 and for Respondents in C. R. P. Nos. 224, 226 to 228 and 588 of 1939.

T. R. Venkatarama Sastri for *B. Jagannadha Das* for Respondents in C. R. P. Nos. 372 to 375 and for Petitioners in C. R. P. Nos. 224, 226 to 228 and 588 of 1939.

K. Ramiah Pantulu for Respondent in C. R. P. No. 225 of 1939.

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* C. R. Ps Nos. 224, 225, 226, 227, 228, 372, 373, 374, 375 and 588 of 1939. 20th September, 1939.

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Pandrang Row, J.

The judgment of the Court was delivered by

Pandrang Row, J.—These are revision petitions from the orders of the Subordinate Judge of Berhampore and of the Subordinate Judge of Chicacole on certain applications presented by the judgment-debtors under Ss. 19 and 20 of the Madras Agriculturists Relief Act, the judgment-debtors being the defendants in a mortgage suit instituted in 1929 in the Sub-Court at Berhampore in which the final decree was passed on 9th March, 1933. The application for execution was made in August, 1934, (E. P. No. 79 of 1934) and it was during the pendency of this application for execution that Orissa was constituted into a separate Province. The execution proceedings continued to be carried on in the Berhampore Sub-Court and some of the mortgaged properties, all of which have been since the formation of the Orissa Province come within the jurisdiction of the Sub-Court at Chicacole in this Presidency, were sold on 26th July, 1937, and they were purchased by the decree-holders themselves after they had obtained permission to bid and to set off the sale price against the decree amount. The sale however was not confirmed because on 24th August, 1937, that is, within a month after the sale, an application was made by the judgment-debtors under O. 21, r. 90, Civil Procedure Code, to set aside the sale and the enquiry into that petition was not completed till the 2nd April, 1938, on which date the judgment-debtors presented petitions under S. 20 of the Madras Agriculturists' Relief Act praying for stay of execution. Petitions under S. 19 of the Act were presented in the same Court, that is, the Berhampore Sub-Court on the 5th May, 1938. Similar petitions under S. 19 of the Act were also presented by the judgment-debtors in the Chicacole Sub-Court on the 14th April, 1938, on the ground that the mortgaged properties were situate within the jurisdiction of that Court. It would thus appear that the judgment-debtors were prosecuting the same remedy so far as the remedy given by S. 19 of the Act was concerned in two Courts at the same time. On the 4th July, 1938, an interim order was made by the Sub-Judge of Berhampore on the petitions for stay under S. 20 of the Act. It is that order which is sought to be revised by the decree-holders in C. R. Ps. Nos. 224 to 228. On the 5th of November, 1938, the Berhampore Sub-Court made an order directing the petitioners, that is to say, the judgment-debtors, to elect between the two Courts, namely, the

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Berhampore Sub-Court and the Chicacole Sub-Court and prosecute their remedy only in one of these two Courts. As this was not done by the petitioners, the Berhampore Sub-Court dismissed the petitions under S. 19 for non-prosecution on 13th December, 1938. It is from this order that C.R.Ps. Nos. 373 and 375 have been presented. It may be mentioned in this connection that the applications under S. 20 of the Act were dismissed by the Berhampore Sub-Court on the 23rd January, 1939. C. R. Ps. Nos. 372 and 374 are petitions to revise this order.

There was an order made by the Chicacole Sub-Court on the petitions presented to it under S. 19 of the Act to the effect that it had jurisdiction to deal with them. This order happens to have been made on the same date as the order of the Berhampore Sub-Court dismissing the similar petitions under S. 19 and C. R. P. No. 588 is the petition to revise this order of the Chicacole Sub-Court dated 13th December, 1938, presented by the decree-holders.

It was conceded by the learned Advocate-General who appeared for the petitioners in C. R. Ps. Nos. 372 to 375 of 1939 that so far as the petitions under S. 20 of the Madras Agriculturists' Relief Act were concerned, it was the Berhampore Court alone which had jurisdiction as that was the Court which passed the decree and was actually executing the decree at the time. On the other side, Mr. Venkatarama Sastriar also agrees that the Berhampore Sub-Court had jurisdiction to deal with the petitions under S. 20 of the Act. So far, therefore, there is agreement, but as regards the petitions under S. 19 of the Act, it is contended by the learned Advocate-General that it was the Chicacole Court alone that had jurisdiction. His alternative contention, however, is that if the Chicacole Court had no jurisdiction then the Berhampore Sub-Court which must have jurisdiction was not right in dismissing the petitions on the alleged ground of non-prosecution, in the circumstances which appear on the record. The question of jurisdiction is really not one of difficulty. The order in Council which is relevant is the Government of India (Constitution of Orissa) Order of 1936. S. 4 (1) of that order is to the effect that the date on which the said provisions, that is to say, the provisions defining the Province of Orissa are to come into operation shall be the 1st April, 1936. So far as the judicial proceedings are concerned, S. 20 gives power to the Governor-General in

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Council to give such directions as he thinks proper as to the disposal of cases pending on or shortly before, the appointed date in any Court acting for an area, any part of which is transferred by this order to Orissa and as to the Courts in which proceedings by way of appeal or revision are to lie in cases decided by any such Courts before the appointed day. In pursuance of these powers the Governor-General in Council published a Notification No. F. 210 of 1936, Judicial dated 1st April, 1936. The notification consists of only two paragraphs which run as follows:—

"(1) Every proceeding pending on the appointed day before any Court, other than a High Court, in, or in respect of any area transferred by the said order to Orissa shall be continued, as if the said order had not been made.

(2) Any appeal or application for revision in respect of any proceeding so pending or of any decision made before the appointed day in any such Court in or in respect of any such area shall lie in the Court which has appellate or revisional jurisdiction to try such proceeding if the proceeding were instituted after the appointed day.

Provided that, where the proceeding relates to any property situate partly within and partly without any area transferred by the said order to Orissa, any appeal or application for revision shall lie as if the said order had not been made."

It is clear from the first paragraph, as the execution petition was pending on the 1st April, 1936, in the Berhampore Sub-Court, the Berhampore Sub-Court was perfectly competent to go on with it as if the Order in Council constituting the Orissa Province had not been made. In other words, it had complete jurisdiction and so far as the jurisdiction to deal with the execution application then pending is concerned, the position was as if the old state of things had continued without any change and the Berhampore Sub-Court continued to function as a Court in this Presidency, and subject to the jurisdiction of this High Court. We have no doubt that all the petitions, that is, those under S. 19 as well as under S. 20 of the Madras Agriculturists Relief Act must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of the decree and therefore come within the matters covered by S. 47, Civil Procedure Code. They were therefore rightly presented in the Berhampore Sub-Court. The presentation of petitions under S. 19 of the Act for the same remedy in the Chicacole Sub-Court was obviously a precaution taken lest there should be some doubt expressed by the Berhampore Sub-Court about its own jurisdiction to deal with the petition under the Madras Agriculturists' Relief Act passed

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by the Madras Legislature after that Court had ceased to be included in the Madras Province to which alone that Act applied. But this precaution taken by the judgment-debtors cannot justify the Berhampore Sub-Court in dismissing the application made to it simply because the petitioners would not make the election which they were asked to make by the Court and would not withdraw the petitions presented by them in the Chicacole Sub-Court. This is not a judicial way of disposing of matters of this kind raising questions of considerable importance, the decision of which will entail serious consequences. It is enough to state in this connection that if the judgment-debtors' case is established, the decree debt would be scaled down by over Rs. 25,000. The order of the 13th December, 1938, made by the Sub-Court of Berhampore is itself very clear that the only reason for dismissing the petitions was not any non-prosecution of the petitions but what the Court appears to have regarded as contumacy on the part of the petitioners. The order runs as follows:—

"Adjournment cost paid. The applicants have so far taken no steps to comply with my previous orders, though the direction was specified and clear, even adjournment was allowed last time on terms of cost. On the contrary, Mr. Y. S Ramamurthy, Advocate for the decree-holders, represents that the applicants are so far maintaining before the Subordinate Judge of Chicacole that it is that Court which is only seized with jurisdiction over the matter in question. As the applicants are playing this double game though they were warned more than once that they are expected to be more candid in their conduct towards the Court, I decline to grant any further adjournment on this ground and dismiss this application and the other analogous applications for non-prosecution."

The reasons given for refusing the adjournment are the only reasons for the dismissal of the applications because there is nothing to show that there was any non-prosecution as such. It is clear therefore that the Berhampore Court had jurisdiction to deal with the applications made to it under Ss. 20 and 19 of the Act and it was bound to deal with them on their merits and that its order dismissing the application on the alleged ground of non-prosecution is wrong and cannot be sustained.

Before however remanding the petitions to the Subordinate Judge of Berhampore for fresh disposal on the merits, we have to deal with the contention put forward by Mr. Venkatarama Sastriar to the effect that the Berhampore Court would not be bound to apply or enforce the provisions of the Madras Agriculturists' Relief Act. This contention has to be met because

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that contention were well founded, there would be no reason to remand the petitions to the Berhampore Sub-Court for fresh disposal. We are of opinion that this contention has really no foundation, because, as was observed already, the very provision in the notification of the Governor-General in Council which provides that pending cases should continue to be dealt with by the Courts in which they were pending also shows that they should be dealt with as if the order in Council constituting the Orissa Province had not been made. In other words, the proceedings have to be continued as if the Berhampore Sub-Court had not ceased to be a Court belonging to and included in this Presidency and as these petitions and applications are proceedings initiated in connection with the pending execution application, it is obvious that the Berhampore Sub-Court and that Court alone has to deal with these applications and deal with them as if that Court is still a Court included in the Madras Province and as such bound by any Legislative enactment that may be in force in the Madras Province.

We are therefore of opinion that the Madras Agriculturists' Relief Act has to be applied and its provisions enforced by the Berhampore Sub-Court in dealing with these petitions so long as the execution application continues to be pending in that Court, or, to use the words of the Notification, is "continued in that Court." It follows from this that Revision Petitions Nos. 372 to 375 have to be allowed and the orders of the Berhampore Sub-Court dated 13th December, 1938, and 23rd January, 1939, set aside and the petitions concerned remanded to the Berhampore Sub-Court for disposal according to law in the light of the observations contained in this judgment. There will, however, in the circumstances of the case, be no order as to costs in this Court in these Revision Petitions.

As regards the other Revision Petitions presented by the decree-holders from the order of the Berhampore Sub-Court dated 4th July, 1938, the order sought to be revised is clearly on the face of it an interim order and it is equally clear that that order was discharged and became of no effect after the petitions in which that interim order was passed had been ultimately dismissed in January, 1939, by the Berhampore Sub-Court. It is not disputed that this is the position in law. But Mr. Venkatarama Sastriar thinks that his clients might be prejudiced if certain observations made in the interim order of

the 4th July, 1938, remain as they are because they might influence the final disposal on the merits of the petitions under Ss. 19 and 20. It is enough, in our opinion, to indicate our view that the order dated 4th July, 1938, is no longer in force after the dismissal of the petitions themselves on the 23rd January, 1939, and that nothing contained in that order should be deemed to be of any force or effect. With this indication of our opinion, these petitions are dismissed but without costs.

There remains only one other petition, namely, C. R. P. No. 588 filed by the decree-holder, to revise the order of the Chicacole Sub-Court dated 13th December, 1938, on the petitions presented to it under S. 19 by the judgment-debtors. That order merely states that the Chicacole Sub-Court had jurisdiction to deal with these petitions. From what we have said it is clear that the Chicacole Court had no jurisdiction because we have found it is the Berhampore Court alone which had jurisdiction. It follows from this that this petition must be allowed though without costs and the order of the Chicacole Sub-Court dated 13th December, 1938, set aside.

K. C. *C. R. Ps. 372 to 375 and 588 allowed; other petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

B. Veeranna Sha and another .. *Appellants** (*Defendants*)
v.
The Official Receiver of Secunderabad .. *Respondent* (*Plaintiff*).

Veeranna Sha v. Official Receiver of Secunderabad.

Private International Law—Foreign insolvency—Vesting of movables—Attachment after adjudication—Effect—Civil Procedure Code (V of 1908), Ss. 64 and 73—Effect.

Where the appellants' creditors who had attached after a foreign adjudication of the decree-holder, claimed rateable distribution of the moneys brought into Court along with some other creditors who had before the adjudication attached the share of the insolvent under a preliminary decree for partition,

Held, the receiver of the foreign Court is entitled to the free assets of the bankrupt. The free assets must include assets which are not required to meet a charge or an attachment in existence at the time of the adjudication. Ss. 64 and 73 of the Civil Procedure Code cannot override this rule of private international law. As the foreign receiver is entitled to all the

* O. S. A. No. 19 of 1938. 4th September, 1939.

Veeranna Sha v. Official Receiver of Secunderabad.

movable assets of the insolvent which were free at the date of the adjudication and the free assets must be deemed to be the moneys left over after the satisfaction of the claim of the creditors who had attached before the adjudication, appellants are not entitled to anything by reason of their attachment after adjudication. The adjudication prevented the attachment having any validity and they were left merely with the right to prove in the insolvency.

Ananthapadmanabhaswami v. *Official Receiver, Secunderabad*, (1933) 64 M.L.J. 562: L.R. 60 I.A. 167: I.L.R. 56 Mad. 405 (P.C.), referred to and explained.

On appeal from the order of the Hon'ble Mr. Justice Gentle dated 17th December, 1937 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2234 of 1937 in C. S. No. 420 of 1922.

K. Krishnaswami Aiyangar, A. Seshachariar, P. Chakrapani and *T. G. Raghavachari* for Appellants.

C. Vasudevan for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises a question of private international law. . In C. S. No. 420 of 1922 of the Original Side of this Court three members of a joint Hindu family sued for partition of the family estate. One of the plaintiffs died and the other two were adjudicated insolvents by an order of the District Judge of Secunderabad, dated the 15th October, 1928, on an application filed on the 27th August, 1928. Secunderabad is not part of British India and the adjudication was therefore in law an adjudication by a foreign Court. On the 5th December, 1922, a preliminary decree was passed in the partition suit. On the 15th June, 1926, a Bombay creditor of the plaintiffs obtained a decree against them in the Bombay High Court and the decree was transferred to this Court for execution. In the execution proceedings which followed the Bombay creditor on the 20th December, 1926, attached the preliminary decree which the plaintiffs had obtained in the partition suit. Other creditors of the plaintiffs obtained decrees against them and nine of them also attached the preliminary decree before the order of adjudication was passed. Three of the creditors obtained orders of attachment after the adjudication. Two of the creditors who attached after adjudication are the appellants in the present appeal.

On the 18th April, 1937, the partition suit was compromised and in pursuance of the compromise the amount of Rs. 1,31,231-9-0 in cash and Government securities was paid

into Court. The Official Receiver of Secunderabad settled with seven of the creditors who had attached before the adjudication for the sum of Rs. 66,926-1-0. We are told that two of the creditors who attached before judgment allowed their claims to become barred by the law of limitation and one proved in the insolvency. After settling with the seven creditors there remained a balance of Rs. 64,305-8-0. The Official Receiver asked that this amount should be paid out to him. The application was opposed by the appellants, but was granted. Under the compromise decree in the partition suit a sum representing 50,000 *sicca* rupees had to be paid into Court in addition to the Rs. 1,31,231-9-0. It was paid in and after reserving sufficient to meet the claim of the appellants which amounted to some Rs. 21,000, and the claim of the other creditor who had also attached after the order of adjudication all the moneys were withdrawn by the Official Receiver. The appeal concerns the right claimed by the appellants to withdraw the Rs. 21,000.

The appellants' case is that they are entitled in law to rateable distribution with the creditors who attached before adjudication and as there is sufficient money to pay all the creditors they are entitled to be paid the full amount of their claim out of the moneys in Court. In the course of the arguments the appellants' Counsel put forward an alternative claim, which was not advanced before Gentle, J., who heard the application. The aggregate amount claimed by the seven creditors with whom the Official Receiver settled was Rs. 98,000. It is said that even if the appellants are not entitled to withdraw the whole of the Rs. 21,000 they are entitled to receive out of the moneys in Court a sum representing the amount they would have received if the Rs. 98,000 had been rateably distributed between them and the seven creditors. In rejecting the claim made by the appellants before Gentle, J., the learned Judge relied on the judgments in *Ananthapadmanabhaswami* v. *Official Receiver, Secunderabad*[1] and *Galbraith* v. *Grimshaw*[2].

In *Ananthapadmanabhaswami* v. *Official Receiver, Secunderabad*[1], an appeal arising out of this very insolvency, the Privy Council held that the adjudication by a foreign Court operated as a private transfer within the meaning of S. 64 of

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1. (1933) 64 M.L.J. 562: L.R. 60 I.A. 167: I L.R. 56 Mad. 405 (P.C.),
2. (1910) A.C. 508.

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the Code of Civil Procedure. When a foreign Court adjudicates a person insolvent the only property in British India which vests in the Receiver is the movable property which the insolvent was free to assign at the date of the adjudication and such property vests by virtue of private international law. Having regard to S. 64 of the Code of Civil Procedure the adjudication did not, however, affect the rights of a creditor who had attached before the adjudication. The creditor was the Bombay creditor to whom I have already referred.

S. 64 of the Code of Civil Procedure reads as follows:—

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation:—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

By virtue of the provisions of S. 73 of the Code where assets are held by a Court and more persons than one have, before the receipt of assets, applied to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction, the assets, after deducting the costs of realization, shall be rateably distributed among them all. There are provisos to the section, but they do not call for mention here. The appellants contend that inasmuch as S. 64 states that a private transfer of property which has been attached shall be void as against all claims enforceable under the attachment and as the section expressly declares that "claims enforceable under attachment" include claims for rateable distribution, they are entitled by virtue of S. 73 to be treated in the same way as the creditors who attached before the adjudication are treated.

Under the municipal law a creditor who has attached before adjudication but has not received payment is not a secured creditor. The adjudication puts an end to the execution proceedings and the only course open to him is to prove in the insolvency. The law of British India is the same as the law of England in this respect. An adjudication by a foreign Court, being a private transfer within the meaning of S. 64 of the Code of Civil Procedure, does not affect the position of a creditor who before the adjudication has attached movable property of the insolvent. He remains entitled to the benefit of

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his attachment. In deciding the appeal in *Ananthapadmanabhaswami* v. *Official Receiver, Secunderabad*[1], the Judicial Committee applied principles laid down by the House of Lords in *Galbraith* v. *Grimshaw*[2]. In that case the adjudication was in Scotland, but before adjudication a creditor had attached personalty in England. It was held that the attachment was effective. Lord Thankerton who delivered the judgment of the Board quoted the following passage from the speech of Lord Dunedin on *Galbraith's case*[2]:

> " Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be the doctrine at the bottom of the cases of which *Goetze* v. *Aders*[3] is only one example."

Lord Thankerton then went on to say:—

> "This means that, after the date of the foreign adjudication order, it will be recognised as effective but it is equally clear from the opinions expressed in *Galbraith's case*[2] that it will not be allowed to interfere with any process, at the instance of a creditor, already pending, even though such process is incomplete, provided that at that date the bankrupt's freedom of disposal was so affected by the process that he could not have assigned the subject-matter of the process to the Receiver."

But an attachment after adjudication by a foreign Court is entirely a different matter. The receiver of the foreign Court is entitled to what Lord Macnaghten described in *Galbraith's case*[2] as the free assets of the bankrupt. I consider that the free assets must include assets which are not required to meet a charge or an attachment in existence at the time of the adjudication. It is said on behalf of the appellants that S. 64 of the Code of Civil Procedure read with S. 73 puts the Indian Law on a different basis. I am unable to accept this contention. The Legislature could not have intended the provisions of these sections to override this rule of private international law. By reason of this rule the appellants were not in a position to attach after adjudication.

On behalf of the appellants Mr. Krishnaswami Aiyangar has laid stress on the following passage in Lord Thankerton's judgment in *Ananthapadmanabhaswami* v. *Official Receiver*,

1. (1933) 64 M.L.J. 562 : L.R. 60 I.A. 167 : I.L.R. 56 Mad. 405 (P.C.).
2. (1910) A.C. 508. 3. (1874) 2 R. 150.

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Secunderabad[1]:

"In the present case, at the date when the foreign adjudication order was made, the appellant was entitled to the benefit of his prior attachment of the decree in the Madras partition suit. The decree was thereby earmarked for the purpose of answering the Bombay money decree, and that inchoate right would have ripened into execution and sale; it is no matter that under S. 73 of the Code of Civil Procedure the appellant would have to share the proceeds of sale with other decree-holders; it would still be a valuable right."

It appears to me that Lord Thankerton must here have had in mind decree-holders who had also attached before adjudication. The position of a creditor attaching after adjudication was not under consideration.

As the foreign receiver is entitled to all the movable assets of the insolvent which were free at the date of the adjudication and as I hold that the free assets must be deemed to be the moneys left over after the satisfaction of the claims of the creditors who had attached before the adjudication it follows that in my opinion the appellants are not entitled to anything by reason of their attachment. The adjudication prevented the attachment having any validity and they were left merely with the right to prove in the insolvency. This disposes of both the points raised by the appellants.

The appeal fails and must be dismissed with costs.

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

G. R. Naidu and others .. *Appellants** (*Petitioners 1 to 3*)

v.

Yerramsetti Venkataswami Naidu .. *Respondent* (*Respondent*).

G. R. Naidu v. Venkataswami Naidu.

Limitation Act (IX of 1908), Art. 182 (5)—Execution petition wrongly numbered in the cause title—Returned for rectification—Re-presentation delayed—New application for execution filed beyond time—Old re-presented application filed along with it—Subsequent order of dismissal on the re-presented application whether can save limitation—Application itself not in accordance with law.

Where an application for execution of a decree was returned for rectification of the suit number and the execution petition was not presented within time, but a fresh execution application was filed along with the returned petition, though unsigned, with the suit number corrected and an order was passed on the re-presented application rejecting it, and it was relied on to save limitation,

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1. (1933) 64 M.L.J. 562: L.R. 60 I.A. 167: I.L.R. 56 Mad. 405 (P.C.).

* A. A. A. O. No. 96 of 1937. 12th September, 1939.

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Held, that when the fresh execution petition was filed along with the re-presented petition, both had become barred in fact and it was impossible to contend that imitation was saved for the fresh execution application by the subsequent order of dismissal passed on the re-presented petition.

The re-presented petition could not be deemed to be pending at the time when the new petition was filed and the new petition was not filed within three years of the final order on an application made in accordance with law.

An application which does not contain correct suit number cannot be deemed to be an application made in accordance with law as prescribed in O. 21, r. 11.

Chidambaram Chettiar v. *Murugesam Pillai*, (1939) 2 M.L.J. 671, relied on.

Judgment in A. A. O. No. 18 of 1936, followed.

Appeal against the order of the District Court of Guntur dated the 1st October, 1936 and made in A. S. No. 72 of 1936 preferred against the order in E. A. No. 1951 of 1935 in O. S. No. 468 of 1925, D. M. C., Guntur.

T. S. Nagaswamy Aiyar for Appellants.

A. Lakshmayya for Respondent.

The Court delivered the following

JUDGMENT.—This appeal deals with a question of limitation in execution. The decree was dated 10th October, 1925. The last execution petition about which there was no dispute was dismissed on 28th June, 1930. On 19th June, 1933, an execution petition was presented bearing the wrong number of the suit and it was returned for rectification with the endorsement "suit number is wrong; names of parties do not tally." Seven days' time was allowed, the date of the return being 5th July, 1933. This execution petition was not re-presented at all until 29th August, 1935, when a fresh execution petition was filed and along with it the returned execution petition was re-presented with the suit number corrected, but the endorsement resubmitting the execution petition was unsigned and there was no application to excuse the delay, nor was there any explanation for the delay. On this the order was passed on 9th September, 1935 "Fresh Execution Petition filed. Vakil has not signed. Dismissed." The defective execution petition was never numbered at all, not even after this somewhat irregular re-presentation. The appellants, re-presenting the decree-holders, seek to rely on this order of dismissal to save limitation for the fresh execution petition which was presented on 29th August, 1935, that is to say, some 11 days before the order of dismissal was passed.

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It was decided in a very recent case, *Chidambaram Chettiar* v. *Murugesam Pillai*,[1] by a Bench of this Court that if an execution petition is returned for amendment and the decree-holder takes no further action upon it, it should be treated as if he had not put in an application at all; that it is not permissible for the decree-holder to extend the period of limitation by simply failing to re-present an execution petition returned for rectification. It was also held that such execution petitions not re-presented within the proper time cannot save limitation and that an order returning an execution petition for rectification by advocates is not a final order within the purport of Art. 182 (5) nor can one read into the order for the purpose of Art. 182 (5) of the Limitation Act a clause that in default of re-presentation within the time allowed, the application will stand dismissed.

In a very recent case I followed that decision in applying it to facts very similar to these with which I have now to deal. In A. A. O. No. 18 of 1936 there was an execution petition returned for defects and not re-presented for four years. Then a fresh execution petition was filed along with the previously returned petition and an attempt was made to treat the previously returned petition as having been continuously pending, so that the new petition would be in time. This was based on an interpretation of a decision in *Muhammad Abu Bakkar Maracair* v. *Ramakrishna Chettiar*[2], which has been dissented from by the learned Judges in the case just quoted. I held that, when an execution petition is returned for amendment, it has no judicial existence pending its re-presentation. If it is re-presented within time duly amended, the date of the original presentation will be the date of the execution application and the same position would result if it is re-presented late and accompanied by an application to excuse delay and the delay is excused. But if the returned petition is withheld for an inordinately long period and re-presented without any application to excuse delay merely in the hope of saving limitation for a fresh application, I held that it could not be deemed to be a pending application so as to save limitation for the fresh application.

An attempt is made to distinguish the present case on the ground that the executing Court actually passed a final order of

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1. (1939) 2 M.L.J. 671. 2. (1932) 64 M.L.J. 401.

G. R. Naidu v. Venkataswami Naidu.

dismissal on the application in spite of the fact that it was re-presented long after the time allowed. I do not see how the appellants' position is improved by this order, which in effect was nothing more than an order of rejection of an unfiled execution application re-presented long after the period allowed. When the fresh execution petition was filed along with the re-presented petition, both of them were in fact barred by limitation. It is impossible to my mind to contend that limitation is saved for the new petition by the subsequent order of dismissal passed on the re-presented petition. The re-presented petition cannot be deemed to have been pending at the time when the new petition was filed and the new petition was not filed within three years of the final order on an application made in accordance with law. I may also state that in my opinion an application which does not contain the correct number of the suit, the decree in which it is proposed to execute, cannot be deemed to be an application made in accordance with law. Not only does the Code in O. 21, r. 11 prescribe the number of the suit as the first requirement in an execution petition but common sense also indicates that an essential feature of an execution petition is that it should be identifiable with the suit under which it is filed. It seems to me that in the present case the defective application was not an application in accordance with law, that it had no judicial existence after it was returned without being filed for rectification and that when re-presented it was barred by limitation and any order upon it passed subsequently cannot avail to save limitation for the fresh execution petition presented contemporaneously. The appeal is therefore dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Kasi Mangalath Illath Vishnu Nambudiri and others .. *Appellants** (*Defendants 2 to 5*)

v.

Rao Sahib Pattath Ramunni Marar and others .. *Respondents* (*Plaintiffs*).

Vishnu Nambudiri v. Ramunni Marar.

Adverse possession—Temple open to public—Archakas' hereditary right of management of suit temple—Trustees' right of supervision—Suit by

*S. A. No. 70 of 1934. 25th November, 1938.

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trustees for possession—Whether entitled to possession—Court-fees—Suit temple not capable of valuation—Excess fee paid to be refunded—Court-Fees Act (VII of 1870), Ss. 13, 14 and 15—Inherent right of Court to order refund.

Where in a small public temple attached to a main bigger temple the defendants, hereditary archakas, for a period of 30 years had been setting up adversely a right of exclusive possession and management to the knowledge of the trustees of the entire endowment,

Held, that from the evidence of facts the inference was that the defendants had acquired the right of being hereditary archakas of the suit temple and as such to be in possession and management of it. They were therefore entitled to be in possession of the said temple, to perform the puja and appropriate the perquisites and offerings subject, of course, to the obligation of performing the puja. The trustees had no right to interfere with the said management except to exercise a general supervision over them as trustees of the main temple. The trustees would not be entitled to a decree for possession.

Held, further, apart from Ss. 13, 14 and 15 of the Court-Fees Act, the Court has got inherent power to refund court-fee—vide *Thammayya Naidu* v. *Venkataramanamma*, (1932) 62 M L J. 541: I.L.R. 55 Mad. 641. As the temple in this case was incapable of valuation the appellants were entitled to a refund of the excess court-fee paid by them.

Appeal against the decree of the District Court of North Malabar in A. S. No. 2 of 1932 preferred against the decree of the Court of the Subordinate Judge of Tellicherry in O.S.No. 8 of 1930.

K. Kuttikrishna Menon and *K. Narayana Marar* for Appellants.

P. Govinda Menon for Respondents.

T. Krishna Rao for *Government Pleader* on behalf of the Government.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit to recover possession of the plaint Siva temple called Vatakketath by the plaintiffs who constitute the board of trustees of the Tiruvangad Devaswom appointed by the decree in O. S. No. 8 of 1925 on the file of the District Court of North Malabar. The basis of the claim is that this Siva temple is a shrine subordinate to the Sri Rama temple of the Devaswom and situate in the same compound but the defendants who are the *archakas* of the Siva temple have set up a hostile title thereto alleging that they own it. The main defence is that the plaint temple does not belong to the Tiruvangad Devaswom and it is not a subordinate shrine as alleged in the plaint. The defendants further pleaded that the plaint temple belongs to their illom in jenm right and their illom has been in exclusive possession of the plaint temple to the knowledge of and against the trustees

of the Tiruvangad Devaswom. They also pleaded that the suit was barred by limitation and adverse possession. The two main questions to which both the lower Courts addressed themselves were the following: (1) whether the plaint temple belongs to the Tiruvangad Devaswom or whether it belongs to the defendants' illom; and (2) whether the suit is barred by limitation and adverse possession. Both the Courts have concurrently found that the plaint temple belongs to the Tiruvangad Devaswom and is not the private property of the defendants' illom, but in regard to the question of adverse possession the lower Courts differed. The learned Subordinate Judge was of the opinion that the right of the Tiruvangad Devaswom to the plaint temple was barred by adverse possession while the learned District Judge held it was not and he therefore gave a decree for possession in favour of the plaintiffs.

Mr. Kuttikrishna Menon on behalf of the defendants-appellants contends that the view taken by the learned District Judge in regard to adverse possession was wrong, that even assuming the right of the Tiruvangad Devaswom was not barred by adverse possession, the plaintiffs can have no right to oust the defendants from their possession of the suit temple on the ground that they have acquired a right to the exclusive management of the suit temple by prescription and that the suit is liable to be dismissed even on the findings of both the Courts. The concurrent finding of both the Courts is that the plaint temple is a subordinate temple of the Tiruvangad Devaswom. Tiruvangad temple is admittedly a public temple and there can be no doubt that the plaint temple is also a public temple. In deciding the question of adverse possession it seems to me that both the Courts have not kept in view this fact. Being a public temple and therefore *res extra commercium* it is not open to a private individual to acquire by prescription any private ownership in regard thereto. The character of the temple as a public temple cannot be taken away by any assertion of private right and there is no evidence that the public have ever been excluded therefrom. Mr. Kuttikrishna Menon rightly concedes before me that he would not dispute the fact of the temple being a public temple. The plaint temple must therefore be deemed to be a public temple and a subordinate shrine to the main Tiruvangad temple. But the question still remains, are the plaintiffs entitled to oust the defendants from their possession of the suit

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temple? The concurrent finding of both the Courts in regard to the possession is that an ancestor of the defendants was introduced into this temple as an *archaka* and that after his death, his descendants continued to be in possession doing *archaka* service. Both the Courts have also found that the defendants have set up an exclusive right to the possession and management of the temple at any rate from 1903. None of the trustees of the temple ever sought to interfere with the management or possession of the defendants' family. The learned District Judge observes thus:—

"It does not also appear that the trustees of the Devasthanam attempted at any time to exercise any acts of control in the plaint temple. . . . . ."

It is in evidence that the defendants' family have been always performing puja and appropriating all the perquisites and offerings received at the temple and were generally attending to the management of the temple and at no time the trustees ever interfered with such management or claimed to receive any portion of the perquisites or offerings, even after the open assertion by the defendants of their absolute rights. It is also in evidence that such repairs as were needed have been done by the defendants in assertion of their absolute rights. It may be that the omission of the trustees of the Tiruvangad Devaswom to interfere with such control may have been due to long continued mismanagement of the trustees of the main temple which necessitated the framing of a scheme by the Court. But if the defendants have been openly setting up exclusive right to the possession and management of the temple adverse to the right of the management which may inhere in the trustees of the main temple by virtue of the fact that the suit temple was a subordinate shrine, the right of the trustees of the temple would certainly be lost by adverse possession. Probably the absence of such control is due to the fact that the usage is that the *archaka* should be in such possession and management subject to general supervision the trustees of the main temple may have over them. The terms under which the defendants' ancestor was introduced into the temple are not known. On the findings of both the Courts there can be no doubt that the defendants' family at any rate for a period of thirty years has been setting up a right of exclusive possession and management to the knowledge of the trustees. Therefore the facts of this case warrant the inference that the defendants have acquired the right of being hereditary *archakas* of the suit temple and as

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such to be in possession and management of it. They are therefore entitled to be in possession of the said temple, to perform the puja and appropriate the perquisites and offerings offered at the temple for their own use subject of course to the obligation of performing the puja. The plaintiffs-trustees have no right to interfere with the said management except to exercise a general supervision over them as trustees of the main temple. The plaintiffs would not therefore be entitled to a decree for possession. In my opinion the defendants are the hereditary *archakas* of the suit temple subject to the supervision of the trustees of the main temple as mentioned by me aforesaid.

In the view I have taken that the defendants are the hereditary *archakas* of the suit temple subject to the supervision of the trustees of the main temple as mentioned by me as aforesaid, the decree of the lower appellate Court negativing their right must be reversed and the decree of the Subordinate Judge dismissing the suit must be upheld on the basis that the defendants are entitled to be in possession as hereditary *archakas*. The result is that the plaintiffs' suit will be dismissed, but I direct each party to bear their own costs throughout.

Leave to appeal is refused.

This appeal having been set down to be spoken to this day, after notice to the Government Pleader *re* refund of court-fee, the Court delivered the following

JUDGMENT.—Some doubt was raised by the office with regard to the refund of court-fee in this case. I issued notice to the Government Pleader. Mr. Krishna Rao on behalf of the Government Pleader frankly stated to me that refund should be ordered and I think he is right. Apart from Ss. 13, 14 and 15 of the Court-Fees Act, the Court has got inherent power to refund court-fee (vide *Thammayya Naidu* v. *Venkataramanammal*[1]). As the temple in this case is incapable of valuation I think the appellants are entitled to a refund of the excess court-fee paid by them. The proper court-fee in this case is Rs. 100. The appellants are therefore entitled to a certificate for the refund of the balance. Mr. Govinda Menon asks me to make an order also in his clients' favour. I cannot do so in this appeal. If so advised, he is entitled to make an application to the lower Court.

K. C. *Appeal allowed.*

1. (1932) 62 M.L.J. 541: I.L.R. 55 Mad. 641.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUNHI RAMAN.

Parasuram Mangacharyulu and others .. *Petitioners* (Respondents 1 to 3—Plaintiffs)*

v.

Parasuram Balarama Krishnamacharyulu and another .. *Respondents (4th Respondent-Defendant and Petitioner).*

Mangacharyulu *v.* Balarama Krishnamacharyulu.

Civil Procedure Code (V of 1908), O. 1, r. 10 (2)—Adding parties—Suit for declaration that plaintiffs were solely entitled to hereditary right to perform archaka *service in a temple—Stranger claiming to be entitled to joint interest in those rights—If can be added as party.*

Where in a suit for a declaration that the three plaintiffs were solely entitled to a hereditary right to perform *archaka* service in the suit temple and to enjoy the service *inam* lands, another person sought to be added as a party as she claimed a joint interest in those rights and contended that her presence as party was therefore necessary to avoid multiplicity of suits,

Held, it was a case in which, in view of the relief claimed by the three plaintiffs, the presence of the new defendant was necessary within the meaning of O. 1, r. 10, Civil Procedure Code, to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit.

Vydianadayyan v. *Sitaramayyan,* (1881) I.L.R. 5 Mad 52 and *Secretary of State* v. *Murugesa Mudaliar,* A.I.R. 1929 Mad. 443, followed.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Tenali dated 21st October, 1936 and made in C. M. P. No. 816 of 1936 in O. S. No. 66 of 1935.

V. Govindarajachari for Petitioners.

P. Satyanarayana Rao for Respondents.

The Court delivered the following

JUDGMENT.—This is an application to revise an order made by the learned District Munsif of Tenali by which he allowed a petition presented on behalf of the second respondent here that she may also be impleaded as a party to a suit O. S. No. 66 of 1935. The application was presented under O. 1, r. 10 of the Code of Civil Procedure. The relevant portion of the rule is worded as follows:

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the

* C. R. P. No. 1495 of 1936. 25th August, 1939.

Mangacharyulu v. Balarama Krishnamacharyulu.

Court to be just, order . . . . . that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

It is obvious from this provision that the Court in making an order directing a new party to be added must be satisfied either that that party ought to have been joined as plaintiff or defendant or that the presence of that party is necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. From the order of the learned District Munsif it appears that at the hearing of the application, the Vakil for the plaintiffs was absent and only the first plaintiff was present in person to represent his objections. The learned District Munsif says that the first plaintiff was unable to explain what detriment would be suffered by him if the petition was granted. Then he says that he sees no detriment that would be caused to the plaintiff if the second respondent here were brought on record as the second defendant. He also says that he does not see how it widens the scope of the suit or changes the character of it. From these statements contained in the order it is clear that the learned District Munsif did not apply his mind to the essential requisites prescribed by O. 1, r. 10 and therefore it became necessary for the learned Advocates for the parties to address lengthy arguments before me in support of their respective contentions.

The suit was filed by three plaintiffs and the main reliefs asked for in the plaint were the following:—

"(1) to declare the plaintiffs' hereditary right to perform *archaka* service in the Chennakesava Anjeneya Swami Varu Temple situated in the village of Nidubrolu;

(2) to remove the defendant from the position of *archaka* and to declare that the defendant has absolutely no right to the *archaka* service;

(3) to remove the defendant from possession of the house mentioned as item 2 in the schedule to the plaint and to put the plaintiffs in possession thereof;

(4) to direct the defendant to give the plaintiffs the property mentioned in item 3 of the schedule to the plaint or its value; and

(5) to grant a permanent injunction restraining the defendant from interfering in future with the plaintiffs' enjoyment of the rights to perform *archaka* service."

The following geneological table is necessary to understand the plaintiffs' case as disclosed in the plaint.

Venkata Narayana-charlu—died in 1921. | Ramacharlu (died). | Mangacharlu—1st plaintiff.

Ramacharlu (died) — Daughter (died).

Venkata Narayanacharlu — Daughter (died). | Daughter—3rd plaintiff married 2nd plaintiff. | Daughter petitioner before the trial Court who has been directed by the trial Court to be impleaded as 2nd defendant.

The plaint allegations are to the effect that the hereditary right to the *archaka* service in the temple was vested in the ancestors of Venkata Narayanacharlu and Ramacharlu who were both the brothers of the first plaintiff that these two brothers are now dead but that during their lifetime they were both of them performing the *archaka* service personally each of them doing duty alternately for six months at a time in the year and that as remuneration for such service they were enjoying separately in two shares the *archaka* service *inam* lands. The first plaintiff's case according to the plaint is that on the death of Ramacharlu his right to enjoy the one-half of the *archaka* service *inam* lands and his right to perform *archaka* service for a period of six months in the year devolved on the first plaintiff. The case of the second and third plaintiffs according to the plaint is that on the death of Venkata Narayanacharlu whose daughter the third plaintiff is, the corresponding rights which vested in Venkata Narayanacharlu devolved on the third plaintiff and her husband the second plaintiff. How the third plaintiff's husband, the second plaintiff became entitled to this right is not explained in the plaint. The plaint goes on to say that the second plaintiff's father Rajagopalacharulu Garu was in actual management of the right mentioned above on behalf of the plaintiffs and while he was in such management he had appointed the defendant as a temporary clerk for performing the *archaka* service and had put him in possession of the house mentioned in Schedule B to the plaint on the distinct understanding that he should relinquish *archaka* service and deliver possession of the house whenever he was called upon to do so. Subsequently an arrangement was made between the first plaintiff on the one hand and the second and third plaintiffs on the other according to which the latter were to perform the *archaka*

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service alternately for six months at a time in the year and the first period of the six months ended on the 30th of June, 1933. Thereupon the first plaintiff caused the second and third plaintiffs to send a registered notice to the defendant informing him that the first plaintiff's right to perform the service for six months commenced on the 1st of July, 1933 and that since the plaintiffs had decided to perform the service themselves the defendant should relinquish such service and deliver possession of the house and other perquisites that were given to him during the time that he was called upon to perform such service. To that notice the defendant replied stating that he was appointed *archaka* not on behalf of the plaintiffs but by the trustees of the temple appointed under the Hindu Religious Endowments Board.

The first defendant in his written statement alleged *inter alia* that the first plaintiff was not entitled to any relief in respect of the temple because he had been given away in adoption to another family as a result of which he had lost all his rights in his natural family and that on the death of Venkata Narayana Charlu, his rights devolved on his two daughters, namely, the third plaintiff and her sister the respondent who has now on her application been directed by the Court below to be impleaded as second defendant. Thus the first defendant's version was that neither the first plaintiff nor the second plaintiff had any interest whatsoever in the *archaka* service or in the service *inam* lands but that the right involved in the suit was vested in the third plaintiff and her sister, the second respondent to this application. The first defendant also asked in his written statement for further particulars as to how the right that was vested in Venkata Narayanacharlu devolved upon the third plaintiff and her husband the second plaintiff and stated that on such particulars being furnished he would plead further. It was after this written statement was filed that the second respondent who as already stated is the sister of the third plaintiff came forward with her application to be impleaded as a party to the suit. Her version in the petition filed by her was that during the minority of herself and the third plaintiff their uncle Rajagopalacharlu Garu who is also the father-in-law of the third plaintiff was invested with the right of managing the temple and the service *inam* lands and also performing the *archaka* service on behalf of the two sisters. Her case therefore was that she was entitled to one-half of the suit properties, that she had an equal joint interest with the third plaintiff in the suit property

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and that consequently she was a necessary party to the suit. This application was resisted before the trial Court on behalf of the three plaintiffs who contended that in case the petition was allowed and the respondent was impleaded as a party, it would lead to a triangular fight about title and that the effect of including her as a party would be to convert the suit which was one in ejectment into a suit based on title. They also pleaded that the right of the present respondent if any to the temple lands had become barred by limitation. These are the main contentions that are urged before me on behalf of the petitioners by their learned Advocate Mr. Govindarajachari. He relies on the English decisions reported in *Moser* v. *Marsden*[1] and also on the decision of a single Judge of this Court reported in *Sri Mahant Prayaga Doss* v. *Board of Commissioners for Hindu Religious Endowments, Madras*[2]. There are other reported cases relied on by him in support of his contention that the second respondent should not have been impleaded as a party to the suit and those are the decisions reported in *Narayanaswami Naidu* v. *Subbaramulu Naidu*[3], *Virbhadrappa Shilvant* v. *Shekabai*[4], *Secretary of State* v. *Murugesa Mudaliar*[5] and *Abdul Gafur* v. *Ali Miah*[6].

The learned Advocate for the respondent on the other hand contends that the subject-matter of the suit concerns the newly added party and that the suit is not a simple suit in ejectment but that it is a suit for a declaration that the three plaintiffs are solely entitled to a hereditary right to perform *archaka* service in the temple and to enjoy the service *inam* lands. He contends that as a joint interest in those rights is claimed by the second respondent her presence as a party to the suit is necessary to avoid multiplicity of suits. In support of his contentions he relies mainly upon the decision in *Vydianadayyan* v. *Sitaramayyan*,[7] which has been followed by Venkatasubba Rao, J., in the decision reported in *Secretary of State* v. *Murugesa Mudaliar*[5]. He also relies upon the decision in *Montgomery* v. *Foy, Morgan & Co.*[8], *Sivarama Pillai* v. *Ganesarathnam Pillai*[9], *Krishnaswami Naidu* v. *Municipal Council, Bellary*[10] and

1. (1892) 1 Ch. 487.
2. (1926) 51 M.L.J. 148: I.L.R. 50 Mad. 34.
3. (1934) 68 M.L.J. 236.
4. (1938) 41 Bom.L.R. 249 at 256.
5. A.I.R. 1929 Mad. 443.
6. (1923) 28 C.W.N. 805.
7. (1881) I.L.R. 5 Mad. 52.
8. (1895) 2 Q.B. 321.
9. A.I.R. 1935 Mad. 353.
10. (1937) 1 M.L.J. 597.

Bavajee v. *Annapurnamma*[1]. I am satisfied that the contentions of the learned Advocate for the respondents are well founded in view of the main relief asked for by the three plaintiffs in their plaint. This, in my view, is a case in which the presence of the second defendant-respondent before the trial Court is necessary within the meaning of O. 1, r. 10 of the Civil Procedure Code to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. By avoiding to implead her as a party to the suit the plaintiffs are seeking to obtain a relief which will not completely dispose of all the matters in controversy involved in the suit.

The learned Judges who decided the case reported in *Vydianadayyan* v. *Sitaramayyan*,[2] were Sir Charles Turner, C.J. and Muthusamy Aiyar, J. The decision turned on the scope of S. 32 of the Code of Civil Procedure of 1877. Under that section also the Court had the power of directing a person to be made a party:

> "Whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit."

These are the words that occur in O. 1, r. 10 (2) of the present Code also. Dealing with these words the learned Judges say as follows:

> "Is it meant by these words that a person not originally impleaded is to be made a party only if the questions raised in the suit cannot otherwise be completely and effectually determined between the parties to the suit? or is it meant completely and effectually determined so that they shall not be again raised in that or in any other suit between the parties to the suit or any of them and third parties? To accept the more restricted interpretation involves the addition of words which we do not find in the section, namely, 'between the parties to the suit' . . . . . ."

This seems to me to be a complete and effective answer to a similar argument addressed in the present case by the learned Advocate for the petitioner. Following the decisions reported in *Vydianadayyan* v. *Sitaramayyan*[2] and *Secretary of State* v. *Murugesa Mudaliar*[3], I therefore hold that the learned District Munsif acted correctly in allowing the petition of the second respondent to be impleaded as a party to the suit. This Civil Revision Petition is in the circumstances dismissed with costs. The order staying the trial before the Court below is cancelled.

K. C. ——— *Revision Petition dismissed.*

1. A.I.R. 1929 Mad. 403 (1). 2. (1881) I.L.R. 5 Mad. 52.
3. A.I.R. 1929 Mad. 443.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Venkat-ramayya, *In re.*

Paluvadi Venkatramayya *alias*
Paluvadi Venkataramanayya .. *Petitioner* (23rd Accused).*

Criminal Procedure Code (V of 1898), S 415—Imposition of separate sentences of fines—No combination of punishments within meaning of section.

S. 415, Criminal Procedure Code, when it refers to two or more punishments is referring to two or more punishments of different kinds.

Where a Sub-Divisional Magistrate passed sentences of imprisonment and imposed two separate sentences of fine, there is no combination of punishments in one sentence within the meaning of S. 415, Criminal Procedure Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Kurnool Division in C. A. No. 7 of 1939 preferred against the judgment of the Court of the Sub-Divisional First Class Magistrate of Markapur in C. C. No. 48 of 1938.

K. S. Jayaram Aiyar for Petitioner.

K. Venkataraghavachari for *The Public Prosecutor (V. L. Ethiraj)* for the Crown.

The order of the Court was made by

Burn, J.—This s an application for revision of the order of the learned Sessions Judge, Kurnool, in C. A. No. 7 of 1939. That appeal was presented to the learned Sessions Judge from the decision of the Sub-Divisional First Class Magistrate, Markapur, in C. C. No. 48 of 1938. In that case the First Class Magistrate was dealing with twenty-four persons who had been tried by the Stationary Second Class Magistrate of Giddalore in C. C. No. 593 of 1937. The learned Sub-Magistrate found all the 24 accused persons guilty of rioting (S. 147 of the Indian Penal Code), wrongful confinement (S. 341 of the Indian Penal Code), assault with intent to dishonour (S. 355 of the Indian Penal Code) and simple hurt (S. 323 of the Indian Penal Code) read with S. 149 of the Indian Penal Code. He convicted them under those sections but considering that they were persons who might properly be dealt with under S. 380, Criminal Procedure Code, he submitted the case to the Sub-Divisional Magistrate under the provisions of S. 562 (1)

* Crl. R. C. No. 418 of 1939. 19th September, 1939.
(Crl. R. P. No. 388 of 1939).

proviso. The learned First Class Magistrate dealing with the case under the provisions of S. 380, Criminal Procedure Code, convicted all the 24 accused of rioting (S. 147, Indian Penal Code) and sentenced them for that offence to pay a fine of Rs. 20 each and accused Nos. 6 and 24 be convicted also under S. 355, Indian Penal Code and sentenced them to pay a fine of Rs. 25 each for that offence. The learned Sub-Divisional Magistrate did not say what he proposed to do with regard to the other convictions which had already been recorded by the Sub-Magistrate. But that is a matter which is not before us now and we do not propose to interfere with it.

The appeal presented to the learned Sessions Judge was on behalf of the 23rd accused only. He had been convicted only of rioting (S. 147, Indian Penal Code) and sentenced to pay a fine of Rs. 20. Under S. 413, Criminal Procedure Code, the 23rd accused would ordinarily have no right of appeal but the appeal was filed on his behalf under the provisions of S. 415-A. It was alleged that the 6th and 24th accused, having been sentenced to pay two fines of Rs. 20 and Rs. 25 had a right of appeal under S. 415-A and therefore the 23rd accused having been convicted at the same trial had also a right of appeal. The learned Sessions Judge has held that none of the 24 accused had any right of appeal in this case. He therefore rejected the appeal referring the 23rd accused to an application for revision to this Court if so advised. The 23rd accused has applied for revision of the order of the learned Sessions Judge.

The only authority of this Court quoted by learned Counsel for the petitioner is the decision of Mr. Justice King in the case of *Public Prosecutor, Madras* v. *Kollur Dasa Pai*[1]. That was a case in which on a summary trial a first class Bench of Magistrates had sentenced one of several persons convicted under the Gaming Act to pay a fine of Rs. 25 for an offence under S. 9 and a fine of Rs. 50 for an offence under S. 8. The persons convicted appealed to the Sessions Judge and he held that an appeal lay. The learned Public Prosecutor filed a revision petition against that decision and Mr. Justice King held that the learned Sessions Judge's decision was correct.

With respect we think that the decision of Mr. Justice King in that case was wrong. The matter depends upon the

1. (1936) M.W.N. 213.

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interpretation of S. 415, Criminal Procedure Code, which says:

"An appeal may be brought against any sentence referred to in S. 413 or S. 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace."

It is contended on behalf of the petitioner that the learned Sub-Divisional Magistrate when he imposed upon the 6th and 24th accused two fines of Rs. 20 and Rs. 25 respectively was passing a sentence combining two of the punishments referred to in S. 413. Now S. 413 is as follows:—

"Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only or in which a Court of Session or District Magistrate or other Magistrate of the First Class passes a sentence of fine not exceeding rupees fifty only."

There are two punishments here mentioned (1) imprisonment and (2) fine. But it is pointed out that in S. 415 there is a reference to "any two or more" of the punishments mentioned in S. 413 or S. 414 and since in S. 413 there are only two kinds of punishments mentioned and in S. 414 there is one kind of punishment mentioned, namely, the punishment of fine, it is argued that if there are two or more sentences of fine this must be regarded as a sentence combining two of the punishments mentioned in S. 413 or S. 414. We are unable to accept this argument. We are of opinion that S. 415 when it refers to two or more punishments is referring to two or more punishments of different kinds. The history of the Code is we think important in this connection and makes the matter clear. When S. 415 was just enacted there were three kinds of punishments provided in both Ss. 413 and 414, namely, in S. 413 a sentence of imprisonment not exceeding one month only, fine not exceeding Rs. 50 only or whipping only and in S. 414 a sentence of imprisoment not exceeding three months only, fine not exceeding two hundred rupees only or whipping only. In those circumstances although it might possibly be argued that S. 415 was to some extent superfluous, it could not be argued that it had no meaning. It was clear that it meant to refer to sentences in which two or more different kinds of punishments referred to in S. 413 and S. 414 were combined. After the modifications in S. 413 and S. 414 introduced in 1923 it is impossible to attribute any real meaning to the phrase "any

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two or more of the punishments therein mentioned" in S. 415 so far as it relates at any rate to S. 414. It is clear we think as Mr. Justice Edgley stated in the case of *Kali Charan* v. *Adhar Mandal*[1] that S. 415 has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50. Learned Counsel for the petitioner has relied upon two decisions of the Oudh Chief Court reported in *Kandhai* v. *King Emperor*[2] and *Makrand Singh* v. *Ganga*[3] and also upon the decision of Mr. Justice Cuming in the case reported in *Akabbar Ali* v. *Emperor*[4]. With respect we are not able to agree with those decisions. We prefer the opinion of Mr. Justice Mitter in the case reported in *Nawabali Haji* v. *Jainab Bibi*[5] and the view of the learned Chief Justice of Bombay and Mr. Justice Crump in the case reported in *Shidlingappa* v. *Emperor*[6]. Our decision can be rested upon the words of S. 415 itself. It is not possible in this case to say that the learned Sub-Divisional Magistrate has passed any sentence by which any two or more of the punishments mentioned in S. 413 are *combined.* The learned Sub-Divisional Magistrate did not combine any of the punishments in either of the sentences that he imposed. He imposed two separate sentences of fine. There is no combination of punishments in one sentence within the meaning of S. 415, Criminal Procedure Code. We think therefore that the learned Sessions Judge was correct and that this application for revision must be dismissed.

Learned Counsel for the petitioner has attempted to persuade us to interfere in revision finally against the order of the learned Sub-Divisional Magistrate. That is not the prayer in the petition which is for revision of the order passed by the learned Sessions Judge. But in so far as this is concerned we observe that the grounds taken for saying that the learned Sub-Divisional Magistrate was wrong in convicting the 23rd accused (present petitioner) are all grounds of fact and not connected with any question of law. Learned Counsel points out that the Sub-Magistrate who tried the case recommended that all the accused should be dealt with under S. 562, Criminal Procedure Code. But the learned Sub-Divisional Magistrate has given

1. (1938) 43 C.W.N. 360.
2. (1931) I.L.R. 7 Luck. 501.
3. (1937) I.L.R. 13 Luck. 618.
4. (1931) I.L.R. 59 Cal. 19.
5. (1932) I.L.R. 59 Cal. 1131.
6. A.I.R. 1926 Bom. 416.

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reasons for not dealing with them under that section and we do not think that there are sufficient grounds for interfering with the exercise of his discretion. We cannot interfere with the conviction on the facts. The 23rd accused was convicted of rioting and let off with a fine of Rs. 20 which cannot be said to be excessive.

This petition is therefore dismissed.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Tholpetti Koloor Kalappan Shetti's son Mondan Shetti .. *Appellant** (*Defendant*)

v.

Ammani Nanchu Shetti's daughter Thimmi Avva and another .. *Respondents* (*Plaintiffs*).

Mondan Shetti *v.* Thimmi Avva.

Hindu Law—Marriage with girl, not a virgin—Validity—Doctrine of factum valet—*Applicability.*

According to ordinary practice Hindus of the higher caste married virgins, but if a Hindu chose to marry a girl who was not a virgin and whom he knew not to be a virgin, he could not use that fact as a ground for treating the marriage null and void. The doctrine of *factum valet* might well be called in aid.

Second appeal against the decree of the District Court of North Malabar in A. S. No. 223 of 1935 preferred against the decree of the Court of the District Munsif of Kuthuparamba in O. S. No. 295 of 1934.

P. Govinda Menon for Appellant.

O. T. G. Nambiar and *S. Venkatachala Sastri* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for maintenance. The appellant (the husband) raises the contention that his marriage with the first plaintiff is invalid because the first plaintiff was pregnant at the time of her marriage; consequently her daughter the second plaintiff must be deemed to be an illegitimate child.

The lower appellate Court has found as a fact that the first plaintiff was pregnant at the time of her marriage, that she was pregnant by the defendant himself and that the marriage was none the less valid, the parties being Sudras. It seems to me

* S. A. No. 673 of 1936. 13th October, 1939.

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not quite clear whether in fact the parties, who belong to the caste known as Edanatan Shettis, are Sudras or Vaisyas, strictly speaking. But I am of opinion that this question has no bearing on the point to be decided. The learned District Munsif propounded a rule, for which he quotes no authority, that one of the essential conditions of a valid Hindu marriage is that the bride should be a virgin. The learned District Judge says that there is no objection under the Hindu law governing Sudras to a pregnant woman marrying, quoting the well-known passage in Manu to the effect that when a man marries a woman who is pregnant, the male child of her womb belongs to the bridegroom and is called "the son received with the bride". The practice recognised in that passage is described by Mayne as now obsolete. Granting that it is no longer the practice—at any rate among the higher castes—for a pregnant woman to be married with the approval of the community and her offspring to be recognised as legitimate regardless of its paternity, it is going a long way to say that if a girl has been regularly married and it is subsequently found that she was pregnant at the time of her marriage or was not a virgin, the marriage becomes void; and it is going still further to say that, when a man has married a girl with due formalities, he himself having had an irregular connection with that girl before marriage, he is entitled to repudiate the marriage on the ground of the lack of virginity of the bride. No authority has been quoted before me in support of the rule that a marriage by a Hindu with a girl who is not a virgin is void. It seems to me most undesirable to lay down such a rule unless it is supported by the most ample authority, for it would open the door to scandalous allegations brought by persons anxious to get rid of an unwanted wife. Still more undesirable is it to allow a husband, in defence to a suit for maintenance by a deserted wife and child, to adduce evidence that he made the bride pregnant before he married her and that therefore the marriage is void. I know of no rule of Hindu Law whereunder a marriage can be declared void merely on the ground that the bride was not a virgin at the time that she was married. I grant that the ordinary practice is for Hindus of the higher castes to marry virgins. But if a Hindu chooses to marry a girl who is not a virgin and whom he knows not to be a virgin, he cannot, in my opinion, use this fact as a ground for subsequently treating the marriage as null and void.

Mondan Shetti v. Thimmi Avva.

It is suggested that a statement in the cross-examination of the plaintiffs' second witness that a pregnant woman cannot be married, might be sufficient evidence of a special custom to that effect in the particular caste. There are grave objections to this contention. Firstly, the witness himself qualifies that statement by saying that such a marriage would be valid if the pregnancy was by the future husband. Secondly, it would take much more than the isolated statement of a single witness made in cross-examination to establish a valid custom as prevailing in the caste. Thirdly, even if it be the rule that a pregnant woman cannot be married, it does not by any means follow that a marriage celebrated in contravention of this rule would be null and void, for the doctrine of *factum valet* might well be called in aid.

The appeal is dismissed with costs.

K. S. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Karinagisetti Chennappa .. *Appellant** (*Plaintiff*)

v.

Karinagisetti Onkarappa .. *Respondent* (*Defendant*).

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Chennappa v. Onkarappa.

Limitation Act (IX of 1908), S. 21 (1)—Hindu Law—Paternal grandmother nearest living relation of minor—If "lawful guardian"—Endorsement by—If saves limitation against minor.

No member of the family other than the father or the mother has been recognised as having the right of guardianship.

Seetharamamma v. *Appiah*, (1925) 50 M.L.J. 689: I.L.R. 49 Mad. 768, overruled.

Kristo Kissor Neoghy v. *Kadermoye Dossee*, (1878) 2 C.L.R. 583; *Mst. Bhikuo Koer* v. *Mst. Chamela Koer*, (1897) 2 C.W.N. 191; In re *Gulbai and Lilbai*, (1907) I.L.R. 32 Bom. 50 and *Ranganayaki Ammal* v. *Ramanuja Aiyangar*, (1911) 21 M.L.J. 600: I.L.R. 35 Mad. 728, approved.

Thayammal v. *Kuppanna Koundan*, (1914) 27 M.L.J. 285: I.L.R. 38 Mad. 1125, not followed.

So on the death of the parents, neither by Hindu Law nor by custom is the grandmother recognised as the lawful guardian of the minor [*Surayya* v. *Subbamma*, (1927) 53 M.L.J. 677 overruled] and endorsements of payments by the paternal grandmother cannot bind the minor and save limitation.

Nagayya v. *Narasayya*, (1938) 2 M.L.J. 501, applied.

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* S. A. No. 318 of 1935. 2nd October, 1939.

Appeal against the decree of the District Court of Bellary in A. S. No. 59 of 1933 preferred against the decree of the Court of the District Munsif of Bellary in O. S. No. 484 of 1932.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

K. Srinivasa Rao for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This appeal raises the question whether the paternal grandmother of a Hindu minor is his lawful guardian when she happens to be his nearest living relation. From 1917 to 1924 the respondent's father had on various occasions borrowed money from the appellant. On the 18th September, 1924, an account was taken and it was found that the respondent's father owed the appellant an aggregate sum of Rs. 3,825 for which he executed a promissory note. The instrument was not properly stamped and therefore was not admissible in evidence. Realizing the defect the appellant filed a suit in the Court of the District Munsif of Bellary for relief on the basis of a settled account. The date of the institution of the suit was 16th July, 1932, and unless the appellant was entitled to rely on certain endorsements on the promissory notes his suit was time barred. I should mention that the respondent's father had died on the 4th October, 1924, and the suit was against the respondent as his legal representative. The respondent's mother had predeceased his father and on his father's death Neelamma, his paternal grandmother, took charge of his property. On the 6th September, 1927, she paid to the appellant a sum of Rs. 70 in reduction of the interest due on the loans and made an endorsement to this effect on the promissory note. On the 10th November, 1927, the District Court of Bellary acting under the provisions of the Guardians and Wards Act appointed one Basappa the guardian of the minor's property. On the 18th February, 1928, Basappa paid a sum in reduction of the amount due and made an endorsement on the promissory note recording the fact of payment. On the 18th July, 1929, Neelamma made another payment in reduction of the debt and this was also followed by an endorsement on the instrument. Basappa was then alive and was still the lawful guardian of the respondent, but he died a month later. The last payment to the appellant was made by Neelamma on the 25th August, 1929. This was a sum of Rs. 1,000 paid towards

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the principal. Again she made an endorsement on the promissory note recording the fact of payment. In order to save limitation the appellant has to rely on the endorsements made by Neelamma on the 6th September, 1927, and on the 25th August, 1929. The District Munsif and on appeal the District Judge of Bellary held that the suit was time barred. The appellant then filed this second appeal which has been placed before a Full Bench in view of conflicting decisions of this Court bearing on the question whether Neelamma was under Hindu Law the lawful guardian of the minor when she made these particular endorsements.

S. 20 of the Indian Limitation Act states that where interest on a debt is, before the expiration of the prescribed period, paid by the debtor or his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent, a fresh period of limitation shall be computed from the time when the payment was made; provided that, save in the case of a payment of interest made before the 1st January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by the person making the payment. S. 21 (1) states that the expression "agent duly authorized in this behalf" includes the person's lawful guardian. The fact that Neelamma was the *de facto* guardian of the minor would not help the appellant. It was expressly held by a Bench of this Court (Madhavan Nair and Abdur Rahman, JJ.), in *Nagayya* v. *Narasayya*[1], that an acknowledgment of a debt made by a *de facto* guardian of a minor does not prevent the debt from being time barred. This decision followed a previous decision of this Court to the same effect. The wording of S. 20 and S. 21 of the Limitation Act leaves no room for doubt that this decision is correct. The appellant, however, says that Neelamma was the lawful guardian of the minor, except during the period when Basappa was acting in pursuance of the order passed under the Guardians and Wards Act.

In support of this contention the learned Advocate for the appellant has relied on a passage in the edition of Strange's "Hindu Law" published in 1864, 4th edition and a passage in Macnaghten's "Principles and Precedents of Hindu Law" quoted in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*[2]. The

1. (1938) 2 M.L.J. 501. 2. (1878) 2 C.L.R. 583.

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passage from Strange is at page 72 and reads as follows:—

"The natural guardians of a minor are, first his father, then his mother, elder brother, paternal relatives and maternal relatives."

The passage from Macnaghten is in these words:—

"A father is recognised as the legal guardian of his children, when he exists; and when the father is dead the mother may assume the guardianship. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relatives, the Office devolves on the maternal kinsmen, according to their degree of proximity; but the appointment of guardians universally rests with the ruling power."

The learned Advocate would have it that these passages must be accepted as authoritative support for the proposition that the legal guardianship devolves upon the nearest paternal relative and in default of a paternal relative on the nearest maternal kinsman. I am not prepared to accept this argument. I consider that it is contrary to principle and accepted authority.

It is common ground that the ancient texts of Hindu Law do not provide for the management of a minor's property beyond stating that the guardianship shall rest with the King. The position of the King is now taken by the Court. Custom has, however, recognised that the father of a Hindu minor, and on his death the minor's mother, is entitled to the guardianship of the minor's estate. This has been accepted from time immemorial so universally that the right of the father or of the mother as the case may be cannot now be disputed, but it appears to be equally clear that custom has not extended the rule beyond the mother. In the case of *Kristo Kissor Neoghy* v. *Kadermoye Dossee*[1], Garth, C. J., referring to the passage from Macnaghten which I have quoted said:—

"We do not think that this passage means that all the persons therein mentioned have in turn an absolute right to take upon themselves the guardianship of a minor, without any permission or authority, from the ruling power. If it did mean this, the authorities cited would not appear to support it."

Garth, C. J., then went on to point out that Jagannatha, one of the authorities cited, after quoting from Manu this passage:

"The King should guard the property which descends to an infant by inheritance, until he returns from the house of his preceptor, or until he has passed his minority,"

1. (1878) 2 C.L.R. 583.

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and from the Ratnacara this statement:—

> "Wealth which descends to an infant by inheritance, and becomes the property of the minor, let the King guard; that is, let him protect it from the other heirs,"

had proceeded to add these observations of his own:

> "Consequently, the meaning is, let him (the King) act in such manner that other heirs may not take the whole, defrauding the infant who is incapable for non-age of conducting his own affairs; or the sense may be, let him commit the share of the minor in trust to any one co-heir or other guardian."

There is here authority that no one in the family is entitled as of right to act as the guardian of the minor. The right to act then depended upon the decision of the King. The judgment in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*[1] is of special importance in the present case as it related to a contest between the paternal grandmother and the paternal uncle on the one side and the maternal grandmother on the other for the custody of a minor. The Court held that none of them was entitled to claim custody as the lawful guardian.

The judgment in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*[1] was accepted as correctly stating the law in *Mst. Bhikuo Koer* v. *Mst. Chamela Koer*[2], which was also decided by the Calcutta High Court. This was a case under the Guardians and Wards Act and the contesting parties were the maternal grandmother and step-sister of a minor who were his nearest relatives. Trevelyan and Stevens, JJ., held that there was not, even before the Guardians and Wards Act was passed, any one other than the father or the mother who had an absolute right to the custody of a Hindu minor.

Kristo Kissor Neoghy v. *Kadermoye Dossee*[1] has been cited with approval in two decisions of this Court. *Ranganayaki Ammal* v. *Ramanuja Aiyangar*[3] and *Thayammal* v. *Kuppanna Koundan*[4]. In the latter case Sadasiva Aiyar, J., following *Kristo Kissor Neoghy* v. *Kadermoye Dossee*[1] and *Mst. Bhikuo Koer* v. *Mst. Chamela Koer*[2], held that under Hindu Law nobody else than the father and mother of a minor "with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor", is entitled as a matter of natural right to be and to act as

1. (1878) 2 C.L.R. 583.
2. (1897) 2 C.W.N. 191.
3. (1911) 21 M.L.J. 600: I.L.R. 35 Mad. 728.
4. (1914) 27 M.L.J. 285: I.L.R. 38 Mad. 1125.

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guardian of a minor's person and properties. Recourse must, he said, be had to the Court (representing the rights of the King which are paramount to even the rights of the parents) where there is no natural guardian alive. It was not indicated how exceptions might arise in favour of the elder brother or the direct male and female ancestors of a minor and the decision cannot be taken as going really beyond what was decided in the two Calcutta cases. In *Seetharamamma* v. *Appiah*[1], Viswanatha Sastriar, J., expressed the opinion that there is nothing in Hindu Law "which limits guardianship only to the father, the mother, and, failing them, the King". This statement cannot be accepted as correctly stating the position as I have already pointed out the Hindu Law, in so far as it is to be gathered from the ancient texts only provides for the King having charge of a minor's property. There is nothing to be found in the ancient writings which can be interpreted as giving the father or the mother any right to guardianship. Their present rights in this respect are based merely on custom.

In *Surayya* v. *Subbamma*[2], Devadoss and Jackson, JJ., went very far and it is this decision which has caused this appeal to be placed before a Full Bench. They decided that under the Hindu Law, in the absence of the father and the mother, the paternal grandmother is the natural guardian of the grandchildren. They said that there was no direct authority for the contention that the paternal grandmother was not the natural guardian of her grandchildren in the absence of their father and mother, but they did not consider the bearing of the two Calcutta cases to which I have referred. The basis of their decision that the paternal grandmother is the natural guardian of her grandchildren is to be gathered from this statement in the judgment:

"Considering the habits and customs of the people of this part of the country, there is no reason why the paternal grandmother should not be considered as the natural guardian of her grandchildren in the absence of their father and their mother."

The short answer to this statement is that neither by Hindu law or custom is the grandmother recognised as the lawful guardian of the minor. No member of the family other than the father or the mother has been recognised as having the right of guardianship and this statement receives full support

1. (1925) 50 M.L.J. 689: I.L.R. 49 Mad. 768. 2. (1927) 53 M.L.J. 677.

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from Mayne, 10th edition, page 299, from Mullah's Principles of Hindu Law, 8th edition, page 565, and from Trevelyan's "Hindu Law", 3rd edition, page 231. The Bombay High Court in effect expressed the same opinion in In re *Gulbai and Lilbai*[1]. Of course, all other things being equal the nearest relative of the minor should have the position of guardian but if the father and the mother have died no relative can become the lawful guardian without an order of the Court.

I hold that the Courts below were right in refusing to recognize Neelamma as the guardian in law of the minor and in rejecting the claim that her endorsements bound him. It follows that I consider that *Surayya* v. *Subbamma*[2] was wrongly decided and therefore should not be followed.

I would dismiss the appeal with costs.

Mockett, J.

Mockett, J.—I entirely agree and am only adding a few words in view of the fact that we are differing from a Bench of this High Court. After the very full investigation into this subject which has been made to-day—the learned Counsel for the appellant referred to all the relevant decisions,—I think it is clear that at least at some period of time which it is difficult to fix, the only guardian of a minor was "the King", as he is so described in the texts. But to-day undoubtedly it cannot be argued that the father and in his absence the mother are not the legal guardians. They have been so recognised by usage and custom. Indeed the position of the father is impliedly recognised by statute under S. 19 of the Guardians and Wards Act. How all this came about is attractively put in the latest edition of Mayne on Hindu Law, paragraph 231 at page 299. The learned author envisages the natural delegation to the parents by the King of duties so intimately affecting their son, but that idea, as has been pointed out in the authorities to which my Lord has referred, although now having attained the force of law, has never been extended beyond the parents by the Courts with the exception of the decision in *Surayya* v. *Subbamma*[2]. In the case of persons other than the parents, an express delegation or appointment is required and this has been done and is to-day done through the machinery of the Court of Wards. With all respect, I think the learned Judges who decided *Surayya* v. *Subbamma*[2] confused the two positions, namely, a consideration as to who

1. (1907) I.L.R. 32 Bom. 50. 2. (1927) 53 M.L.J 677.

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was the most desirable person to be *appointed* as guardian of a minor with a consideration of whether desirability constituted a person a legal guardian automatically. The difference between the two positions is fully recognised by Davar, J., in In re *Gulbai and Lilbai*[1] and it seems to me that if these two distinctions are kept apart, this subject presents very little difficulty. Desirability can only be relevant in an application to remove the father or mother or in an application to appoint some one else. I agree that the decision of my learned brothers, Devadoss and Jackson, JJ., in *Surayya* v. *Subbamma*[2] is not in conformity with authority and that this appeal must be dismissed with costs.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—It is scarcely necessary for me to add anything after, if I may say so with the utmost respect, the full and elaborate consideration that the matter has received at the hands of my Lord. The question in short is whether a paternal grandmother can by reason of her relationship alone be held to be a lawful guardian within the meaning of S. 21 of the Indian Limitation Act. She may in a sense be regarded as a natural guardian as her relationship to the minor is so close that she may be expected naturally to watch over and guard his interests. It is however better to avoid the use of the expression for the present purpose, as we are not concerned with finding whether in the ordinary course of nature she is or is not a fit and proper person to protect the minors' interests in the absence of a nearer relation. The statute has used the expression lawful guardian and the introduction of the term natural guardian can scarcely elucidate discussion, but on the contrary may divert the attention.

The Act does not define the expression "lawful guardian". But it is obvious, that we must resort to the personal law of the minor or to other enactments if any to ascertain its meaning. The only enactment having a bearing is the Guardians and Wards Act, 1890, which does no more than define the word guardian, simpliciter. We have therefore to fall back on the personal law of the minor, namely, the Hindu law to get at the meaning of the expression with which we are concerned. If a person has been appointed or declared a guardian by Court under the Guardians and Wards Act, he or she is undoubtedly a lawful guardian. The difficulty arises only when no such

1. (1907) I.L.R. 32 Bom. 50.
2. (1927) 53 M.L.J. 677.

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appointment has been made. A lawful guardian can be no other than a person whom the law invests with the right and duty of protecting the property of the minor. Such a person is generally described as a *de jure* guardian, in contrast to a *de facto* guardian. The law does make a real distinction between a *de jure* guardian and a *de facto* guardian. A *de facto* guardian may be a relation or even a mere intermeddling stranger who in fact assumes the management of a minor's property though in law he or she has no authority to do so. It is consequently impossible to regard him as a lawful guardian, notwithstanding the fact that by reason of the decision of Courts, the acts of a *de facto* guardian bind the estate of the minor, if done under the pressure of necessity or for the clear benefit of his estate.

There is in the texts of Hindu law no warrant for regarding a paternal grandmother or indeed even the parents themselves for that matter, as the lawful guardians of a minor entitled to manage his property as of right. The texts bearing upon the point are few, and do not throw any direct light on the point under consideration. They only seem to establish the proposition that it is the King alone who as *parens patriae* is the universal and supreme guardian of all the minors and their estates in the Kingdom. He of course has the power to delegate his authority and to appoint guardians, and that power is now vested in the Courts established by law by a process of legislative delegation, if I may so call it. As has been pointed out by my Lord, the parents of a minor have been so long and so consistently regarded as lawful guardians by the Courts no less than by the community that an exception in their favour must be held to have been engrafted on the primeval law of the Hindu text writers. The father and in his absence the mother must accordingly be regarded as lawful guardians, not requiring an appointment for acting as such, and this has now to be treated as an integral rule of the law itself. But such a custom is wholly lacking in the case of other remoter relations not excluding the paternal grandmother however much they may be interested in the welfare of the minor. In the passages cited from Macnaghten and Strange, there would seem to be at the first look a statement of the order of lawful guardianship which includes other relations besides the father and the mother. It is however clear to my mind that the enumeration was not

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intended to declare the persons to be recognised as lawful guardians under the Hindu law without reference to an appointment by Court. It seems to me that it will be more in consonance with the spirit of the law to hold that what was intended by the enumeration was but an indication of the order of preference which the Court should bear in mind in making the choice of a guardian among the available relations, the dominant consideration being the welfare of the minor. It follows that neither the paternal grandmother nor any other relations beyond the mother can be regarded as possessing an inherent right to act as lawful guardians for the purposes of S. 21 of the Limitation Act. I have the less hesitation in assenting to this view, as I consider that it will tend to the better protection of the minors' properties than if I were to hold that a series of relations commencing from the elder brother and including the paternal and the maternal relations have the inherent right directly and without an appointment by the Court to assume charge of a minor's estate and proceed to keep alive debts on his behalf. Such an expansion of the rule is, it seems to me, fraught with dangerous consequences, and in the absence of binding authority, should not be upheld. I concur in the judgment just now pronounced by my Lord.

K. S. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD RUSSELL OF KILLOWEN, LORD ROMER AND SIR GEORGE RANKIN.

Keshardeo Chamria .. *Appellant**

v.

The Commissioner of Income-tax, Bengal .. *Respondent.*

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Indian Income-tax Act (XI of 1922), S. 41—Consent decree in action over title to property—Agreement between parties to share rents and profits—Party in receipt of such share—Whether to be assessed under S. 41 as managers appointed by order of Court.

By a consent decree made in May, 1930, it was provided *inter alia* that *K. C.* and *R.* were each entitled to one half of the properties in question, and that a partition of the properties into two equal shares should be made accordingly—the division of the immovable properties to be made by metes and bounds. In July, 1930, an order was made in the suit appointing the Official Receiver as receiver of the rents and profits of the immovable pro-

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perties, with power to divide the income between *K.C.* and *R.* The Official Receiver never took possession under that order, and in April, 1931, on *K.C.'s* petition, an order was made discharging the Official Receiver from further acting as receiver of the properties, the parties having meanwhile agreed that the Official Receiver should not take possession of the properties, that they should divide or invest the proceeds of the rents, and that either should be at liberty to apply for reappointment of the Official Receiver in the event of certain disagreements between them. That arrangement remained in force until August, 1933, when the Official Receiver was again appointed. He obtained possession in February, 1934, the parties having meanwhile divided receipts equally between them. *K.C* having objected to assessments to income-tax made upon him for the years ending 31st March, 1934 and 1935, in respect of his receipts from the properties in question, contending that the assessments should have been made on him as a manager of the properties under S. 41 of the Income-tax Act,

Held, that that section had no application to the case inasmuch as *K.C.* and *R.* were never appointed receivers or managers of the properties, the order of April, 1931, neither doing so nor purporting to do so. The assessments were accordingly rightly made.

Appeal from a decision of the High Court at Fort William, Bengal, dated 4th March, 1937 (Costello and Panckridge, JJ.) on a reference to it by the Commissioner of Income-tax, Bengal, under S. 66 (2) of the Indian Income-tax Act, 1922.

The facts are fully set out in the judgment of the Board.

Sir T.J. Strangman, K.C. and *J.M. Pringle* for Appellant.

J.M. Tucker, K.C. and *Hubert Hull* for the Crown.

9th May, 1939. Their Lordships' judgment was delivered by

Lord Russell of Killowen.

LORD RUSSELL OF KILLOWEN.—In this case the appellant appeals from a judgment of the High Court of Judicature at Fort William in Bengal on a reference to it by the respondent under S. 66 (2) of the Indian Income-tax Act, 1922.

The question referred was framed thus:—

"Whether in the circumstances described above the present assessee and Rai Bahadur Ramprotap Chamria were the managers of the properties appointed by or under any order of a Court within the meaning of S. 41 of the Indian Income-tax Act and whether in the facts and circumstances given above the Income-tax Officer acted illegally in assessing the present assessee in respect of his share of the property?"

The relevant facts and circumstances, which appear in the statement of case, must be stated.

In the year 1929, the appellant instituted a suit in the High Court at Calcutta (No. 183 of 1929) against one Ramprotap, and a minor grandson of Ramprotap, alleging that he was the adopted son of Ramprotap's deceased brother

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Amloke Chand. By way of relief he claimed declarations that he was the son of Amloke Chand, and that he was entitled jointly with Ramprotap to certain properties specified in a schedule attached to his plaint. He also asked for an enquiry as to what other properties were joint and for partition. On the 23rd May, 1930, a consent decree was made in the suit. The decree recited that the terms of settlement set forth in the schedule thereto had been agreed to by the adult parties and the guardian *ad litem* of the infant defendant, and that the Court was of opinion that it would be for the benefit of the infant defendant that the decree should be made. The operative portion of the decree, so far as relevant, ran thus:—

"It is declared with the consent of the adult parties and the guardian-*ad-litem* of the infant defendant by their respective counsel that the said terms ought to be carried out and the same are ordered and decreed accordingly and it is further declared with the like consent that the plaintiff is entitled to one equal half part or share of the residue of the joint estate mentioned in the said terms after setting apart the sum of Rupees Eleven lacs for allotment to the said Rai Bahadur Ramprotap Chamria in terms of cl. 2 of the said terms and also setting apart premises No. 178, Harrison Road, and No. 71, Cross Street, in terms of cl. 4 of the said terms (the same into two equal parts or shares being considered as divided and hereinafter referred to as the said properties) AND that the defendant Rai Bahadur Ramprotap Chamria is entitled to the remaining equal half part or share thereof. And it is further ordered and decreed with the like consent that a partition be made of the said properties with the appurtenances into two equal parts or shares and that a commission do issue directed to Rai Bahadur Badridas Goenka and Radhakissen Chamria both named in the said terms for the purposes also mentioned therein and it is further ordered and decreed with the like consent that the said Commissioners do take an account subject to the conditions mentioned in the said terms of the joint properties (including the loss and profits of the business carried on by Rai Bahadur Ramprotap Chamria) and submit a separate report along with the return hereinafter mentioned and make a division of the said properties into two equal parts or shares and as regards the immovable properties make the same by metes and bounds where they shall see occasion with power to them to award compensation in money by way of equalising the said partition and all deeds and writings relating to the said properties in the custody or power of any of the parties are to be produced before the said Commissioners upon oath or solemn affirmation as the said Commissioners shall direct. And it is further ordered and decreed with the like consent that the said Commissioners be at liberty to examine witnesses upon oath or solemn affirmation and do take the depositions in writing and return the same with the said Commission. And it is further ordered and decreed with the like consent that the said Commissioners do allot one equal half part or share of the said properties to the plaintiff to be held and enjoyed by him in severalty and the remaining one equal half part or share thereof to the said defendant Rai Bahadur Ramprotap Chamria to be held and enjoyed by him in severalty."

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In fact the scheduled terms of settlement did not mention any specific items of the joint estate, although they provided for partition "of the joint properties as mentioned above."

On the 28th July, 1930, an order was made in the suit whereby the Official Receiver was appointed receiver "of the rents, issues and profits of the immovable properties belonging to the parties to this suit in the plaint in this suit mentioned," with liberty to divide the income into two equal shares and to pay one equal share to the appellant and Ramprotap respectively. The Official Receiver, however, never took possession under that order; and on the 2nd April, 1931, an order was made on the appellant's petition in the following terms:—

"It is ordered that the said order dated the 28th day of July last do stand varied in the manner indicated in the Schedule hereunder written and it is further ordered without prejudice to the rights of either party to apply to the Court for the re-appointment of the said Official Receiver as the Receiver of the properties mentioned in the said Schedule (hereinafter referred to as the said properties) in the circumstances and on the conditions also mentioned in the said Schedule and the said Official Receiver be and he is hereby discharged from further acting as the Receiver of the said properties."

The schedule to that order contained a copy of para. 5 of the appellant's said petition which stated that since the order of the 28th July, 1930, the parties had agreed as follows:—

"(a) that the Official Receiver shall not take possession of the following immovable properties and shall, without prejudice to the right of either party to apply for reinstatement of the Receiver, be discharged from acting as Receiver in respect of such properties:—[Then followed a list of the properties which included all the properties relevant to this appeal.]

"(b) that the plaintiff (present assessee) and the defendant Ramprotap are jointly given liberty to realise the rents of the above properties on joint receipts, duly to make the necessary expenses thereout and to file rent suits,

"(c) that the documents of title be kept in joint custody of the plaintiff Keshardeo and the defendant Ramprotap,

"(d) that Ramprotap and Keshardeo are also given liberty to invest the money which will come to their hands or divide the same equally,

"(e) that liberty be given to either party to apply for an order for re-appointment of Receiver of the rents, issues and profits of the abovenamed properties without any objection on the part of the other party in the event of their not being able to agree as to collections, disbursements, investments or distribution of the said rents, issues and profits and on such application being made by either party the other party shall consent to such appointment."

The arrangement so provided for remained in force until the 23rd August, 1933, when on the application of the parties, the Official Receiver was again appointed receiver. He did not,

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however, obtain possession until about the 24th February, 1934. The appellant and Ramprotap, while in possession, divided the receipts between themselves in equal shares.

When called upon for a return of his income for the year ending the 31st March, 1933, for the purpose of assessment for the year ending the 31st March, 1934, the appellant (on the 31st July, 1933), under the head "Property" made a return of Nil, stating that "the properties are in the hands of the Official Receiver and Joint Managers appointed in suit No. 183 of 1929 from whom the petitioner has not obtained his share"; and also that "the income from properties . . . are liable to be assessed in the hands of the Receivers under S. 41 of the Act." The Income-tax Officer nevertheless assessed his total income at the figure of Rs. 48,628, which included a sum of Rs. 33,920 under the head "Property" in respect of properties specified in the schedule to the plaint, and in the schedule to the order of the 2nd April, 1931. The appellant appealed against this assessment, alleging that the assessment was wrong, as the properties "are in the hands of the Official Receiver appointed in suit No. 183 of 1929," and further alleging that the assessment was wrong on the ground that his title, as claimed by him to the extent of a half share in respect of the properties, was disputed by Ramprotap.

In regard to the assessment of the appellant for the following year ending the 31st March, 1935, the same procedure took place. The appellant returned Nil under the head "Property," alleging that the assessment should be made under S. 41 of the Act and that his title was in dispute. His total income was assessed by the Income-tax Officer at Rs. 54,558, which included a sum of Rs. 28,177 under the head "Property" in respect of the same properties as before; and the appellant appealed against that assessment.

The Assistant Commissioner dealt with both appeals together, and confirmed both assessments. It is clear from the confirmation order, which contains the grounds of his decision, that the matter was throughout dealt with on the footing that the appellant was the owner of an undivided half share of the properties in question, and that the contention raised on behalf of the appellant was that the assessments in respect of the properties should have been made under S. 41 of the Act on the appellant and Ramprotap in respect of the entirety, and not

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upon each separately in respect of a moiety. The contention of the appellant's pleader is stated thus—"that according to an order of the Honourable High Court the management of the properties in question were taken away from the Official Receiver and made over to the assessee and Ramprotap whereby the two parties were authorised to collect rents jointly and meet the necessary expenses. It is therefore argued that the income was not allocated separately and should have been assessed on the managers and not on the parties separately"; and it is subsequently stated that in this connection the appellant relied on S. 41 of the Act.

The appellant, by two petitions, required the respondent to refer to the High Court several questions as being questions of law arising out of the Assistant Commissioner's order. The respondent, however, was of opinion that the only contention of any substance was the appellant's contention that as the property in question was under the joint management of himself and Ramprotap by or under the order of the 2nd April, 1931, "the tax in respect of its income can be levied only upon such managers by virtue of the provisions of S. 41 of the Income-tax Act," and that such matter would be covered by the question which he submitted for the Court's decision. The respondent stated as his own opinion that S. 41 had no application to the case. He thought that the decree of the 23rd May, 1930, declared the appellant and Ramprotap to be owners of the properties in equal shares, and that the question formulated should be answered, as to both parts, in the negative.

The appellant, being dissatisfied with the question as framed by the respondent, obtained an order of the High Court, dated the 30th July, 1936, ordering the respondent to show cause why he should not be required to state a case on the questions as framed by the appellant in his petitions. The case and the rule were heard together on the 26th and 27th January, 1937, and on the 4th March, 1937, the High Court delivered judgment, their answer to the question referred being "that the assessee and Ramprotap were not managers of the properties appointed by or under any order of a Court within the meaning of S. 41 of the Indian Income-tax Act, and that the Income-tax officer did not act illegally in assessing the assessee in respect of his share of the property". The appellant now appeals to His Majesty in Council from that judgment. An order was also

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made on the 4th March, 1937, discharging the order of the 30th July, 1936, and ordering the appellant to pay the costs of the application. From that order the appellant has not appealed.

Their Lordships have thought it necessary to state the history of the case at some length in view of the course taken by the arguments before the Board. The question for decision on this appeal is simply whether the question referred to the High Court has been correctly answered; and it is not open to their Lordships to go beyond the question or to consider matters outside its limits.

Leading counsel for the appellant stated, in opening the appeal, that he did not contend that the assessment should have been made under S. 41, because (as he explained in his reply) the section even if applicable was not in his view mandatory or compulsory. His main argument was based upon the view that there was no finding that the appellant was "owner" of the property, that the decree of the 23rd May, 1930, did not establish ownership in him, that the question of the ownership of the properties was still in dispute in the partition suit, and that he could not be assessed under the head "property" in respect of buildings and lands of which his ownership (as required by S. 9 of the Act) had not been established. Junior counsel for the appellant, however, took the unusual course of venturing upon ground which his leader had feared to tread, and relied wholeheartedly upon the provisions of S. 41 as being fatal to the assessment.

Counsel for the respondent, however, argued that the appellant should not be allowed to travel outside the contention under S. 41. This, they said, was the only contention raised before the Assistant Commissioner; and the case stated, which under S. 66 (2) is limited to questions of law arising out of the order or decision of an Assistant Commissioner, treats the point involved as being merely the contention under S. 41. Further, it was pointed out that the High Court judgment, though touching on other points, treats S. 41 as the section with which the reference was directly concerned.

Their Lordships are of opinion that this argument of the respondent's counsel is well founded. They feel no doubt that the only objection to the assessment which was urged before the Assistant Commissioner was that the assessment could only be

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made under S. 41, that the decision of the Assistant Commissioner was given on the assumption of ownership in the appellant, and that the question of law referred under S. 66 consists simply of the question whether on that assumption S. 41 operated to compel the authorities to assess in respect of the entirety the two persons who were alleged to be acting as managers, and to prevent them from assessing one of the co-owners in respect of his moiety.

In this view of the case the only question for their Lordships' consideration is whether the case falls within S. 41. That section provides as follows:—

"41.—In the case of income, profits or gains chargeable under this Act which are received by the Courts of Wards, the Administrators-General, the Official Trustees or by any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, the tax shall be levied upon and recoverable from such Court of Wards, Administrator-General, Official Trustee, receiver or manager in the like manner and to the same amounts as it would be leviable upon and recoverable from any person on whose behalf such income, profits or gains are received, and all the provisions of this Act shall apply accordingly."

In their Lordships' opinion the case does not come within the words of the section at all. The respondent and Ramprotap were never appointed receivers or managers by or under any order of the Court. The order of the 2nd April, 1931, did not do so, nor did it purport to do so. It follows, therefore, that the section has no application to the case, and that the question referred was correctly answered by the High Court.

It is unnecessary for their Lordships to express any opinion upon the various other points which were argued before them. If the appellant desired to enlarge the area of the question referred or to add other questions, so as to raise those points, it was open to him to appeal against the order which discharged the rule. That he has not done.

Neither is it necessary to decide whether the consent decree operated to establish that the lands specified in the schedule to the plaint formed part of the joint estate, a question which, it was said, was still in dispute; although as at present advised their Lordships feel great difficulty in understanding how partition can have been ordered of parcels which were not ascertained and for the ascertainment of which no machinery was provided, or how under the orders of the 28th July, 1930, and the 2nd April, 1931, the income of the properties therein mentioned was

divisible in moieties, except upon the footing that those properties formed part of the joint estate.

For the reasons indicated, their Lordships are of opinion that this appeal should be dismissed and they will humbly so advise His Majesty. The appellant will pay the respondent's costs of the appeal.

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Keshardeo Chamria *v.* Commissioner of Income-tax, Bengal.

Lord Russell of Killowen.

Solicitors for Appellant: *W. W. Box and Co.*

Solicitors for Respondent: *The Solicitor, India Office.*

R. C. C. —— *Appeal dismissed.*

K. S.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD ROMER, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

Sri Nadimpalli Narayanaraju and another .. *Appellants**

v.

Yennamsetti Suryanarayudu and others .. *Respondents.*

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Narayanaraju *v.* Suryanarayudu.

Madras Estates Land Act (I of 1908), Ss. 6 and 9—Applicability—Person holding part of village on under-tenure for small annual payment—Whether a "landholder", entitled to eject ryots.

A minor post-settlement inamdar holding under a grant of both varams on a permanent kattubadi is a landholder within the meaning of the Madras Estates Land Act, 1908.

Brahmayya v. *Achiraju*, (1922) 43 M L.J. 229: I.L.R. 45 Mad. 716 (F.B.), approved.

Accordingly where the title of certain plaintiffs, if made out, was to a permanent under-tenure of a portion of a village on a small annual payment (by whatever name described),

Held, that the interest claimed clothed the plaintiffs with the character of landowners, and put the cultivating tenants under them in the position of ryots to whom Ss. 6 and 9 of the Act of 1908, applied.

Appeal from a decree of the High Court, Madras, dated 31st October, 1935 (Stone and Pakenham Walsh, JJ.) reversing a decision of the Subordinate Judge, Vizagapatam, dated 17th December, 1927.

Of the five respondents to this appeal, the first three were in possession of the lands forming the subject-matter of the proceedings, the remaining two being impleaded as persons claiming title to the lands as against the plaintiffs. The decree under appeal did not decide the question of title, but dismissed the plaintiffs' claim to eject the first three respondents on the ground that they (the plaintiffs) were "landholders" within the meaning of the

* P. C. Appeal No. 39 of 1937. 21st July, 1939.

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Madras Estates Land Act, 1908, and so debarred by S. 9 of the Act from maintaining an action of ejectment against a ryot.

The plaintiffs claimed to derive title under a grant made in 1811 to the eldest of three brothers whose estate was joint but who later separated. One of the brothers, Gajapatiraju, died in 1859, being succeeded as to his third share by two daughters. The plaintiffs claimed as purchasers from the sons of Gajapatiraju's elder daughter. The last two respondents were grandsons of the younger daughter who died in 1918. The plaintiffs claimed that on her death Gajapatiraju's whole share vested in the elder sister, and that they duly obtained it by purchase from her three sons. In the present action they claimed to eject the first three respondents from their possession of one half of the share to which the plaintiffs claimed to be entitled as against the last two respondents, the validity of that claim being the sole issue in the present proceedings. The Subordinate Judge held in favour of the plaintiffs, but the High Court decided against them on the ground that they were landholders within the meaning of the Act (I of 1908). The plaintiffs now appealed to His Majesty.

P. V. Subba Row for Appellants.

S. Hyam for the first three Respondents.

C. Sidney Smith for the last two respondents.

21st July, 1939. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This is an appeal by the plaintiffs from a decree of the High Court of Madras (16th October, 1937), dismissing a suit brought in the Court of the Subordinate Judge at Vizagapatam to recover possession of certain agricultural lands in the village of Thagarampudi. The trial Court's decree (17th December, 1927), had been in favour of the plaintiffs. Of the defendants to the suit (who numbered 15) five are respondents to this appeal; the first three respondents (defendants 3 to 5) being the persons in possession of the suit lands, while respondents four and five (defendants 14 and 15) are impleaded as persons claiming title thereto as against the plaintiffs.

Much of the detail of the case has for the purposes of this appeal become unimportant, since the decree appealed from did not decide the question of title disputed between the plaintiffs and respondents four and five, but dismissed the plaintiffs' claim to eject the first three respondents on the ground that the

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plaintiffs were landholders within the meaning of the Madras Estates Land Act (Madras Act I of 1908) and by S. 9 thereof could not maintain ejectment in the Civil Court against a ryot.

The plaintiffs claim title under Ex. C, an instrument dated 11th May, 1811, which is expressed as follows:

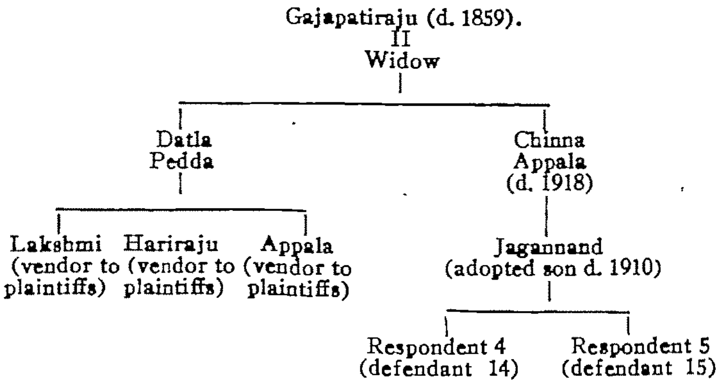
"Patta, dated Saturday the 3rd day of Vaisakha Bahulam of the year Prajotpatti (11th May, 1811), executed and granted by Sri Narayana Gajapathiraju Maharajulingaru, to Nadimpalli Venkatapatiraju.

"Whereas, in the village of Thagarampudi of my *mokhasa* (lands granted either free as reward or on light rent) Vaddade taluk, I have granted to you land fetching a fixed rent of Rs. 300, as *manyam*, and 10 *visams* (⅛th part) of land known as the *vudika manu garuvu* (name of land) for a tope to be planted thereon, you shall bring them to extensive cultivation and profits, and be living happily, enjoying the same hereditarily."

The grantor was the proprietor of the estate of Vizianagaram and the grantee Venkatapatiraju was the eldest of three brothers who were joint. The other two were called Murtiraju and Gajapatiraju. By what right the grantor could afterwards modify his grant is a question which has not been clearly answered, but by a letter to the grantee dated 21st August, 1826, he purported to impose for the future a rent or payment of Rs. 50 per annum and this has ever since been paid. The terms of the letter are as follows:

"In respect of the land granted to you in the village of Thagarampudi, a reduction of Rs. 50 has been ordered from the current year Vijaya, and deducted out of your *musara*. So, you shall pay these Rs. 50 every year in our Sirkar and be obtaining receipts."

The lands were at first enjoyed by the joint family, but the brothers separated and each became entitled to a one-third share therein. At some date which is not now material they appear to have divided the lands between them each paying to the zemindar Rs. 16-10-8. The plaintiffs are great grandsons of the original grantee Venkatapatiraju who was the eldest brother, but their suit has reference to the one-third share of the youngest brother Gajapatiraju of which they claim to be purchasers. They seek to obtain possession of one-half only of that one-third share, and the pedigree table of Gajapatiraju's branch will assist to show how they deduce their title.



Gajapatiraju died in 1859 leaving a widow and two daughters. In 1861, the widow relinquished her interest and the daughters became entitled. In 1918 the younger daughter, Chinna Appala, died leaving her sister and two grandsons by a pre-deceased son (respondents four and five). The plaintiffs say that thereupon the whole of Gajapatiraju's interest vested in the elder daughter Datla Pedda; that in 1919 Datla Pedda's three sons were the reversioners of her father, and that she relinquished her interest so as to accelerate theirs. The plaintiffs by sale-deed dated the 27th April, 1921, purchased from these three sons of Datla Pedda the whole of the interest of her father Gajapatiraju for Rs. 32,000. On the 24th September, 1924, they brought the present suit to recover possession of the half share in Gajapatiraju's lands which his younger daughter Chinna Appala had possessed. The first three respondents were also in possession of the other half share (which Datla Pedda had possessed), but as they had certain rights therein as mortgagees this other half share was not included in the suit.

Respondents four and five claim title to the suit lands by saying that the instrument of 1811 has long since ceased to have effect; that it created no more than a service tenure neither heritable nor transferable but resumable at will; that on the death of Gajapatiraju the lands were sequestered or resumed by the zemindar and regranted as a new tenure to his widow; and that on her death one half was granted to each of her two daughters separately. Hence respondents four and five claim to be entitled to the lands held by their grandmother, Chinna Appala, which are the lands in suit. Whether or not on this case the first three respondents could claim to have a ryoti interest in the lands, it is clear that the plaintiffs could have no

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interest at all. The plaintiffs do not seek to avail themselves in any respect of the case made or evidence adduced by respondents four and five.

The first matter for consideration is the case made by the plaintiffs for ejectment of the first three respondents. These respondents are the cultivators in possession of the lands in suit. They or their ancestors (at some date not readily ascertainable) became tenants of the plaintiffs' vendors or their predecessors. Notice to quit has been given to these respondents but they claim that they are ryots with occupancy right who cannot be ejected by the Civil Court. The plaintiffs, who have to succeed upon the strength of their own title, disclose a title of which the root is the grant of 1811, and the question is as to the character of the right which they allege and prove. At one stage of the case it appears to have been contended (1) for the plaintiffs that the grant merely gave to the grantees the *kudivaram* interest on favourable terms, (2) for the first three respondents, that agricultural tenants were on the land at the time of the grant so that it gave to the grantees the *melvaram* interest only. It is now conceded, however, on both sides, and very properly, that the grant of 1811 was of both *varams*. Their Lordships are unable to attach importance for the purposes of this appeal to the documents upon which the plaintiffs based a contention that the zemindar had treated the grantees under Ex. C as ryots giving them the usual *jirayati* leases. The operation and effect of Ex. C as a document of title cannot be determined upon the basis of subsequent documents which contradict it on essential matters. Their Lordships are not satisfied, on the other hand, by any of the exhibits that at the date of the grant of 1811 agricultural tenants other than the grantee were already on the land.

The question which presents itself on the threshold of the case, and which has been decided by the High Court against the plaintiffs, is whether the interest granted by Ex. C is one which constitutes the plaintiffs landholders within the meaning of the Act of 1908. The words *mokhasa* and *manyam* occur in the grant and both appear in Wilson's Glossary as meaning in the south of India lands held either at a low assessment or altogether free on condition of or in consideration of services. The word *inam* does not appear in the terms of the grant. The word *musara* appears in the letter of 1826 and the words

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musara-vasathi appear in some of the later documents: they are said to mean "allowance" or "remission." The word *kattubadi* (translated by "quit-rent" for want of a nearer word) appears in the plaintiffs' conveyance of the 27th April, 1921, to describe the annual payment under Exhibit C. But the title upon which the plaintiffs seek ejectment is put forward as a transferable and heritable right to the lands under Exhibit C upon payment to the zemindar of the annual sum of Rs. 50 or a due proportion thereof. If this would constitute the plaintiffs "landholders" under the Act of 1908, then the first three respondents claim to be ryots entitled to a permanent right of occupancy under S. 6 and protected from ejectment by the Civil Court under S. 9 of the Act.

The definitions which bear upon the question whether the plaintiffs' title, if made out, gives them the status of a "landholder" are to be found in certain sub-sections of S. 3 of the Act.

"By sub-S. (2), 'Estate' means—

(*a*) any permanently settled estate or temporarily settled zemindari;

(*b*) any portion of such permanently settled estate or temporarily settled zemindari which is separately registered in the Office of the Collector;

(*c*) any unsettled palaiyam or jagir;

(*d*) any village of which the land-revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village;

(*e*) any portion consisting of one or more villages of any of the estates specified above in cls. (*a*), (*b*) and (*c*), which is held on a permanent under-tenure.

By sub-S. (5), 'Landholder' means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent Court or of any provision of law.

By sub-S. (11), 'Rent' means whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture.

By sub-S. (15), 'Ryot' means a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it.

By sub-S. (16), 'Ryoti land' means cultivable land in an estate other than private land."

On these definitions it is to be observed that cl. (*d*) of sub-S. (2) relates to a grant made prior to the Permanent Settlement and to a village not now part of a zemindari, whereas

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cl. (*e*) relates (though not exclusively) to villages which are part of a zemindari but are held on permanent under-tenure. The lands now in question do not constitute a village but are only part of a village, and they cannot be held to come within any of the clauses which define the word "estate." On the other hand the word "estate" as employed in the Act has not the abstract meaning "quality or quantity of the interest of the holder." The plaintiffs' title, if made out, can only constitute them "landholders" upon one or other of two grounds; first, that they come within the words in sub-S. (5) "or part thereof," secondly, that they are within the extended meaning given to the word "landholder" by the provision that it "includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title." The application of these expressions to what have been called "minor inams" has been considered by the High Court of Madras in a series of decisions. In *S. Appalanarasimhulu* v. *M. Sanyasi*[1], it was held by Sundara Aiyar and Sadasiva Aiyar, JJ., that, though a minor inam was not an "estate" within the Act, the inamdars were landholders because "there is no reason why the holder of an under-tenure should not be held to be a person entitled to collect rents of a portion of the estate out of which the under-tenure is carved". The learned judges considered that "if the tenure-holder is not bound to make any payment to the zemindar for his tenure he will then be a person owning a part of the estate." In *Gadadhara* v. *Suryanarayana*[2], Wallis, C. J., dissented from the conclusion that a minor inamdar was a "landholder." He was of opinion that so long as the zemindar reserves an interest to himself, as by way of rent, no matter how insignificant it be, he continues to be the owner. He considered that in the definition of "rent" in sub-S. (11) the words "in his estate" could not apply to an inamdar and excluded such a person from the extended meaning given by the clause which refers to persons entitled to collect the rent of a portion of an estate. Sadasiva Aiyar, J., however, held the inamdar to be a landholder on both of the grounds already mentioned. As to the first ground, he laid stress on the fact that in the case of an entire village clause (*e*) of S. 3 (2) treats a permanent under-tenure as an estate and its holder as owner of the estate.

1. (1912) I.L.R. 38 Mad. 33.
2. (1921) 41 M.L.J. 97: I.L.R. 44 Mad. 677 (F.B.).

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He considered that there was already a *catena* of decisions in the High Court that a minor inamdar was a landholder. When this case came before three judges on Letters Patent Appeal, Ayling, J., took the view that "it may be conceded at once that so long as the zemindar reserves to himself a quit-rent the inamdar cannot be regarded as the owner of the lands in the ordinary legal meaning of the term." But on the second ground he thought it clear that when the inamdar's grant was only of the *melvaram* it was a transfer by the owner of the right to collect the rent of a portion of the estate. Where, however, the grant was of both *varams* he had more difficulty but came to the same conclusion: "When we say that the grant was of both *varams* we merely mean that the rights of the grantee in respect of the land were not limited by the necessity of respecting the right of any person possessed of the *kudivaram* at the time of the grant." Coutts-Trotter, J., proceeded entirely upon the second ground, observing that he was unable to gather from the language of this Act any general intention with regard to the position of minor inamdars. Kumaraswami Sastri, J., held that a minor inamdar was not a landholder where the grant to him was of both the *varams*. He thought that, if the grantee was himself the occupancy ryot at the time of the grant, it could not divest him of that character and convert his sub-tenants into occupancy ryots; while, if the land was at the time in the absolute disposal of the grantor, the object of the grant was to allow the grantee to occupy and enjoy the lands on favourable terms and not to create minor landholders. In such cases he considered that the grantee could not be regarded as collecting rents from himself by virtue of the grant of the *melvaram*. The result of the Letters Patent Appeal was that by a majority of two judges to one the minor inamdar was held to be a landholder.

The matter came before a Full Bench in *Brahmayya* v. *Achiraju*[1], where the patta had been held to be a grant in inam and not a mere lease on favourable terms to a *jirayati* tenant. The question was framed as follows:

"Where a zamindar makes a post-settlement inam grant of a portion of a village with both varams on a permanent kattubadi, is the grantee a landholder within the meaning of S. 3 (5) of the Madras Estates Land Act?"

1 (1922) 43 M.L.J. 229: I.L.R. 45 Mad. 716 (F.B.).

Schwabe, C. J., thought that such an inamdar was not owner of a part of the estate and was not entitled to collect rent by virtue of any transfer. The provision as to persons entitled to collect rent was in his opinion intended for purchasers of part of an estate, mortgagees, or farmers of an estate and did not apply to an inamdar collecting rent under leases granted by himself. Oldfield, J., found the considerations upon each side to be evenly balanced and the question difficult. He thought the liability of the inamdar for quit-rent need not be regarded as inconsistent with the character of landholder under the Act, but that in any case a grantee of both *varams* of a part of a village was a person entitled to "collect the rent by virtue of a transfer from the owner," and that this very general language could not be read subject to an unexpressed restriction. Phillips, J., held that the word "owner" was applicable to the inamdar notwithstanding the reservation of an annual payment, and that the grantee of both *varams* was entitled to collect rents which would previously have been payable to the grantor. Devadoss, J., relied much on the definition of "estate" as excluding mere parts of villages:

> "The word estate does not mean land but all the rights, liabilities and duties attaching to or incident to certain classes of tenure as defined by S. 3 (2). The words 'part of an estate' have been put into the definition of landholder so as to include the transferee of a portion of the estate either by operation of law or by act of parties. An inamdar is not a transferee of the whole or any portion of the estate."

He further considered that where the grant is of vacant land the inamdar is not to be considered as having the right to collect rent but as having the *kudivaram* right himself plus a portion of the *melvaram*, and does not lose the character of ryot. Venkatasubba Rao, J., regarded the definitions of "estate" and "landholder" as inconsistent, but thought it more in consonance with the intention of the legislature to regard minor inamdars as landholders. He considered that they were owners of part of an estate notwithstanding liability for *kattubadi*, and that they came within the language of sub-S. (5) as persons entitled to collect rents.

By this decision of three judges against two, after long debate and much difference of opinion it was established by authority of the highest Court of the Province in March, 1922, that the minor post-settlement inamdar holding under a grant of both *varams* on a permanent *kattubadi* is a "landholder" under

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the Act of 1908. This decision was confirmatory of a course of decisions that had been given since 1912 and earlier, though not without some dissent. For a considerable number of years tenants under such inamdars have been entitled to rely upon the special protection granted by the Act to ryots, and their Lordships would be loath to disturb titles taken or dealt with on that footing. They do not conceal from themselves that neither of the two grounds above-mentioned is free from difficulty. They discard all argument from the presumed general intention of the Act as treacherous and inconclusive. But they cannot agree that "part of the estate" or "portion of the estate" does not refer to the land itself by the word "estate", nor do they feel any confidence in the doctrine that, so long as the zemindar reserves any interest, however insignificant, a permanent grantee from him cannot be the owner. It may be that the words "or part thereof" were given a place in the definition of landholder without full appreciation of their effect in connection with the definition of "estate"; but there is no presumption to that effect; the words cannot be ignored, and good reason must be found in the Act itself for restricting their *prima facie* meaning. Their Lordships, as to the second ground, notice that, not only does the definition of "estate" employ the word "estate", but the definition of "landholder" employs the word "rents" and the definition of "rent" employs the word "landholder." They feel more difficulty than was felt by the majority of the learned judges in Madras in regarding the extension, given to the meaning of the word "landholder" by the clause as to collection of rents, as applicable to an inamdar. But on either ground they are satisfied that the Full Bench decision of 1922 represents a careful and reasonable solution of a stubborn ambiguity in the Act, and that it ought not now to be overruled having regard to the time which has elapsed and to the character of the interests affected thereby. They are wholly unable to distinguish the present case so as to regard the reasoning of the majority of the Full Bench as inapplicable thereto, nor can they hold that Exhibit C is a mere *jirayati* patta on favourable terms. The plaintiffs' title, if it be made out, is to a permanent under-tenure of a portion of a village on a small annual payment by whatever name the payment may be described. In their Lordships' judgment they claim an interest which must be held to clothe them with the character of landowner and to put the cultivating

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tenants under them in the position of ryots, to whom Ss. 6 and 9 apply. The plaintiffs' claim to eject the first three respondents must therefore fail.

It was contended that even so the High Court ought not to have dismissed the suit without deciding the dispute as to title between the plaintiffs and respondents four and five. Their Lordships, however, are not prepared to remand the case for a decision on this point. Having regard to their pleading the plaintiffs have no right to such an order since they impleaded respondents four and five without asking for any declaration as to title against them and merely as persons who might object to the relief sought against the first three respondents. The matter is one to be decided now upon the balance of convenience to the parties on both sides and their Lordships see nothing to induce them on this point to interfere with the decree of the High Court which has left the question of title open.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay one set of costs to the first three respondents and another to the fifth respondent.

Solicitors for Appellants: *Douglas Grant & Dold.*

Solicitors for Respondents: *Barrow, Rogers & Nevill Harold Shephard.*

R. C. C.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

The Madras and Southern Mahratta Railway Company, Limited .. *Appellant** (*Defendant*)

v.

P. Ranga Rao .. *Respondent* (*Plaintiff*).

M. & S. M. Ry. Co., Ltd. v. Ranga Rao.

Master and servant—Dismissal—Right to dismiss servant on conviction—Dismissal on conviction—If wrongful dismissal—Setting aside of conviction on revision—If master can be compelled to take back the servant.

If a company had, under the terms of employment, the right to dismiss its employee when he was convicted for anything by a criminal court it could not be compelled to take the servant back into its employment when the conviction was set aside at some later date by the High Court in revision; and the servant is not entitled to damages on the ground of wrongful dismissal.

* O. S. A. No. 73 of 1938. 17th August, 1939.

M. & S. M. Ry. Co., Ltd. v. Ranga Rao.

On appeal from the decree of the Hon'ble Mr. Justice Gentle dated 14th September, 1938 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 284 of 1935.

C. Krishnaswamy Aiyar instructed by *King and Partridge* for Appellant.

S. Panchapagesa Sastri instructed by *T. V. Srinivasan* for Respondent.

Leach, C. J.

The judgment of the Court was delivered by

The Chief Justice.—The appellant company appeals against a decree passed for the payment of Rs. 2,987-3-7 in a suit instituted on the Original Side of this Court. The respondent was in the employ of the company as a station master and claimed damages for wrongful dismissal. About the middle of 1931, while the respondent was holding the position of station master at Narasaraopet, it was discovered that the assistant goods clerk had misappropriated monies collected by him in respect of freight charges. It is said that the misappropriations amounted to Rs. 15,000. The discovery was made as the result of an audit. On the defalcations being discovered the company made a written complaint to the police. The result was that the respondent, the assistant goods clerk and another employee of the company were arrested. They were all charged with criminal breach of trust and conspiracy under the provisions of Ss. 408 and 120-B of the Indian Penal Code. On his arrest on the 24th August, 1931, the respondent was placed under suspension. On the 3rd October, 1932, the trial Magistrate convicted all the accused and sentenced the respondent and the third accused to one year's rigorous imprisonment. The goods clerk was sentenced to two years' rigorous imprisonment. As the result of the conviction the company dismissed the respondent from its service by a letter dated the 11th November, 1932. The respondent appealed against his conviction to the Sessions Judge of Guntur, who by a judgment dated the 21st November, 1932, dismissed the appeal. The respondent then applied to this Court to set aside the conviction and sentence under its revisional powers. By an order dated the 22nd November, 1933, the petition was allowed and the conviction and sentence were set aside. On the 17th July, 1935, the respondent filed the suit out of which this appeal arises. In his plaint he claimed Rs. 6,049-15-0, made up of the following amounts:—(1)

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Rs. 1,200 as damages for wrongful dismissal; (2) Rs. 100 as damages in lieu of one month's notice; (3) Rs. 300, being the amount of a security deposit made by the respondent which he said had been wrongfully withheld; (4) Rs. 2,449-15-0, being the amount which it was said the company was bound to pay into the company's provident fund for the respondent's benefit; and (5) Rs. 2,000 claimed as arrears of salary from the 24th October, 1932 to the 23rd November, 1935. Item No. 1 was abandoned by the respondent in the course of the trial. Items Nos. 3 and 5 were disallowed by the trial Judge (Mr. Justice Gentle) and his decision has been accepted. Items 2 and 4 were decreed. The company contends that the respondent was not entitled in law to any sum and that the suit should have been dismissed. The appeal turns on the decision of the question whether the respondent was wrongfully dismissed. It is common ground that if the dismissal was not wrongful the company had the right of withholding its contribution from the provident fund and that the respondent had no right to notice.

The respondent was employed by the company under an agreement in writing. The agreement was embodied in a letter which the respondent addressed to the agent of the company. Under it the respondent agreed to accept service with the company upon the terms and conditions set out in the letter. It is only necessary to refer to the third and the seventh conditions. The third condition reads as follows:

"That I hereby bind myself to obey and abide by all the instructions and regulations contained in the General Rules for Indian Railways, the subsidiary working rules and all regulations in force that affect my duties and work and by any further instructions that may, from time to time, be issued by any person duly placed in authority over me."

The seventh condition is this:—

"That I clearly understand that the authority which appoints me has the power, for any reason that may to him appear sufficient, to dismiss me."

The appellant company has framed rules regulating the discharge and dismissal of its subordinate servants and the submission of appeals. The rules deal not only with dismissal but also with the discharge of the employees. It is not necessary to refer to the rules relating to discharge as this case is merely concerned with the appellant company's powers of dismissal. The relevant rules so far as this case is concerned are rr. 5 and 7. R. 5 reads thus:—

"Dismissal—An employee will be liable to be dismissed from the service in the following circumstances, namely:—

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(*i*) in consequence of his conviction by a Criminal Court, or

(*ii*) for serious misconduct, or

(*iii*) for neglect of duty resulting in, or likely to result in, loss to Government or to the Railway Administration, or danger to the lives of persons using the Railway".

R. 7 on which the respondent places great reliance is in these terms:—

"Dismissal—Procedure—In all cases where an employee is charged with an offence of a nature, which if proved against him, is likely to lead to his dismissal, his District Officer shall order a Departmental Enquiry, and if a *prima facie* case is established, shall forward the proceedings with a copy of the employee's service register to the Head of his Department for decision.

"At the enquiry a definite charge in writing shall be framed in respect of each offence and explained to the employee, and the evidence which he may adduce in his defence shall be recorded in his presence, provided that, for special reasons to be recorded, the evidence of any witness may be taken and recorded otherwise than in the presence of the employee. A finding with its grounds, shall be recorded on each charge."

There are two notes appended to this rule. They read as follows:—

"1. An order of dismissal operates as a bar to re-employment in any capacity by this Railway and shall not be issued unless the employee's guilt is established by clear and conclusive evidence. In other cases when there is circumstantial evidence as to his guilt, it shall be open to the competent authority to consider the question of discharging him.

"2. The provisions of this rule do not apply when it is proposed to issue an order on the strength of facts or conclusions established at a judicial trial, or when the Railway servant concerned has absconded with an accusation hanging over his head."

It is the respondent's case that he had been wrongfully dismissed because there was no inquiry held under this rule, and this contention was accepted by Gentle, J. The learned Judge found as a fact that the respondent had failed to carry out his duties as station master, that he did not faithfully and diligently employ himself in the company's service according to the terms of the contract of employment and that he was guilty of neglect of duty resulting in a loss to the company and such neglect of duty amounted to serious misconduct. The learned Judge was here referring to the duty cast upon the respondent as a station master to control his subordinates at the station and inspect their accounts. The learned Judge, however, considered that notwithstanding these facts the company should have held an inquiry before exercising its right of dismissal. In his opinion the company was not justified in dismissing the respondent because it had not been proved before him that the

dismissal was based on the facts or the conclusions established at the trial before the magistrate. The company says that the learned Judge here misinterpreted r. 7 and that on a correct interpretation it was entitled to dismiss the respondent without an inquiry.

As I have indicated, the respondent's dismissal took place shortly after his conviction. The letter of dismissal is in these terms:—

"You are dismissed from the company's service from 24th August, 1931, the date you are placed under suspension. Please note and acknowledge receipt of this letter."

There can be no doubt that the dismissal was based on the respondent's conviction. This the respondent accepted as being the case in the letter which his advocate wrote before suit and also accepted in his plaint. In the letter it was said:

"My client states that as the order of dismissal is based on conviction by the trial Court, it ought to have been cancelled on my client's acquittal and that if you did not want to entertain my client any longer in service, you ought to have given a month's notice under the rules."

Paragraph 8 of the plaint reads as follows:—

"The plaintiff further submits that, as he was dismissed from service owing to the said conviction by the Sub-Divisional Magistrate, Narasaraopet, he ought to have been re-instated on his acquittal."

Therefore it is clearly the respondent's case that he was dismissed because of the conviction, and that this was so is obvious from the course of events. The respondent was placed under suspension as soon as he was arrested and he remained under suspension until he was dismissed, which took place on his conviction.

The learned Advocate for the respondent contends that the dismissal by reason of the conviction was not sufficient to deprive the respondent of the right of an inquiry under r. 7 of the rules regulating dismissal. He says that under note 2 of that rule an inquiry can be dispensed with only if the dismissal is based expressly on the strength of facts or conclusions established at the trial. But for the conclusion of the learned trial Judge on this question I should not have regarded this argument as a substantial one. With great respect, if a dismissal is based on a criminal conviction it seems to me that it must be taken to be based on the findings of the Court. The conviction follows the conclusions arrived at by the Court and to base a dismissal on a conviction it follows, in my opinion, that the

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conclusions of the Court are accepted. The respondent having recognised that his dismissal was based on his conviction I hold that he has no case.

The fact that as the result of revision proceedings the conviction was set aside does not affect the position. If the company had the right to dismiss the respondent when he was convicted it could not be compelled to take him back into its employment when the conviction was set aside at some later date. In fact there was no argument to the contrary.

In my judgment the respondent was rightly dismissed and he is not entitled to maintain this suit. I wish, however, to make it clear that I am not holding that the rules must be read into the respondent's agreement of service. It is not necessary for the purposes of this appeal to decide this question. I have assumed that the rules were embodied in the agreement.

The result is that the appeal succeeds and the suit must be dismissed with costs both here and below.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

A. M. K. M. K. Karuppan Chettiar and another .. *Appellants* (Plaintiffs)*

v.

Rajangam (minor) represented by mother and guardian Thayyu Ammal and others .. *Respondents (L. Rs. of 1st and 2nd Defendants).*

Karuppan Chettiar v. Rajangam.

Civil Procedure Code (V of 1908), O. 21, r. 57—Execution—Application to bring legal representative on record—Dismissal—Previous execution application—No final orders on it—Attachment effected on previous application subsisting—Sale during pendency of such attachment void.

It is clear from the language of O. 21, r. 57 that before a pending attachment shall cease, there must be a dismissal of the application for execution in which the attachment was effected; for the expression used in the section is 'upon the dismissal of such application'.

Where there had been an attachment of the suit property but no final orders for sale, etc., were passed on the application and a subsequent application to bring on record the legal representatives of the deceased defendant and to order sale was dismissed, but in the meantime as a result of a claim suit of the same property under a mortgage it was sold, on the question whether in the circumstances the sale under the mortgage suit was void owing

* S. A. No. 51 of 1935. 24th October, 1938.

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to the attachment subsisting in favour of the plaintiffs over the same property,

Held, that as long as the earlier execution petition was pending, any order of dismissal on an interlocutory application in the pending execution petition would not terminate the attachment. If owing to mistake or ignorance of legal rights, the plaintiffs obtained a fresh attachment it would not terminate the attachment which was already subsisting. Hence the sale was void as against the attachment.

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in A. S. No. 29 of 1934 preferred against the decree of the Court of the District Munsif, Valangiman at Kumbakonam in O. S. No. 98 of 1931.

M. S. Venkatarama Aiyar for Appellants.

A. V. Viswanatha Sastri for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit filed under O. 21, r. 63, Civil Procedure Code, by the plaintiffs for a declaration that they are entitled to sell the properties in suit in execution of a decree obtained by them in O. S. No. 371 of 1919 on the file of the District Munsif of Valangiman against the second defendant's father and that the deed of sale executed by the second defendant's mother as guardian dated 17th August, 1927, in favour of the first defendant is a sham and nominal transaction executed with a view to defeat and defraud their rights. The plaintiffs also attacked the deed on the ground that it was executed during the pendency of a subsisting attachment issued in execution of their decree. The sale deed in favour of the first defendant was for a sum of Rs. 8,000 part thereof, namely, Rs. 6,500 represented the amount due under a mortgage in his favour dated 25th October, 1921, executed by the second defendant's father and the balance Rs. 1,500 represented in part the amount due under a promissory note dated 7th November, 1921, also executed in his favour by the second defendant's father. Both the lower Courts took the view that the alienation was not invalid on the ground that it was made during the pendency of a subsisting attachment, but they differed on the question whether the sale deed was executed in order to defraud the plaintiffs' rights. The learned District Munsif took the view that it was a sham and nominal transaction, but the learned Subordinate Judge held that it was a *bona fide* transaction intended to pass title.

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This appeal is by the plaintiffs and Mr. Venkatarama Aiyar on their behalf urged before me two contentions, namely, (1) that the deed of sale is void having been executed during the pendency of a subsisting attachment and (2) that it was executed in order to defeat and defraud the plaintiffs' rights. If the first contention is answered in plaintiffs' favour, it would be unnecessary to go into the other. I therefore propose to deal with the first contention. A few facts are necessary to appreciate it. On the 16th September, 1923, plaintiffs filed an application (E. P. No. 559 of 1923) and obtained an order for attachment of the suit properties. Then they obtained an order for sale and the date of the sale was fixed for 14th February, 1924, but later adjourned to 29th March, 1924. The second defendant filed a suit against his father Venkata Reddi for partition and in that suit he obtained an injunction for stay of execution of the said decree. The sale was accordingly not held and that fact was recorded in E. P. No. 559 of 1923. But the execution application was pending and no final orders were passed thereon. The suit filed by the second defendant was dismissed on the 9th November, 1925. After the dismissal of that suit, the plaintiffs filed an application E. P. No. 222 of 1928 wherein they prayed that the second defendant might be brought on record as the legal representative of his father Venkata Reddi who has since died and also that the properties already attached in E. P. No. 559 of 1923 and ordered to be sold might again be ordered to be sold without the necessity of a fresh attachment, but the application was dismissed for default on the 12th November, 1928. The plaintiffs then filed a third application (E. P. No. 320 of 1930) wherein they prayed that the immovable properties already mentioned in E. P. No. 559 of 1923 might again be attached and the property directed to be sold. They were accordingly attached and directed to be sold on 7th April, 1930. The first defendant preferred a claim petition and it was allowed. Hence this suit. It will be seen that the sale deed was executed on the 17th August, 1927, before the dismissal of E. P. No. 222 of 1928. It is conceded that on the date of the sale the attachment which was made in pursuance of the order made on E. P. No. 559 of 1923 was subsisting, but it is contended that by reason of the dismissal of the application (E. P. No. 222 of 1928), the attachment ceased and therefore the sale must be deemed to be valid. Both the lower Courts have

taken this view and the question is, is it sound? The provision of law bearing on this matter is O. 21, r. 57, which runs thus:

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

It is clear from the language of the section that before a pending attachment shall cease, there must be a dismissal of the application for execution in which the attachment was effected. The expression used is "upon the dismissal of such application." There has been no final orders on E. P. No. 559 of 1923; it has never been dismissed. The question therefore is, can the dismissal of E. P. No. 222 of 1928 operate as a dismissal of the prior execution application? What was prayed in E. P. No. 222 of 1928 was to bring on record the legal representatives of the deceased defendant and to order a fresh sale, but that application was dismissed. The dismissal of this application would not prevent the plaintiffs from making a fresh application and from renewing the same prayer. As long as E. P. No 559 of 1923 was pending, any order of dismissal on an interlocutory application in the pending execution petition would not terminate the attachment. It is contended that the procuring of a fresh attachment in E. P. No. 320 of 1930 would indicate clearly that the prior attachment was treated by the plaintiffs as not legally subsisting. If owing to a mistake or ignorance of legal rights, the plaintiffs obtained a fresh attachment it would not terminate the attachment which was already subsisting. The fresh attachment is a superfluity. I am therefore of the opinion that the sale must be treated as void and inoperative as against the attachment obtained by the plaintiffs in execution of their decree and which is still subsisting. The question is, what is the relief the plaintiffs will be entitled to? It will be seen that the sale in favour of the plaintiffs was executed in part discharge of a mortgage. The plaintiffs had impeached the said mortgage as fraudulent, but the lower appellate Court has declared it to be a *bona fide* transaction and Mr. Venkatarama Aiyar has not challenged the finding in respect thereof. The plaintiffs will only be entitled to bring the properties to sale subject to the said mortgage in favour of the first defendant. It is open to the first defendant, if he desires, to have the property sold free from encumbrances and have the amount due on the mortgage

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paid out to him leaving the plaintiffs to realise their amount from and out of the surplus.

The result is that the decree of the lower appellate Court must be set aside and the plaintiffs be declared entitled to bring the suit properties to sale subject to the mortgage, in favour of the first defendant and the decree of the District Munsif restored with costs throughout.

Leave to appeal is refused.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Sri Veerabhadraswami at Samayanallur, through its managers and representatives, Subramania Aiyar and another .. *Appellants* (Plaintiffs-Respondents 1 and 2)*

v.

Maya Kone and others .. *Respondents (Defendants 1 to 4 and 7 to 10—Appellant and Respondents 3 to 5 and 7 to 10).*

Sri Veerabhadraswami v. Maya Kone.

Civil Procedure Code (V of 1908), S. 92—Mortgage of temple properties by poojaries—Suit by villagers to set aside the alienations—Maintainability apart from S. 92—Limitation Act (IX of 1908), Art. 134-A—Knowledge of plaintiff—If refers only to plaintiffs eo nomine *on record in a representative suit.*

In a representative suit by the villagers (*mahajans*) to set aside certain *othis* created by the poojaries of a temple,

Held, a suit against the alienee of temple property from the trustees or manager thereof can be maintained apart from the provisions of S. 92, Civil Procedure Code.

"Plaintiff" in column 3 of Art. 134-A must in the case of a representative suit be understood to refer only to the plaintiffs *eo nomine* on record and a suit brought within 12 years of their knowledge of the alienation is not barred; for otherwise, if 'plaintiff' be taken to mean every individual member of the community which is the only alternative view possible, it would be practically impossible to prove knowledge on the part of such a large number of persons.

Appeal against the decree of the Court of the Subordinate Judge of Madura in Appeal Suit No. 74 of 1935 preferred against the decree of the Court of the District Munsif of Madura Taluk in Civil Suit No. 8 of 1933.

* S. A. No. 526 of 1936. 17th August, 1939.

T. S. Vaithianatha Aiyar for Appellants.

G. S. Venkatarama Aiyar for Respondents.

The Court delivered the following

Sri Veerabhadraswami v. Maya Kone.

JUDGMENT.—The appellants brought the suit out of which this appeal arises on behalf of all the villagers of Samayanallore for a declaration that the suit property is Devadayam Inam land belonging to the temple of Veerabhadra Swami in that village, that certain *othis* thereof by the pujaries, defendants 3 to 10, in favour of the second defendant, another poojari, and a sub-mortgage by the latter in favour of the first defendant are void and not binding on the institution, for a permanent injunction restraining the first defendant from executing the decree obtained by him on foot of the sub-mortgage and bringing the suit property to sale and for other incidental reliefs. The suit was decreed by the trial Court, but on appeal, though the learned Subordinate Judge found that the suit property belonged to the temple in question and that therefore the pujaries, defendants 3 to 10, had no right to alienate the property as if it was their own private property, he held that the suit as framed was not maintainable and dismissed it. Hence the second appeal.

The learned Counsel for the appellants contends that this view of the learned Subordinate Judge is erroneous. It is unnecessary to refer to the several cases cited by him in support of his contention, as the decision of the Full Bench in *Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar*[1] clearly shows that a suit like the present can be maintained against an alienee of temple property from the trustees or managers thereof apart from the provisions of S. 92, Civil Procedure Code. *Cf.* also *Abdur Rahim* v. *Mahomed Barkat Ali*[2]. These decisions were apparently not brought to the notice of the learned Subordinate Judge and it is by no means clear on what legal grounds he held that the suit is not maintainable. In more than one place in his judgment he seems to think that the present suit is but an indirect attempt by the alienating pujaries themselves to get round their own alienation. But even if this suspicion—for, it is no more—is well founded, it is not open to the Court to take into consideration the motives by which the plaintiffs are actuated in bringing the suit. In another place the learned Subordinate Judge seems to suggest that a suit for the removal of the

1. (1916) 31 M.L.J. 777: I.L.R. 40 Mad. 212 (F.B.).
2. (1927) 54 M.L.J. 609: L.R. 55 I.A. 96: I.L.R. 55 Cal. 519 (P.C.),

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pujaries under S. 92, Civil Procedure Code, would be a more effective remedy if the plaintiffs were really anxious to protect and safeguard the interests of the temple. This, again, is entirely beside the point as the existence of a more effective remedy can obviously be no answer to this suit and cannot therefore justify its dismissal. The learned Judge also appears to have thought that a prayer for possession was necessary, It is however difficult to see how the appellants could have asked for possession of the properties in this suit in the circumstances of the case. The suit temple is clearly one of those numerous small village temples where the pujaries or archakas are also the managers of the temple and its properties with the tacit consent of the villagers, and unless the defendants 2 to 10 are removed from the management and fresh managers are appointed in appropriate proceedings in Court or otherwise, there would be no means of recovering possession of the properties from the second defendant who is now in possession and is himself a pujari. On the other hand, the immediate injury to the temple which this suit is brought to avert is the impending Court sale of the temple properties in execution of the mortgage decree obtained by the first defendant and there is no reason why relief by way of injunction with the appropriate declarations should not be awarded if the circumstances otherwise warrant such award.

The learned Counsel for the respondents attempted to support the decree of the Court below on another ground also, namely, that the suit is barred by limitation. An issue was raised in this point, being Issue No. 3 in the case, but the learned Subordinate Judge did not deal with it as being unnecessary. The trial Court disposed of it merely with the remark that it was not shown by the contesting defendant how the suit was barred by limitation. The learned Counsel for the respondent now relies upon Art. 134-A of the Limitation Act which provides for a period of 12 years for a suit to set aside an alienation of property comprised in a Hindu charitable endowment. The allegations in favour of the second defendant by defendants 3 to 10 were of years 1911 and 1914 and the alienations by the second defendant was in 1915, and the suit having been brought only in 1933 the learned Counsel for the respondents contends that it is out of time. According to this article, the starting point of limitation is "when the transfer becomes

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known to the plaintiff." The respondents' counsel points to a sentence in paragraph 12 of the learned Subordinate Judge's judgment where he says:

"There can therefore be no doubt that the pujaries have been creating *othies* all along to the knowledge of the *mahajanams*,"

and contends that, according to this finding, the villagers who must be regarded as the plaintiffs in this case have had knowledge of these alienations all along and that therefore the period of 12 years must be taken to have expired before the suit was brought. Though the passage referred to above in the learned Subordinate Judge's judgment is quite general, it cannot be supposed that he intended to find that every individual '*mahajan*' in the village actually knew of these allegations, and it is conceded by the respondents' Counsel that there is no evidence on record to show that the two plaintiffs who brought the suit on behalf of all the villagers had knowledge of these alienations for more than 12 years before the suit. In my view, the word 'plaintiff' in the third column of Art. 134-A must, in the case of a representative suit like the present, brought on behalf of the general body of worshippers in a village, be understood to refer only to the plaintiffs *eo nomine* on record. Otherwise, the article would become unworkable; for, if 'plaintiff' be taken to mean every individual member of the community which is the only alternative view possible, it would be practically impossible to prove knowledge on the part of such a large number of persons. Nor would that view assist the respondents in this case; for, it is admitted, as already stated, that at least two of the *mahajans*, that is, the appellant herein, are not proved to have had knowledge of these alienations before 12 years prior to the suit. I am therefore of opinion that there is no bar of limitation under that article.

The respondents' learned Counsel has not challenged the finding of the Court below that the lands in suit are Devadayam Inam lands and that the alienations are invalid and not binding on the temple. A contention to the contrary would clearly be unsustainable.

The appeal therefore succeeds and the decree of the learned Subordinate Judge is set aside and that of the District Munsif restored. The appellants will have their own costs here and in the Court below.

Leave refused.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Suryadevara Subbayya minor by next friend Tatineni Venkataramayya .. *Appellant** (*2nd Judgment-debtor*)

v.

Vamulapalli Venkatasubbayya and another .. *Respondents* (*Decree-holder and 1st Judgment-debtor*).

Surya-devara Subbayya *v.* Venkata-subbayya.

Mortgage deed—Provision in the deed for mortgagee to waive penalty clause and sue for only arrears — Objections in execution proceedings—Whether proper—Mortgagor whether can be heard to say that penalty should have been enforced against him—Principle of S. 67 (a), Transfer of Property Act (IV of 1882), not applicable.

Where a mortgage instrument provides that the mortgagee might treat the whole of his mortgage as payable on default in respect of the first two instalments, and the mortgagee actually elected to sue on the two instalments which were in arrears and the sale put up when objection was taken that more of the property was sold than necessary to realise the arrears and that the sale could not be held subject to the remaining instalments of the mortgage debt in respect of which no suit had been filed.

Held, (1) that since the first objection was not one to the manner of execution so much as to the decree which had been obtained, if the mortgagee was bound to sue on the whole of the mortgage, then the plea should have been taken in the suit and the mortgagee given an opportunity of either paying court-fee on the whole claim and getting a decree thereon or of abandoning so much of the mortgage amount as it was not worth his while to pursue. The objection should not be used in the process of execution.

(2) That since the instrument gave the mortgagee an option to waive the penalty and sue merely on the instalments which were due, the mortgagor had the benefit of a deferred liability to pay the balance of mortgage debt and could not be heard to say that the mortgagee was bound to enforce a penalty against himself. The principle of S. 67 (a) of the Transfer of Property Act could not be applied, unless there were either two mortgagees or two separate portions of the same mortgage both of which were payable.

Appeal against the order of the District Court of Kistna at Masulipatam dated 11th December, 1936, and made in A. S. No. 242 of 1936 preferred against the order of the Court of the District Munsif of Gudiwada dated 26th September, 1936, and made in E. P. No. 89 of 1936 in O. S. No. 144 of 1934.

P. Somasundaram and *P. Suryanarayana* for Appellant.

T. Krishna Rao for *B. Sitarama Rao* for Respondents.

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* C. M. S. A. No. 85 of 1937. 6th September, 1939.

Surya-devara Subbayya v. Venkata-subbayya.

The Court delivered the following

JUDGMENT.—This appeal arises out of an order in the execution of a mortgage decree. The mortgage instrument is not before me, but from the recital in the preliminary decree it would appear that it provided for the payment of the amount due in ten annual instalments, with a default clause that if two consecutive instalments were in arrears, the mortgagee could claim the whole. In fact the mortgagee elected to sue only on the two instalments which were in arrears and he got a mortgage decree for the payment of these amounts. He must therefore be taken to have waived his right to enforce the default clause. When the hypotheca was put up for sale an objection was raised which is not very clearly stated, but appears to have been directed to two points, *firstly*, that more of the property was sold than was necessary to realise the arrears and *secondly*, that the sale could not be held subject to the remaining instalments of the mortgage debt in respect of which no suit had been filed. In so far as the objection was made to the extent of the land covered by the sale proclamation, I doubt very much whether the order is appealable at all. In so far as it relates to the power of the mortgagee to sell the land subject to the balance of his mortgage rights, it must, I think, be held that this is an order on a dispute between the parties arising out of execution and affecting the substantial rights of the judgment-debtor and is therefore appealable.

The basis of the objection has been stated here somewhat differently from the way in which it appears to have been stated in the Courts below. It is contended that, on the analogy of S. 67 (*a*) of the Transfer of Property Act which of course does not apply in terms to the present proceedings, the mortgagee is bound to sue on the whole of his mortgage and that he not having done so, the decree must be executed by the sale of the properties free of the balance of the mortgage. No authority has been quoted covering the contention raised. It seems to me clear that the objection is really not one to the manner of execution so much as to the decree which has been obtained. If the mortgagee was bound to sue on the whole of his mortgage, then the plea should have been raised in the suit and the mortgagee should have been given an opportunity of either paying court-fee on the whole of the claim and getting a decree thereon, or of abandoning so much of the mortgage claim as it

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was not worth his while to pursue. The defendant cannot keep such an objection in reserve to be used in the process of execution. The decree itself makes the property liable to be sold to realise the amount due in respect of the first two instalments and it does not affect the rights of the decree-holder under the balance of his mortgage.

Quite apart from the question of the time at which this objection should have been urged I doubt very much whether the objection is sound in substance; for the principle of S. 67 (*a*) of the Transfer of Property Act could not be applied unless there were either two mortgages or, possibly, two separate portions of the same mortgage both of which were payable. The present instrument apparently provided that the mortgagee might treat the whole of his mortgage as payable on default in respect of the two first instalments. This is presumably an option given to the mortgagee and, if he chooses to waive the penalty and sue merely on those instalments which were due, the mortgagor has the benefit of a deferred liability to pay the balance of the mortgage debt. He cannot in my opinion be heard to say that the mortgagee was bound to enforce a penalty against himself. Whichever way one looks at the case, the appeal has no substance and is dismissed with costs.

Leave refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Raja Inuganti Venkata Rayanim Varu .. *Appellant** (*Petitioner*)

v.

Alluri China Bapanna, represented by his natural father Alluri Sooranna, under a general power-of-attorney and others .. *Respondents* (*Respondents*).

Venkata Rayanim Varu v. China Bapanna.

Civil Procedure Code (V of 1908), O. 5, r. 19—Summons—Service of—Sufficiency of in the absence of party elsewhere—Circumstances—Declaration of sufficiency implied.

Where no less than four summonses were taken out to the (seventh defendant) appellant and they were all returned with reports that he was absent at some place or other and after such last return the Court declared that "Defendant 7 affixed, etc. . . . . . . called absent. Defendant 7 *ex parte*",

*A. A. O. No. 95 of 1937. 15th September, 1939.

Venkata Rayanim Varu v. China Bapanna.

Held, that in the circumstances of the case there was an implied, though not an express, declaration of sufficiency of service on the particular party.

Even though it is desirable that all Courts should observe the mandatory provision of O. 5, r. 19 and "either declare that the summons has been duly served or order such further service as it thinks fit," the absence of such an express declaration will not involve as a necessary consequence a finding that a summons has not been duly served.

Appeal against the order of the Court of the Subordinate Judge of Nellore dated 22nd September, 1936 and made in I. A. No. 363 of 1933 in O. S. No. 32 of 1932.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

K. Venkatarama Raju for Respondents.

The Court delivered the following

JUDGMENT.—It is of course desirable that all Courts should observe the mandatory provision in O. 5, r. 19, Civil Procedure Code, and "either declare that the summons has been duly served or order such further service as it thinks fit." But we do not think that the absence of such an express declaration will involve as a necessary consequence a finding that a summons has not been duly served. In the present case no less than four summonses were taken out to the appellant and they were all returned with reports that the copies had been affixed because the appellant was absent in some place or other. After the *fourth* return of the kind, the Court said on 24th March, 1933, "defendant 7 affixed on 15th March, 1933, said to have gone to Tirupattur by the inmates of the house. Called absent. Defendant 7 *ex parte*." In the circumstances of this case we see no difficulty in saying that there is here an implied, though not an express, declaration of sufficiency of service on the seventh defendant. The decisions in *Azhagappa Chetti* v. *Ramanathan Chettiar*[1] and *Ramaswami Chettiar* v. *Chinnappa Chetty*[2] are not in point. Moreover we must agree with the learned Sub-Judge that the appellant really knew all about the suit as it was going on. The mortgagor-defendants were his son-in-law and his grandsons and it is not possible to believe his statements that he knew nothing about the suit until after it has been decreed.

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1. (1932) 64 M.L.J. 629. 2. (1933) 64 M.L.J. 637.

Venkata Rayanim Varu v. China Bapanna.

We agree with the learned Sub-Judge that the appellant did not prove that he was prevented by any sufficient cause from appearing when the suit came on for trial.

We therefore dismiss this appeal with costs, and we do so with no compunction, since the appellant has not and never has had any defence of his own to raise. He wants now, he says, to press a plea actually taken at the trial on behalf of the mortgagor-defendants, but not substantiated by their Court guardian.

K. C. *Appeal dismissed.*

[END OF VOLUME II.]

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THE INDIA ACTS, 1939.

THE INDIAN TARIFF (AMENDMENT) ACT, 1939.

ACT No. I OF 1939.

[28th January, 1939.

An Act further to amend the Indian Tariff Act, 1934.

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934, for the purpose of assisting the sale in India of wheat produced therein by imposing a temporary duty of customs on the importation of wheat; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN TARIFF (AMENDMENT) ACT, 1939.

Amendment of First Schedule, Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934,—

(*a*) after Item No. 10, the following item shall be inserted, namely:—

"10 (1)	WHEAT.	Protective	Re. 1-8 per cwt.	..	..	March 31st, 1940".

(*b*) after Item No. 11, the following item shall be inserted, namely:—

"11 (1)	WHEAT FLOUR	Protective.	Re. 1-8-0 per cwt.	..	..	March 31st, 1940".

THE AJMER-MERWARA MUNICIPALITIES REGULATION (AMENDMENT) ACT, 1939.

ACT No. II OF 1939.

[1st February, 1939.

An Act further to amend the Ajmer-Merwara Municipalities Regulation, 1925, for the purpose of lowering the educational qualification entitling a person to be enrolled as an elector.

WHEREAS it is expedient further to amend the Ajmer-Merwara Municipalities Regulation, 1925, for the purpose of lowering the educational qualification entitling a person to be enrolled as an elector; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE AJMER-MERWARA MUNICIPALITIES REGULATION (AMENDMENT) ACT, 1939.

Amendment of section 30, Regulation VI of 1925.

2. For sub-clause (*i*) of clause (*b*) of sub-section (2) of section 30 of the Ajmer-Merwara Municipalities Regulation, 1925, the following sub-clause shall be substituted, namely:—

"(*i*) the holder of a certificate proving that he has passed the Upper Primary (fourth standard) examination or any other examination prescribed by rule

in this behalf as at least equivalent to that examination, or that he possesses such lower educational qualification as may be so prescribed, or."

THE DESTRUCTIVE INSECTS AND PESTS (AMENDMENT) ACT, 1939.

ACT NO. III OF 1939.

[*2nd February, 1939.*

An Act further to amend the Destructive Insects and Pests Act, 1914.

WHEREAS it is expedient further to amend the Destructive Insects and Pests Act, 1914, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title. 1. This Act may be called THE DESTRUCTIVE INSECTS AND PESTS (AMENDMENT) ACT, 1939.

Amendment of section 2, Act II of 1914. 2. In section 2 of the Destructive Insects and Pests Act, 1914,—

(*a*) at the end of clause (*b*) the word "and" shall be omitted;

(*b*) at the end of clause (*c*) the word "and" shall be added; and

(*c*) after clause (*c*) the following clause shall be added, namely:—

"(*d*) a reference to British India shall be construed as a reference to British India and Berar."

THE MOTOR VEHICLES ACT, 1939.

ACT NO. IV OF 1939.

[*16th February, 1939.*

An Act to consolidate and amend the law relating to motor vehicles.

WHEREAS it is expedient to consolidate and amend the law relating to motor vehicles in British India; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement. 1. (1) This Act may be called THE MOTOR VEHICLES ACT, 1939.

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of July, 1939; but Chapter VIII shall not have effect until the 1st day of July, 1943.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "axle weight" means in relation to an axle of a vehicle the total weight transmitted by the several wheels attached to that axle to the surface whereon the vehicle rests;

(2) "certificate of registration" means the certificate issued by a competent authority to the effect that a motor vehicle has been duly registered in accordance with the provisions of Chapter III;

(3) "contract carriage" means a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum and from one point to another without stopping to pick up or set down along the line of route passengers not included in the contract; and includes a motor cab notwithstanding that the passengers may pay separate fares;

Explanation.—"Contract carriage" does not include a motor vehicle, possession of which has been temporarily transferred in accordance with an express agreement of hire for use as a private vehicle and which is used in accordance with the terms of such agreement;

(4) "delivery van" means any goods vehicle the registered laden weight of which does not exceed 5,000 pounds avoirdupois;

(5) "driver" includes, where a separate person acts as steersman of a motor vehicle, that person as well as any other person engaged in the driving of the vehicle;

(6) "fares" includes sums payable for a season ticket or in respect of the hire of a contract carriage;

(7) "goods" includes live-stock, and any thing (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle;

(8) "goods vehicle" means any motor vehicle constructed or adapted for use for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers;

(9) "heavy transport vehicle" means a transport vehicle the registered axle weight of which exceeds 10,600 pounds avoirdupois, or the registered laden weight of which exceeds 14,500 pounds avoirdupois;

(10) "invalid carriage" means a motor vehicle the unladen weight of which does not exceed five hundredweights, specially designed and constructed, and not merely adapted, for the use of a person suffering from some physical defect or disability, and used solely by or for such a person;

(11) "licence" means the document issued by a competent authority authorising the person specified therein to drive a motor vehicle or a motor vehicle of any specified class or description;

(12) "licensing authority" means an authority empowered to grant licences, appointed by the Provincial Government by rule made under section 21;

(13) "light transport vehicle" means any public service vehicle other than a motor cab, or any goods vehicle other than a heavy transport vehicle or a delivery van;

(14) "locomotive" means a motor vehicle which is itself not constructed to carry any load (other than equipment used for the purpose of propulsion), the unladden weight of which exceeds 16,000 pounds avoirdupois; but does not include a road-roller;

(15) "motor cab" means any motor vehicle constructed, adapted or used to carry not more than six passengers excluding the driver, for hire or reward;

(16) "motor car" means any motor vehicle other than a transport vehicle, locomotive, road-roller, tractor, motor cycle or invalid carriage;

(17) "motor cycle" means a motor vehicle, other than an invalid carriage, with less than four wheels, the unladen weight of which, inclusive of any side-car attached to the vehicle, does not exceed 900 pounds avoirdupois;

(18) "motor vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or used solely upon the premises of the owner;

(19) "owner" means, where the person in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire purchase agreement, the person in possession of the vehicle under that agreement;

(20) "permit" means the document issued by a Provincial or Regional Transport Authority authorising the use of a transport vehicle as a contract carriage, or stage carriage, or authorising the owner as a private carrier or public carrier to use such vehicle;

(21) "prescribed" means prescribed by rules made under this Act;

(22) "private carrier" means an owner of a transport vehicle other than a public carrier who uses that vehicle solely for the carriage of goods which are his property or the carriage of which is necessary for the purposes of his business not being a business of providing transport, or who uses the vehicle for any of the purposes specified in sub-section (2) of section 42;

(23) "public carrier" means an owner of a transport vehicle who transports or undertakes to transport goods, or any class of goods, for another person at any time and in any public place for hire or reward, whether in pursuance of the terms of a contract or agreement or otherwise, and includes any person, body, association or company engaged in the business of carrying the goods of persons associated with that person, body, association or company for the purpose of having their goods transported;

(24) "public place" means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set down by a stage carriage;

(25) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a motor cab, contract carriage, and stage carriage;

(26) "registered axle weight" means in respect of any vehicle the axle weight certified and registered by the registering authority as permissible for that vehicle;

(27) "registered laden weight" means in respect of any vehicle the total weight of the vehicle and load certified and registered by the registering authority as permissible for that vehicle;

(28) "registering authority" means an authority empowered to register motor vehicles under chapter III:

(29) "stage carriage" means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey;

(30) "tractor" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion) the unladen weight of which does not exceed 16,000 pounds avoirdupois; but excludes a road-roller;

(31) "traffic signs" includes all signals, warning sign posts, direction posts, or other devices for the information, guidance or direction of drivers of motor vehicles;

(32) "trailer" means any vehicle other than a side-car drawn or intended to be drawn by a motor vehicle;

(33) "transport vehicle" means a public service vehicle, a goods vehicle a locomotive or a tractor other than a locomotive or tractor used solely for agricultural purposes;

(34) "unladen weight" means the weight of a vehicle or trailer including all equipment ordinarily used with the vehicle or trailer when working, but excluding the weight of a driver or attendant; and where alternative parts or bodies are used the unladen weight of the vehicle means the weight of the vehicle with the heaviest such alternative part or body;

(35) "weight" means the total weight transmitted for the time being by the wheels of a vehicle to the surface on which the vehicle rests.

CHAPTER II.

Licensing of Drivers of Motor Vehicles.

Necessity for driving licence.

3. (1) No person shall drive a motor vehicle in any public place unless he holds an effective licence issued to himself authorising him to drive the vehicle; and no person shall so drive a motor vehicle as a paid employee or shall so drive a public service vehicle unless his licence specifically entitles him so to do.

(2) A Provincial Government may prescribe the conditions subject to which sub-section (1) shall not apply to a person receiving instruction in driving a motor vehicle.

(3) Nothing contained in sub-section (1) shall for a period of twelve months after the commencement of this Act invalidate a licence to drive a motor vehicle issued by a competent authority under the provisions of the Indian Motor Vehicles Act, 1914.

Age limit in connection with driving of motor vehicles.

4. (1) No person under the age of eighteen years shall drive a motor vehicle in any public place.

(2) Subject to the provisions of section 14, no person under the age of twenty years shall drive a transport vehicle in any public place.

(3) Nothing contained in sub-section (1) or sub-section (2) shall prevent any person who, before the commencement of this Act, possessed a licence to drive a motor vehicle from obtaining a licence to drive a motor vehicle of the same class.

Responsibility of owners of motor vehicles for contraventions of sections 3 and 4.

5. No owner or person in charge of a motor vehicle shall cause or permit any person who does not satisfy the provisions of section 3 or section 4 to drive the vehicle.

Restrictions on the holding of licences.

6. (1) No person shall, while he holds any licence for the time being in force, hold any other licence except a licence issued in accordance with the provisions of section 14, or a document authorising, in accordance with the rules made under section 92, the person specified therein to drive a motor vehicle.

(2) No holder of a licence shall permit it to be used by any other person.

(3) Nothing in this section shall prevent a licensing authority having the jurisdiction referred to in sub-section (1) of section 7 from adding to the classes of vehicle which the licence authorises the holder to drive.

Grant of licence.

7. (1) Any person who is not disqualified under section 4 for driving a motor vehicle and who is not for the time being disqualified for holding or obtaining a licence may apply to the licensing authority having jurisdiction in the area in which he ordinarily resides or carries on business or, if the application is for a licence to drive as a paid employee, in which the employer resides or carries on business, for the issue to him of a licence.

(2) Every application under sub-section (1) shall be in Form A as set forth in the First Schedule, shall be signed by, or bear the thumb impression of, the applicant in two places, and shall contain the information required by the form.

(3) Where the application is for a licence to drive as a paid employee or to drive a transport vehicle, or where in any other case the licensing authority for reasons to be stated in writing so requires, the application shall be accom-

panied by a medical certificate in Form C, as set forth in the First Schedule, signed by a registered medical practitioner.

(4) Every application for a licence to drive as a paid employee and every application for a licence to drive a transport vehicle shall be accompanied by three clear copies of a recent photograph of the applicant.

(5) If, from the application or from the medical certificate referred to in sub-section (3), it appears that the applicant is suffering from any disease or disability specified in the Second Schedule or any other disease or disability which is likely to cause the driving by him of a motor vehicle of the class which he would be authorised by the licence applied for to drive to be a source of danger to the public or to the passengers, the licensing authority shall refuse to issue the licence:

Provided that—

(*a*) a licence limited to driving an invalid carriage may be issued to the applicant, if the licensing authority is satisfied that he is fit to drive such a carriage,

(*b*) the applicant may, except where he suffers from a disease or disability specified in Second Schedule, claim to be subjected to a test of his fitness or ability to drive a motor vehicle of a particular construction or design, and, if he passes such test to the satisfaction of the licensing authority and is not otherwise disqualified, the licensing authority shall grant him a licence to drive such motor vehicle as the licensing authority may specify in the licence.

(6) No licence shall be issued to any applicant unless—

(*a*) he passes to the satisfaction of the licensing authority the test of competence to drive specified in the Third Schedule, or

(*b*) where the application is made within twelve months from the commencement of this Act, he satisfies the licensing authority that he was at the commencement of this Act the holder of a current licence granted under the provisions of the Indian Motor Vehicles Act, 1914, entitling him to drive a vehicle of the class or description which he would be entitled to drive under the licence applied for:

Provided that, where the application is for a licence to drive a motor cycle or a motor car, the licensing authority shall exempt the applicant from Part I of the test specified in the Third Schedule if the licensing authority is satisfied that the applicant has previously held a licence to drive and has had not less than twelve months' recent experience of driving a motor cycle or a motor car, as the case may be:

Provided further that where the application is for a licence to drive a motor vehicle (not being a transport vehicle) otherwise than as a paid employee, the licensing authority may exempt the applicant from Part I of the test specified in the Third Schedule if the applicant possesses a driving certificate issued by an automobile association recognised in this behalf by the Provincial Government.

(7) The test of competence to drive shall be carried out in a vehicle of the type to which the application refers, and, for the purposes of Part I of the test,—

(*a*) a person who passes the test in driving a motor car or a motor cab or a delivery van shall be deemed to have passed the test for all of these vehicles;

(*b*) a person who passes the test in driving a light transport vehicle shall be deemed also to have passed the test in driving the vehicles referred to in clause (*a*); and

(*c*) a person who passes the test in driving a heavy transport vehicle shall be deemed also to have passed the test in driving any motor vehicle other than a motor cycle.

(8) When an application has been duly made to the appropriate licensing authority and the applicant has satisfied such authority of his physical fitness and of his competence to drive and has paid to the authority a fee of five rupees, the licensing authority shall grant the applicant a licence unless the applicant is disqualified under section 4 for driving a motor vehicle or is for the time being disqualified for holding or obtaining a licence:

Provided that—

(*a*) the fee for a licence issued in accordance with the provisions of clause (*b*) of sub-section (6) shall be three rupees only, and

(*b*) a licensing authority may issue a licence to drive a motor cycle or a motor car notwithstanding that it is not the appropriate licensing authority, if the licensing authority is satisfied that there is good reason for the applicant's inability to apply to the appropriate licensing authority.

Form and contents of licence.

8. (1) Every licence, except a licence issued under section 14, shall be in Form D as set forth in the First Schedule and shall have affixed thereto one of the signatures or thumb impressions given on the form of application for the licence and, in the case of a licence to drive as a paid employee or to drive a transport vehicle, one of the photographs referred to in sub-section (4) of section 7.

(2) A licence shall specify whether the holder is entitled to drive as a paid employee and whether he is entitled to drive a public service vehicle and shall further be expressed as entitling the holder to drive a motor vehicle of one or more of the following classes, namely:—

(*a*) motor cycle,

(*b*) motor car,

(*c*) motor cab,

(*d*) delivery van,

(*e*) light transport vehicle,

(*f*) heavy transport vehicle,

(*g*) locomotive,

(*h*) tractor,

(*i*) road-roller,

(*j*) invalid carriage, or

(*k*) motor vehicle of a specified description.

Extent of validity of licence.

9. (1) Subject to any rules made by a Provincial Government under sub-section (3), a licence issued under the foregoing sections shall be effective throughout British India.

(2) Subject, in the case of international driving permits issued in pursuance of the International Convention relative to motor traffic concluded at Paris on the 24th day of April, 1926, or of any Convention modifying the same, to any rules made by the Central Government under section 92 and subject in any other case to the provisions of sub-section (4), a licence to drive a motor vehicle issued by a competent authority in any Indian State or in the French or Portuguese Settlements bounded by India shall, if the holder is ordinarily resident in the State or Settlement in which the licence was issued, be valid throughout British India as if it were a licence issued under this Act:

Provided that such holder is not disqualified under any of the provisions of this Act for holding or obtaining a licence in British India.

(3) A Provincial Government may, by rules made under section 21,—

(a) provide that a specification entitling the holder of a licence to drive a public service vehicle shall be made in the licence only by or under the authority of the Regional Transport Authority constituted under Chapter IV,

(b) regulate the submission of applications for such licences to the said authority, or

(c) require as a condition of its validity in a province that a licence entitling the holder to drive a public service vehicle shall be countersigned by a prescribed authority in the province.

(4) If the Central Government is satisfied that licences issued in British India under this Act are not effective in any Indian State or French of Portuguese Settlement bounded by India or are effective subject to unreasonable conditions or that like conditions and requirements to those imposed by this Act are not imposed in a reasonable degree upon the issue of licences in any State or Settlement as aforesaid, the Central Government shall, by notification in the Official Gazette, declare that licences generally or any particular class of licence issued in any such State or Settlement shall not be valid in British India.

Currency of licences.

10. A licence issued under the foregoing sections shall, subject to the provisions contained in this Act as to the cancellation of licences and the disqualification of holders of licences for holding or obtaining licences, be effective without renewal for a period of twelve months only from the date of issue or last renewal.

Renewal of licences.

11. (1) Any licensing authority may on application made to it renew a licence issued under the provisions of this Act.

(2) An application for the renewal of a licence shall be made in Form B as set forth in the First Schedule and shall contain the declaration required by that form; provided that where the applicant does not or is unable to subscribe to the said declaration the provisions of sub-section (5) of section 7 shall apply.

(3) The fee payable for the renewal of a licence shall be three rupees, if the application for renewal is made previous to, or not more than fifteen days subsequent to, the date on which the licence is due to expire and shall be five rupees in any other case, unless the licensing authority is satisfied that the holder was prevented by good cause from applying for the renewal of the licence within fifteen days after its expiry.

(4) When the authority renewing the licence is not the authority which issued the licence, it shall intimate the fact of renewal to the authority which issued the licence.

Revocation of licence on grounds of disease or disability.

12. Notwithstanding anything contained in the foregoing sections, a licensing authority may at any time revoke a licence issued by it, or may require, as a condition of continuing to hold such licence, the holder thereof to furnish a fresh medical certificate in Form C as set forth in the First Schedule signed as required by sub-section (3) of section 7, if the licensing authority has reasonable grounds to believe that the holder of the licence is, by virtue of any disease or disability, unfit to drive a motor vehicle.

Orders refusing or revoking licences and appeals therefrom.

13. (1) Where the licensing authority refuses to issue or revokes or refuses to renew any licence, it shall do so by an order communicated to the applicant or the holder, as the case may be, giving the reasons in writing for such refusal or revocation.

(2) Any person aggrieved by the refusal of a licensing authority to grant or renew a licence or by the revocation of a licence may, within thirty days of the service on him of the order of such refusal or revocation, appeal to the

prescribed authority, who shall decide the appeal after giving the licensing authority an opportunity of being heard, and the decision of the appellate authority shall be binding on the licensing authority.

(3) The order of a licensing authority shall, unless the appellate authority, conditionally or unconditionally, directs otherwise, be in force pending the disposal of an appeal under sub-section (2).

Licences to drive motor vehicles, the property of the Central Government.

14. (1) The authority specified in Part A of the Fourth Schedule may grant licences, valid throughout British India, to persons who have completed their eighteenth year to drive motor vehicles which are the property of the Central Government.

(2) A licence issued under this section shall specify the class or classes of vehicle which the holder is entitled to drive and the period for which he is so entitled.

(3) A licence issued under this section shall not entitle the holder to drive any motor vehicle except a motor vehicle which is the property of the Central Government.

(4) The authority issuing any licence under this section shall at the request of any Provincial Government furnish such information respecting any person to whom a licence is issued as that Government may at any time require.

Power of licensing authority to disqualify for holding a licence.

15. (1) If a licensing authority is satisfied after giving him an opportunity of being heard that any person—

(*a*) is a habitual criminal or a habitual drunkard, or

(*b*) is using or has used a motor vehicle in the commission of a cognisable offence, or

(*c*) has by his previous conduct as driver of a motor vehicle shown that his driving is likely to be attended with danger to the public,

it may, for reasons to be recorded in writing, make an order disqualifying that person for a specified period for holding or obtaining a licence.

(2) Upon the issue of any such order a person affected, if he is the holder of a licence, shall forthwith surrender his licence to the licensing authority making the order, if the licence has not already been surrendered, and the licensing authority shall—

(*a*) if the licence is a licence issued under this Act, keep it until the disqualification has expired or has been removed, or

(*b*) if it is not a licence issued under this Act, endorse the disqualification upon it and send it to the licensing authority by which it was issued.

(3) Any person aggrieved by an order made by a licensing authority under this section may, within thirty days of the receipt of the order, appeal to the prescribed authority, and such appellate authority shall give notice to the licensing authority and hear either party if so required by that party and may make such inquiry into the matter as it thinks fit. An order made by any such appellate authority shall be final.

Power of Regional Transport Authority to disqualify.

16. (1) A Regional Transport Authority constituted under Chapter IV may for reasons to be recorded in writing and subject to any prescribed conditions declare any person disqualified, for a specified period, for holding or obtaining a licence to drive a public service vehicle in the province.

(2) Any person aggrieved by an order of a Regional Transport Authority made under sub-section (1) may within thirty days of the receipt of intimation of such order appeal against the order to the prescribed authority.

Power of Court to disqualify.

17. (1) Where a person is convicted of an offence under this Act, or of an offence in the commission of which a motor vehicle was used, the Court by which such person is convicted may, subject to the provisions of this section, in addition to imposing any other punishment authorised by law, declare the person so convicted to be disqualified, for such period as the Court may specify, for holding any licence or for holding a licence to drive a particular class or description of vehicle.

(2) A Court shall not order the disqualification of an offender convicted for the first or second time of an offence punishable under section 115.

(3) A Court shall order the disqualification of an offender convicted of an offence punishable under section 117, and such disqualification shall be for a period of not less than six months.

(4) A Court shall order the disqualification of an offender convicted of an offence against the provisions of clause (*c*) of sub-section (1) of section 87 or of section 89, and such disqualification shall be for a period of not less than one month.

(5) A Court shall, unless for special reasons to be recorded in writing it thinks fit to order otherwise, order the disqualification of an offender—

(*a*) who having been convicted of an offence punishable under section 116 is again convicted of an offence punishable under that section,

(*b*) who is convicted of an offence punishable under section 120, or

(*c*) who is convicted of an offence punishable under section 123:

Provided that the period of disqualification shall not exceed, in the cases referred to in clauses (*a*) and (*b*), two years, or, in the case referred to in clause (*c*), one year.

(6) A Court ordering the disqualification of an offender convicted of an offence punishable under section 116 may direct that the offender shall, whether he has previously passed the test of competence to drive specified in the Third Schedule or not, remain disqualified until he has subsequent to the making of the order of disqualification passed that test to the satisfaction of the licensing authority.

(7) The Court to which an appeal lies from any conviction of an offence of the nature specified in sub-section (1) may set aside or vary any order of disqualification made by the Court below, and the Court to which appeals ordinarily lie from any Court may set aside or vary any order of disqualification made by that Court, notwithstanding that no appeal lies against the conviction in connection with which such order was made.

Effect of disqualification order.

18. (1) A person in respect of whom any disqualification order is made shall be debarred to the extent and for the period specified in such order from holding or obtaining a licence and the licence, if any, held by such person at the date of the order shall cease to be effective during such period.

(2) The operation of a disqualification order made under section 17 shall not be suspended or postponed while an appeal is pending against such order or against the conviction as a result of which such order is made, unless the appellate Court so directs.

(3) Any person in respect of whom any disqualification order has been made may at any time after the expiry of six months from the date of the order apply to the Court or other authority by which the order was made, to remove the disqualification; and the Court or authority, as the case may be, may, having regard to all the circumstances, either remove or vary the order of disqualification:

Provided that where an application has been made under this section a second application thereunder shall not be entertained before the expiry of a further period of three months.

Endorsements.

19. (1) The Court or authority making an order of disqualification shall endorse or cause to be endorsed upon the licence, if any, held by the person disqualified particulars of the order of disqualification and of any conviction of an offence in respect of which an order of disqualification is made; and particulars of any removal or variation of an order of disqualification made under sub-section (3) of section 18 shall be similarly so endorsed.

(2) A Court by which any person is convicted of an offence specified in the Fifth Schedule shall, whether or not an order of disqualification is made in respect of such conviction, endorse or cause to be endorsed particulars of such conviction on any licence held by the person convicted.

(3) Any person accused of an offence specified in the Fifth Schedule shall when attending the Court bring with him his licence if it is in his possession.

Transfer of endorsement and issue of licence free from endorsement.

20. (1) An endorsement on any licence shall be transferred to any new or duplicate licence obtained by the holder thereof until the holder becomes entitled under the provisions of this section to have a licence issued to him free from endorsement.

(2) Where a licence is required to be endorsed and the licence is at the time not in the possession of the Court or authority by which the endorsement is to be made then—

(*a*) if the person in respect of whom the endorsement is to be made is at the time the holder of a licence, he shall produce the licence to the Court or authority within five days, or such longer time as the Court or authority may fix, or

(*b*) if, not being then the holder of a licence, he subsequently obtains a licence, he shall within five days after obtaining the licence produce it to the Court or authority;

and if the licence is not produced within the time specified it shall on the expiration of such time be of no effect until it is produced for the purpose of endorsement.

(3) A person whose licence has been endorsed shall, if during a continuous period of three years since the last endorsement was made no further order of endorsement has been made against him, be entitled, on surrendering his licence and on payment of a fee of five rupees, to receive a new licence free from all endorsements. If the endorsement was only in respect of exceeding a speed limit, he shall be entitled to have a clean licence issued on the expiration of one year from the date of the order:

Provided that in reckoning the said period of three years and one year, respectively, any period during which the said person was disqualified for holding or obtaining a licence shall be excluded.

(4) When a licence is endorsed by or an order of endorsement is made by any Court, the Court shall send particulars of the endorsement or order, as the case may be, to the licensing authority by which the licence was last renewed and to the licensing authority which granted the licence.

(5) Where the holder of a licence is disqualified by the order of any Court for holding or obtaining a licence, the Court shall take possession of the licence and forward it to the licensing authority by which it was granted or last renewed and that authority shall keep the licence until the disqualification has expired or has been removed and the person entitled to the licence has made a demand in writing for its return to him:

Provided that, if the disqualification is limited to the driving of a motor vehicle of a particular class or description, the Court shall endorse the licence to this effect and shall send a copy of the order of disqualification to the licensing authority by which the licence was granted and shall return the licence to the holder.

(6) Where on an appeal against any conviction or order of a Court which has been endorsed on a licence, the appellate Court varies or sets aside the conviction or order, the appellate Court shall inform the licensing authority by which the licence was last renewed and the licensing authority which granted the licence, and shall amend or cause to be amended the endorsement of such conviction or order.

Power to make rules.

21. (1) A Provincial Government may make rules for the purpose of carrying into effect the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the appointment, jurisdiction, control and functions of licensing authorities and other prescribed authorities;

(*b*) for the conduct and hearing of appeals that may be preferred under this Chapter;

(*c*) the issue of duplicate licences to replace licences lost, destroyed or mutilated, the replacement of photographs which have become obsolete, and the issue of temporary licences to persons receiving instruction in driving, and the fees to be charged therefor;

(*d*) the conditions subject to which a Regional Transport Authority may disqualify a person for holding a licence to drive a public service vehicle;

(*e*) the medical examination and testing of applicants for licences and of drivers and the fees to be charged therefor;

(*f*) the refund of fees paid under the provisions of this Act or of any enactment relating to motor vehicles in force in British India at the commencement of this Act;

(*g*) the granting by registered medical practitioners of the certificates referred to in sub-section (3) of section 7;

(*h*) the communication of particulars of licences granted by one licensing authority to other licensing authorities;

(*i*) the control of schools or establishments for the instruction of drivers of motor vehicles and the acceptance of driving certificates issued by such schools or establishments as qualifying the holder for exemption from Part I of the test specified in the Third Schedule;

(*j*) the exemptions of drivers of road-rollers from all or any of the provisions of this Chapter or of the rules made thereunder; and

(*k*) any other matter which is to be or may be prescribed.

CHAPTER III.

REGISTRATION OF MOTOR VEHICLES.

Necessity for registration.

22. (1) No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place for the purpose of carrying passengers or goods unless the vehicle is registered in accordance with this Chapter and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner.

(2) Nothing in this section shall apply to a motor vehicle while being driven within the limits of jurisdiction of one registering authority to or from the appropriate place of registration for the purpose of being registered under section 23, 25 or 39 or to a motor vehicle exempted from the provisions of this Chapter while in the possession of a dealer in motor vehicles.

Registration, where to be made.

23. (1) Subject to the provisions of section 25 and section 39, every owner of a motor vehicle shall cause the vehicle to be registered by a registering authority in the province in which he has the residence or place of business where the vehicle is normally kept.

(2) A motor vehicle already registered under any enactment in force in British India at the commencement of this Act shall be deemed to be registered under this Act until the 1st day of April, 1941, and on the application of the owner before that date shall be registered under this Act without payment of any registration fee.

(3) A Provincial Government may, by rules made under section 41, provide that within a prescribed period certificates of registration of any prescribed class of transport vehicles deemed to be registered under this Act by virtue of sub-section (2) shall be presented to a prescribed authority for the entry therein of all or any of the particulars specified in section 37.

Registration how to be made.

24. (1) An application by or on behalf of the owner of a motor vehicle for registration shall be in Form E as set forth in the First Schedule, shall contain the information required by that form, and shall be accompanied by the prescribed fee.

(2) The registering authority shall issue to the owner of a motor vehicle registered by it a certificate of registration in Form G as set forth in the First Schedule and shall enter in a record to be kept by it particulars of such certificate.

(3) The registering authority shall assign to the vehicle, for display thereon in the prescribed manner, a distinguishing mark (in this Act referred to as the registration mark) consisting of one of the groups of letters allotted to the province by the Sixth Schedule followed by a number containing not more than four figures.

Temporary registration.

25. (1) Notwithstanding anything contained in section 23, the owner of a motor vehicle may apply to any registering authority to have the vehicle temporarily registered in the prescribed manner and for the issue in the prescribed manner of a temporary certificate of registration and a temporary registration mark.

(2) A registration made under this section shall be valid only for a period not exceeding one month, and shall not be renewable.

Production of vehicle at time of registration.

26. The registering authority may before proceeding to register a motor vehicle require the person applying for registration of the vehicle to produce the vehicle either before itself or such authority as the Provincial Government may by order appoint in order that the registering authority may satisfy itself that the particulars contained in the application are true and that the vehicle complies with the requirements of Chapter V and of the rules made thereunder.

Refusal of registration.

27. The registering authority may refuse to register any motor vehicle if the vehicle is mechanically defective or fails to comply with the requirements of Chapter V or of the rules made thereunder, or if the applicant fails to furnish particulars of any previous registration of the vehicle, and it shall furnish the applicant whose vehicle is refused registration with the reasons in writing for such refusal.

Effectiveness in British India of registration.

28. (1) Subject to the provisions of section 29, a motor vehicle registered in accordance with this Chapter in any province or deemed to be registered under this Act shall not require to be registered elsewhere in British India and a certificate of registration issued or in force under this Act in respect of such vehicle shall be effective throughout British India:

Provided that the Provincial Government may, by rules made under section 41, provide that the certificates of registration or transport vehicles of any prescribed class issued by an authority not within the province and effective by virtue of sub-section (2) of section 23 shall not be valid unless they contain the particulars specified in section 37 or such of those particulars as may be prescribed.

(2) Subject, in the case of international motor vehicle certificates issued in pursuance of the International Convention relative to motor traffic concluded at Paris on the 24th day of April, 1926, to any rules made by the Central Government under section 92, and subject in any other case to the provisions of sub-section (1) of section 23 and sub-section (3) and sub-section (4) of this section, a motor vehicle registered by a competent authority in any Indian State or in the French or Portuguese Settlements bounded by India shall not require to be registered in British India:

Provided that there is in force in respect of the vehicle a certificate conforming to and containing substantially the same particulars as the certificate of registration in Form G as set forth in the First Schedule issued by such competent authority in respect of such vehicle.

(3) A certificate complying with the requirements of the proviso to sub-section (2) shall be effective throughout British India as if it were a certificate of registration issued under this Act.

(4) Sub-section (2) shall not apply to any motor vehicle previously registered in British India, if the certificate of registration of the vehicle in British India is for the time being suspended or cancelled for any reason other than that of permanent removal of the vehicle from British India.

(5) If at any time the Central Government is satisfied that motor vehicles registered in British India under this Act are not permitted to be driven in any Indian State or French or Portuguese Settlement without fresh registration in such State or Settlement, or are permitted to be driven only subject to unreasonable conditions or that like conditions and requirements to those imposed under this Act (including the specification of the particulars required by Form G as set forth in the First Schedule) are not imposed in a reasonable degree upon the issue and for the continued effectiveness of certificates of registration in any State or Settlement as aforesaid, the Central Government shall, by notification in the Official Gazette, declare that certificates of registration generally or in respect of any particular class of motor vehicle issued in any such State or Settlement shall not be effective in British India.

Assignment of fresh registration mark on removal to another province

29. (1) When a motor vehicle registered in one province has been kept in another province for a period exceeding twelve months, the owner of the vehicle shall apply to the registering authority, within whose jurisdiction the vehicle then is, for the assignment of a new registration mark and shall present the certificate of registration to that registering authority.

(2) The registering authority, to which application is made under sub-section (1), shall assign the vehicle a registration mark in accordance with the Sixth Schedule to be carried thenceforth on the vehicle and shall enter the mark upon the certificate of registration before returning it to the applicant and shall, in communication with the registering authority by whom the vehicle was previously registered, arrange for the transfer of the registration of the vehicle from the records of that registering authority to its own records.

(3) A Provincial Government may make rules under section 41 requiring the owner of a motor vehicle not registered within the province, which is brought into or is for the time being in the province, to furnish to a prescribed authority in the province such information with respect to the motor vehicle and its registration as may be prescribed.

Change of residence or place of business.

30. (1) If the owner of a motor vehicle ceases to reside or have his place of business at the address recorded in the certificate of registration of the vehicle, he shall, within thirty days of any such change of address, intimate his new address to the registering authority by which the certificate of registration was issued, or, if the new address is within the jurisdiction of another registering authority, to that other registering authority, and shall at the same time forward the certificate of registration to the registering authority in order that the new address may be entered therein.

(2) A registering authority other than the original registering authority making any such entry shall communicate the altered address to the original registering authority.

(3) Nothing in sub-section (1) shall apply where the change of the address recorded in the certificate of registration is due to a temporary absence not intended to exceed six months in duration or where the motor vehicle is neither used nor removed from the address recorded in the certificate of registration.

Transfer of ownership.

31. (1) Within thirty days of the transfer of ownership of any motor vehicle registered under this Chapter, the transferee shall report the transfer to the registering authority within whose jurisdiction he resides and shall forward the certificate of registration to that registering authority together with the prescribed fee in order that particulars of the transfer of ownership may be entered therein.

(2) A registering authority other than the original registering authority making any such entry shall communicate the transfer of ownership to the original registering authority.

Alteration in motor vehicle.

32. (1) If a motor vehicle is so altered that the particulars contained in the certificate of registration are no longer accurate, the owner of the vehicle shall, within fourteen days of the making of any such alteration, report the alteration to the registering authority within whose jurisdiction he resides and shall forward the certificate of registration to that authority together with the prescribed fee in order that particulars of the alteration may be entered therein:

Provided that it shall not be necessary to report any change in the unladen weight of the motor vehicle consequent on the addition or removal of fittings or accessories, if such change does not exceed two per cent. of the weight entered in the certificate of registration.

(2) A registering authority other than the original registering authority making any such entry shall communicate the details of the entry to the original registering authority.

Suspension of registration.

33. (1) A registering authority or other prescribed authority, which has reason to believe that any motor vehicle within its jurisdiction is in such a condition that its use in a public place would constitute a danger to the public, or that it fails to comply with the requirements of Chapter V or of the rules made thereunder, may, after giving the owner an opportunity of making any representation he may wish to make, for reasons to be recorded in writing suspend the certificate of registration of the vehicle until the defects are remedied to its satisfaction.

(2) An authority other than a registering authority shall, when making a suspension order under sub-section (1), intimate in writing the fact of suspension

and the reasons therefor to the registering authority within whose jurisdiction the vehicle is at the time of the suspension.

(3) Where the registration of a motor vehicle has been suspended under sub-section (1) for a continuous period of not less than one month, the registering authority, within whose jurisdiction the vehicle was when the registration was suspended, shall, if it is not the original registering authority, inform that authority of the suspension; and when the suspension has continued without interruption for a period of not less than six months, the registering authority, within whose jurisdiction the vehicle was when the registration was suspended, may, if it is the original registering authority, cancel the registration, and, if it is not the original registering authority, shall forward the certificate of registration to that authority which may cancel it forthwith.

(4) The owner of a motor vehicle shall, on the demand of a registering authority or other prescribed authority which has suspended the certificate of registration of the vehicle under this section, surrender the certificate of registration and any token or card issued to authorise the use of the vehicle in a public place.

(5) A certificate of registration and any token or card surrendered under sub-section (4) shall be returned to the owner when the order suspending registration has been rescinded and not before.

Cancellation of registration.

34. (1) If a motor vehicle has been destroyed or has been rendered permanently incapable of use, the owner shall, within fourteen days or as soon as may be, report the fact to the registering authority within whose jurisdiction he resides and shall forward to that authority the certificate of registration of the vehicle together with any token or card issued to authorise the use of the vehicle in a public place.

(2) The registering authority shall, if it is the original registering authority, cancel the registration and the certificate of registration, or, if it is not, shall forward the report and the certificate of registration to the original registering authority and that authority shall cancel the registration and the certificate of registration.

(3) Any registering authority may order the examination of a motor vehicle within its jurisdiction by such authority as the Provincial Government may by order appoint and, if upon such examination and after giving the owner an opportunity to make any representation he may wish to make it is satisfied that the vehicle is in such a condition that its use in a public place would constitute a danger to the public and that it is beyond reasonable repair, may cancel the registration of the vehicle.

(4) If a registering authority is satisfied that a motor vehicle has been permanently removed out of British India, the registering authority shall cancel the registration.

(5) A registering authority cancelling the registration of a motor vehicle under section 33 or under this section shall communicate the fact in writing to the owner of the vehicle and the owner of the vehicle shall forthwith surrender to that authority the certificate of registration of the vehicle and any token or card issued to authorise the use of the vehicle in a public place.

(6) A registering authority making an order of cancellation under this section shall, if it is the original registering authority, cancel the certificate of registration and the entry relating to the vehicle in its records, and, if it is not the original registering authority, forward the certificate of registration to that authority, and that authority shall cancel the certificate of registration and the entry relating to the motor vehicle in its records.

(7) The expression "original registering authority" in this section and in sections 30, 31, 32 and 33 means the registering authority in whose records the registration of the vehicle is recorded.

Appeals.

35. (1) Any owner of a motor vehicle aggrieved by an order of refusal under section 27 to register a motor vehicle or under sub-section (1) of section 38 to issue a certificate of fitness or by an order of suspension or cancellation made under section 33 or 34 or by an order of cancellation under sub-section (3) of section 38 may, within thirty days of the date on which he has received notice of such order, appeal against the order to the prescribed authority.

(2) The appellate authority shall give notice of the appeal to the original authority and after giving opportunity to the original authority and the appellant to be heard either personally or by pleader in the appeal pass such orders as it thinks fit:

Provided that orders of the original authority shall remain in force pending the disposal of the appeal unless the appellate authority otherwise directs.

Special requirement for registration of transport vehicle.

36. (1) After the commencement of this Act, a registering authority shall refuse to register any transport vehicle other than a motor cab, unless the application for registration is accompanied by a document in Form F as set forth in the First Schedule signed by the maker of the vehicle or an assembler duly authorised by the maker in this behalf stating the greatest laden weight and greatest axle weights for which the vehicle is and the several axles are designed:

Provided that nothing in this sub-section shall apply to any application for the registration of a transport vehicle already registered under any enactment in force at the commencement of this Act.

(2) Where a transport vehicle or chassis, as the case may be, has affixed to it a metal plate, bearing the stamp of the maker or assembler and identified as appertaining to the particular vehicle or chassis to which it is attached, which contains the particulars specified in sub-section (1), that plate may at the discretion of a registering authority be deemed to be the document referred to in sub-section (1).

Special particulars to be recorded on registration of transport vehicle.

37. (1) A registering authority when registering a transport vehicle other than a motor cab, shall enter in the record of registration and shall also enter in the certificate of registration of the vehicle the following particulars, namely:—

(*a*) the unladen weight of the vehicle;

(*b*) the number, nature and size of the tyres attached to each wheel;

(*c*) the registered laden weight of the vehicle and the registered axle weights pertaining to the several axles thereof, fixed in accordance with sub-section (2) with reference to the particulars of the tyres entered in the certificate of registration; and

(*d*) if the vehicle is used or adapted to be used for the carriage of passengers solely or in addition to goods, the number of passengers for whom accommodation is provided,

and the owner of the vehicle shall have the said particulars exhibited in the prescribed manner on the vehicle.

(2) Notwithstanding any statement contained in the document referred to in sub-section (1) of section 36 as supplied by the maker or assembler of a transport vehicle, the registered weight to be recorded by the registering authority for any axle shall not exceed the permissible weight for that axle calculated in accordance with the Seventh Schedule, nor shall the registered laden weight of the vehicle exceed the sum of the several axle weights as so determined:

Provided that where it appears to a Provincial Government that heavier weights than those specified in the Seventh Schedule may be permitted in a particular locality for vehicles of a particular type, the Provincial Government may by

notification in the official Gazette direct that the provisions of this sub-section shall apply with such modifications as may be specified in the notification.

(3) When by reason of an alteration in the number, nature or size of tyres attached to the vehicle the registered laden weight or any registered axle weight recorded in the certificate of registration no longer accords with the laden weight or the axle weight as determined in accordance with sub-section (2), the provisions of section 32 shall apply, and the registering authority shall enter in the certificate of registration a revised registered laden weight and registered axle weights.

Certificate of fitness of transport vehicle.

38. (1) Subject to the provisions of section 39, a transport vehicle shall not be deemed to be validly registered for the purposes of section 22, unless it carries a certificate of fitness in Form H as set forth in the First Schedule, issued by the prescribed authority, to the effect that the vehicle complies for the time being with all the requirements of Chapter V and the rules made thereunder. Where the prescribed authority refuses to issue such certificate, it shall supply the owner of the vehicle with its reasons in writing for such refusal.

(2) Subject to the provisions of sub-section (3), a certificate of fitness shall remain effective for three years, unless a shorter period, not being in any case less than six months, is specified in the certificate by the prescribed authority.

(3) The issuing authority or other prescribed authority may for reasons to be recorded in writing cancel a certificate of fitness at any time, if satisfied that the vehicle to which it relates no longer complies with all the requirements of this Act and the rules made thereunder; and on such cancellation the certificate of registration of the vehicle and any permit granted in respect of the vehicle under Chapter IV shall be deemed to be suspended until a new certificate of fitness has been obtained.

(4) Notwithstanding anything contained in sub-section (1), a Provincial Government may, until the expiry of one year from the commencement of this Act, by rules made under section 41, dispense with the necessity for a certificate of fitness in the case of all or any transport vehicle in respect of which certificates of registration and permits had already been issued before the commencement of this Act.

Registration of vehicles, the property of the Central Government.

39. (1) The authority specified in Part B of the Fourth Schedule may register any motor vehicle which is the property of the Central Government; and any vehicle so registered shall not, so long as it remains the property of the Central Government, require to be registered otherwise under this Act.

(2) A transport vehicle registered under this section shall carry a certificate of fitness in Form H as set forth in the First Schedule issued by the authority referred to in sub-section (1).

(3) An authority registering a vehicle under sub-section (1) shall assign a registration mark in accordance with the provisions contained in the Fourth Schedule and shall issue a certificate in respect of the vehicle that the vehicle has been registered under this section.

(4) If a vehicle registered under this section ceases to be the property of the Central Government, the provisions of section 23 shall thereupon apply.

(5) The authority registering a vehicle under sub-section (1) shall furnish to any Provincial Government all such information regarding the general nature, over all dimensions, and axle weights of the vehicle as the Provincial Government may at any time require.

Application of Chapter III to trailers.

40. (1) The registration mark assigned to a trailer shall be displayed in the prescribed manner on the side of the vehicle.

(2) No person shall drive a motor vehicle to which a trailer is or trailers are attached unless the registration mark of the motor vehicle so driven is displayed in the prescribed manner on the trailer or on the last trailer in the train, as the case may be.

Power to make rules.

41. (1) A Provincial Government may make rules for the purpose of carrying into effect the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the conduct and hearing of appeals that may be preferred under this Chapter;

(*b*) the appointment, functions and jurisdiction of registering and other prescribed authorities;

(*c*) the issue of certificates of registration and duplicate certificates of registration to replace certificates lost, destroyed or mutilated;

(*d*) the temporary registration of motor vehicles, and the issue of temporary certificates of registration and marks;

(*e*) the manner in which registration marks and the particulars referred to in sub-section (1) of section 37, and other prescribed particulars shall be exhibited;

(*f*) the fees to be charged for the issue or alteration of certificates of registration, for certificates of fitness, for registration marks, and for the examination or inspection of motor vehicles, and the refund of such fees;

(*g*) the forms, other than those set forth in the First Schedule, to be used for the purposes of this Chapter;

(*h*) the communication between registering authorities of particulars of certificates of registration and by owners of vehicles registered outside the province of particulars of such vehicles and of their registration;

(*i*) the particulars to be furnished by the owner of any motor vehicle to the registering authority, upon the transfer of possession of the motor vehicle under the terms of a hiring agreement;

(*j*) the extension of the validity of certificates of fitness pending consideration of applications for their renewal;

(*k*) the exemption from the provisions of this Chapter, and the conditions and fees for exemption, of motor vehicles in the possession of dealers;

(*l*) the exemption of road-rollers from all or any of the provisions of this Chapter and the rules made thereunder, and the conditions governing such exemption; and the exemption of delivery vans from the provisions of section 38 and the conditions governing such exemption; and

(*m*) any other matter which is to be or may be prescribed.

CHAPTER IV.

Control of Transport Vehicles.

Necessity for permits.

42. (1) No owner of a transport vehicle shall use or permit the use of the vehicle in any public place, save in accordance with the conditions of a permit granted or countersigned by a Regional or Provincial Transport Authority authorising the use of the vehicle in that place in the manner in which the vehicle is being used:

Provided that a stage carriage permit shall, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a contract carriage:

Provided further that a stage carriage permit may, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a goods vehicle either when carrying passengers or not:

Provided further that a public carrier's permit shall, subject to any conditions that may be specified in the permit, authorise the holder to use the vehicle for the carriage of goods for or in connection with a trade or business carried on by him.

(2) In determining, for the purposes of this Chapter, whether a transport vehicle is or is not used for the carriage of goods for hire or reward,—

(*a*) the delivery or collection by or on behalf of the owner of goods sold, used or let on hire or hire-purchase in the course of any trade or business carried on by him other than the trade or business of providing transport.

(*b*) the delivery or collection by or on behalf of the owner of goods which have been or which are to be subjected to a process or treatment in the course of a trade or business carried on by him, or

(*c*) the carriage of goods in a transport vehicle by a manufacturer of or agent or dealer in such goods whilst the vehicle is being used for demonstration purposes,

shall not be deemed to constitute a carrying of the goods for hire or reward; but the carriage in a transport vehicle of goods by a person not being a dealer in such goods who has acquired temporary ownership of the goods for the purpose of transporting them to another place and there relinquishing ownership shall be deemed to constitute a carrying of the goods for hire or reward.

(3) Sub-section (1) shall not apply—

(*a*) to any transport vehicle owned by or on behalf of the Central Government or a Provincial Government other than a vehicle used in connection with the business of an Indian State Railway;

(*b*) to any transport vehicle owned by a local authority or by a person acting under contract with a local authority and used solely for road cleansing, road watering or conservancy purposes;

(*c*) to any transport vehicle used solely for police, fire brigade or ambulance purposes;

(*d*) to any transport vehicle used solely for the conveyance of corpses;

(*e*) to any transport vehicle used for towing a disabled vehicle or for removing goods from a disabled vehicle to a place of safety;

(*f*) to any transport vehicle used for any other public purpose prescribed in this behalf;

(*g*) to any transport vehicle owned by, and used solely for the purposes of any educational institution which is recognised by the Provincial Government or whose managing committee is a society registered under the Societies Registration Act, 1860;

(*h*) subject to any prescribed conditions, to any transport vehicle owned by the Government of any Indian State or French or Portguese Settlement bounded by India used for Government purposes unconnected with any commercial enterprise; or

(*i*) to any trailer used for any purpose other than the carriage of goods for hire or reward when drawn by a motor vehicle constructed for the carriage of not more than six passengers excluding the driver.

(4) Subject to the provisions of sub-section (3), sub-section (1) shall, if the Provincial Government by rule made under section 68 so prescribes, apply to any motor vehicle adapted to carry more than nine passengers excluding the driver.

Power to Provincial Government to control road transport.

43. (1) A Provincial Government, having regard to—

(*a*) the advantages offered to the public, trade and industry by the development of motor transport, and

(*b*) the desirability of co-ordinating road and rail transport, and

(*c*) the desirability of preventing the deterioration of the road system, and

(*d*) the desirability of preventing uneconomic competition among motor vehicles,

and after having heard the representatives of the interests affected and having consulted the Provincial and Regional Transport Authorities concerned, may, by notification in the official Gazette,—

(*i*) prohibit or restrict throughout the province or in any area or on any route within the province, subject to such conditions as it may think desirable, the conveying of long distance goods traffic generally, or of prescribed classes of goods, by private or public carriers; or

(*ii*) fix maximum or minimum fares or freights for stage carriages and public carriers to be applicable throughout the province or within any area or on any route within the province.

(2) The Provincial Government shall permit, at such intervals of time as it may fix, the interests affected by any notification issued under sub-section (1) to make representations urging the cancellation or variation of the notification on the following grounds, namely:—

(*a*) that the railways are not giving reasonable facilities or are taking unfair advantage of the action of the Provincial Government under this section; or

(*b*) that conditions have changed since the publication of the notification; or

(*c*) that the special needs of a particular industry or locality require to be considered afresh.

(3) If the Provincial Government, after considering any representation made to it under sub-section (2) and having heard the representatives of the interests affected and the Provincial and Regional Transport Authorities, is satisfied that any notification issued under sub-section (1) ought to be cancelled or varied, it may cancel the notification or vary it in such manner as it thinks fit.

Transport authorities.

44. (1) The Provincial Government shall, by notification in the official Gazette, constitute for the province a Provincial Transport Authority to exercise and discharge the powers and functions specified in sub-section (3), and shall in like manner constitute Regional Transport Authorities to exercise and discharge throughout such areas (in this Chapter referred to as regions) as may be specified in the notification, in respect of each Regional Transport Authority, the powers and functions conferred by or under this Chapter on such Authorities:

Provided that in the North-West Frontier Province and in Chief Commissioners' Provinces the Provincial Government may abstain from constituting any Regional Transport Authority:

Provided further that the area specified as the region of a Regional Transport Authority shall in no case be less than an entire district, or the whole area of a Presidency-town.

(2) A Provincial Transport Authority or a Regional Transport Authority shall consist of such number of officials and non-officials as the Provincial Government may think fit to appoint; but no person who has any financial interest whether as proprietor, employee or otherwise in any transport undertaking shall be appointed as or continue as a member of a Provincial or Regional Transport Authority, and, if any person being a member of any such Authority acquires a financial interest in any transport undertaking, he shall, within four weeks of so doing, give notice in writing to the Provincial Government of the acquisition of such interest and shall vacate office.

(3) A Provincial Transport Authority shall exercise and discharge throughout the province the following powers and functions, namely:—

(*a*) to co-ordinate and regulate the activities and policies of the Regional Transport Authorities, if any, of the province;

(*b*) to perform the duties of a Regional Transport Authority where there is no such Authority and, if it thinks fit or if so required by a Regional Transport Authority, to perform those duties in respect of any route common to two or more regions;

(*c*) to settle all disputes and decide all matters on which differences of opinion arise between Regional Transport Authorities; and

(*d*) to discharge such other functions as may be prescribed.

(4) For the purpose of exercising and discharging the powers and functions specified in sub-section (3), a Provincial Transport Authority may, subject to such conditions as may be prescribed, issue directions to any Regional Transport Authority and the Regional Transport Authority shall be guided by such directions.

General provision as to applications for permits.

45. Every application for a permit shall be made to the Regional Transport Authority of the region or of one of the regions in which it is proposed to use the vehicle and, if the applicant resides or has his principal place of business in any one of those regions, to the Regional Transport Authority of that region.

Application for stage carriage permit.

46. An application for a permit to use a motor vehicle as a stage carriage (in this Chapter referred to as a stage carriage permit) shall contain the following particulars, namely:—

(*a*) the type and seating capacity of the vehicle in respect of which the application is made;

(*b*) the route or routes on which or the area within which it is intended to use the vehicle;

(*c*) the time table, if any, of the service to be provided; and

(*d*) such other matters as may be prescribed.

Procedure of Regional Transport Authority in considering application for stage carriage permit.

47. (1) A Regional Transport Authority shall, in deciding whether to grant or refuse a stage carriage permit, have regard to the following matters, namely:—

(*a*) the interest of the public generally;

(*b*) the advantages to the public of the service to be provided, including the saving of time likely to be effected thereby and any convenience arising from journeys not being broken;

(*c*) the adequacy of existing road passenger transport services between the places to be served, the fares charged by those services and the effect upon those services of the service proposed;

(*d*) the benefit to any particular locality or localities likely to be afforded by the service;

(*e*) the operation by the applicant of other transport services and in particular of unremunerative services in conjunction with remunerative services; and

(*f*) the condition of the roads included in the proposed route or routes;

and shall also take into consideration any representations made by persons already providing road transport facilities along or near the proposed route or routes or by any local authority or police authority within whose jurisdiction any part of the proposed route or routes lies or by any association interested in the provision of road transport facilities.

(2) A Regional Transport Authority shall refuse to grant a stage carriage permit if it appears from any time table furnished that the provisions of this Act relating to the speed at which vehicles may be driven are likely to be contravened:

Provided that before such refusal an opportunity shall be given to the applicant to amend the time table so as to conform to the said provisions.

Power to restrict the number of stage carriages and impose conditions on stage carriage permits.

48. A Regional Transport Authority may, after consideration of the matters set forth in sub-section (1) of section 47,—

(*a*) limit the number of stage carriages in respect of which stage carriage permits may be granted for a specified route or for specified routes or for a specified area;

(*b*) limit the use of specified routes to stage carriages of a particular type or design;

(*c*) issue a stage carriage permit in respect of a particular stage carriage or a particular service of stage carriages;

(*d*) regulate timings of arrival or departure of stage carriages whether they belong to a single or more owners; or

(*e*) attach to a stage carriage permit any prescribed condition or any one or more of the following conditions, namely:—

(*i*) that the service specified in the permit shall be commenced not later than a specified date and be continued for a specified period;

(*ii*) that the service may be varied only in accordance with specified conditions;

(*iii*) that copies of the fare table and time table shall be exhibited on the stage carriage and that the fare table and time table so exhibited shall be observed;

(*iv*) that not more than a specified number of passengers and not more than a specified amount of luggage shall be carried on any specified vehicle at any one time;

(*v*) that within municipal limits and in such other areas and places as may be prescribed passengers shall not be taken up or set down at or except at specified points; or

(*vi*) that tickets shall be issued to passengers for the fares paid.

Application for contract carriage permit.

49. An application for a permit to use a motor vehicle as a contract carriage (in this Chapter referred to as a contract carriage permit) shall contain the following particulars, namely:—

(*a*) the type and seating capacity of the vehicle;

(*b*) the area for which the permit is required;

(*c*) in the case of a motor vehicle other than a motor cab, the manner in which it is claimed that the public convenience will be served by the vehicle; and

(*d*) any other particulars which may be prescribed.

Procedure of Regional Transport Authority in considering application for contract carriage permit.

50. A Regional Transport Authority shall, in deciding whether to grant or refuse a contract carriage permit, have regard to the extent to which additional contract carriages may be necessary or desirable in the public interest; and shall also take into consideration any representations which may then be made or which may previously have been made by persons already holding contract carriage permits in the region or by any local authority or police authority in the region to the effect that the number of contract carriages for which permits have already been granted is sufficient for or in excess of the needs of the region or any area within the region.

Power to restrict the number of contract carriages and impose conditions on contract carriage permits.

51. A Regional Transport Authority may, after consideration of the matters set forth in section 50,—

(*a*) limit the number of contract carriages generally or contract carriages of any specified type for which contract carriage permits may be granted in the region or any specified area within the region;

(*b*) fix in the case of motor cabs the fares which may be charged;

(*c*) require that every motor cab shall carry a copy of the fare table for inspection by passengers;

(*d*) require that any motor cab shall be fitted with a taxi meter; or

(*e*) impose on the use of a contract carriage any other condition which may be prescribed.

Application for private carrier's permit.

52. An application for a permit to use a transport vehicle for the carriage of goods for or in connection with a trade or business carried on by the applicant (in this Chapter referred to as a private carrier's permit) shall contain the following particulars, namely:—

(*a*) the type and carrying capacity of the vehicle;

(*b*) the nature of the goods which the applicant expects normally to carry in connection with his trade or business;

(*c*) the area for which the permit is required; and

(*d*) any other particular which may be prescribed.

Procedure of Regional Transport Authority in considering application for a private carrier's permit.

53. (1) A Regional Transport Authority shall, in deciding whether to grant or refuse a private carrier's permit, have regard to the condition of the roads to be used by the vehicle or vehicles in respect of which the application is made, and shall satisfy itself that the vehicle or vehicles for which the permit is required will not be used except in connection with the business of the applicant.

(2) The Regional Transport Authority may in granting a private carrier's permit impose conditions to be specified in the permit relating to the description of goods which may be carried, or the area in which the permit shall be valid, or the maximum laden weight and axle weights of any vehicle used.

(3) If the applicant is the holder of a private carrier's permit which has been suspended or has been the holder of a private carrier's permit which has been revoked, the Regional Transport Authority may at its discretion notwithstanding anything contained in sub-section (1) refuse the application,

Application for public carrier's permit.

54. An application for a permit to use a motor vehicle for the carriage of goods for hire or reward (in this Chapter referred to as a public carrier's permit) shall contain the following particulars, namely:—

(*a*) the routes on which or the area in which it is intended to use the vehicle;

(*b*) the type and carrying capacity of the vehicle;

(*c*) the manner in which it is claimed that a public need will be served by the vehicle;

(*d*) such particulars as the Regional Transport Authority may require with respect to any business as a carrier of goods for hire or reward carried on by the applicant at any time before the making of the application, and of the rates charged by the applicant;

(*e*) particulars of any agreement or arrangement, affecting in any material respect the provision within the region of the Regional Transport Authority of facilities for the transport of goods for hire or reward, entered into by the applicant with any other person by whom such facilities are provided, whether within or without the region; and

(*f*) any other particulars which may be prescribed.

Procedure of Regional Transport Authority in considering application for public carrier's permit.

55. A Regional Transport Authority shall, in deciding whether to grant or refuse a public carrier's permit, have regard to the following matters, namely:—

(*a*) the interests of the public generally;

(*b*) the advantages to the public of the service to be provided and the convenience afforded to the public by the provision of such service;

(*c*) the adequacy of existing road transport services for the carriage of goods upon the routes or within the area to be served and the effect upon those services of the service proposed;

(*d*) the benefit to any particular locality or localities likely to be afforded by the service;

(*e*) the need for providing for occasions when vehicles are withdrawn from service for overhaul or repair; and

(*f*) the condition of the roads included in the proposed routes or area; and shall also take into consideration any representations made by persons already providing road transport facilities along or near to the proposed route or routes or by any local authority within whose jurisdiction any part of the proposed route or routes lies.

Power to restrict the number of and attach conditions to public carrier's permits.

56. The Regional Transport Authority may, after consideration of the matters set forth in section 55,—

(*a*) limit the number of transport vehicles or transport vehicles of any specified type for which public carrier's permits may be granted in the region or in any specified area or on any specified routes within the region; or

(*b*) attach to a public carrier's permit all or any of the following conditions, namely:—

(*i*) that the vehicle shall be used only on specified routes or in a specified area,

(*ii*) that the laden weight and the axle weights of any vehicle used shall not exceed a specified maximum,

(*iii*) that such records as may be prescribed relating to the plying of the vehicle shall be maintained, and

(*iv*) any other prescribed condition appropriate to the service to be provided by the vehicle which the Regional Transport Authority thinks proper to impose in the public interest or with a view to prevent uneconomic competition between road transport services.

Procedure in applying for and granting permits.

57. (1) An application for a contract carriage permit or a private carrier's permit may be made at any time.

(2) An application for a stage carriage permit or a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints dates for the receipt of such applications, on such dates.

(3) On receipt of an application for a stage carriage permit or a public carrier's permit, the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date, not being less than thirty days from such publication, on which, and the time and place at which, the application and any representations received will be considered.

(4) No representation in connection with an application referred to in sub-section (3) shall be considered by the Regional Transport Authority unless it is made in writing before the appointed date and unless a copy thereof is furnished simultaneously to the applicant by the person making such representation.

(5) When any representation such as is referred to in sub-section (3) is made, the Regional Transport Authority shall dispose of the application at a

public hearing at which the applicant and the person making the representation shall have an opportunity of being heard either in person or by a duly authorised representative.

(6) When any representation has been made by the persons or authorities referred to in section 50 to the effect that the number of contract carriages for which permits have already been granted in any region or any area within a region is sufficient for or in excess of the needs of the region or of such area, whether such representation is made in connection with a particular application for the grant of a contract carriage permit or otherwise, the Regional Transport Authority may take any such steps as it considers appropriate for the hearing of the representation in the presence of any persons likely to be affected thereby.

(7) When a Regional Transport Authority refuses an application for a permit of any kind, it shall give to the applicant in writing its reasons for the refusal.

Duration and renewal of permits.

58. (1) A permit other than a temporary permit issued under section 62 shall be effective without renewal for such period, not less than three years and not more than five years, as the Regional Transport Authority may in its discretion specify in the permit:

Provided that in the case of a permit issued or renewed within two years of the commencement of this Act, the permit shall be effective without renewal for such period of less than three years as the Provincial Government may prescribe.

(2) A permit may be renewed on an application made and disposed of as if it were an application for a permit:

Provided that, other conditions being equal, an application for renewal shall be given preference over new applications for permits.

General conditions attaching to all permits.

59. (1) Save as provided in section 61, a permit shall not be transferable from one person to another except with the permission of the transport authority which granted the permit and shall not without such permission operate to confer on any person to whom a vehicle covered by the permit is transferred any right to use that vehicle in the manner authorised by the permit.

(2) The holder of a permit may, with the permission of the authority by which the permit was granted, replace by another vehicle of the same nature and capacity any vehicle covered by th permit.

(3) The following shall be conditions of every permit—

(*a*) that the vehicle or vehicles to which the permit relates are at all times so maintained as to comply with the requirements of chapter V and the rules made thereunder;

(*b*) that the vehicle or vehicles to which the permit relates are not driven at a speed exceeding the speed lawful under this Act;

(*c*) that any prohibition or restriction imposed and any maximum or minimum fares or freights fixed by notification made under section 43 are observed in connection with any vehicle or vehicles to which the permit relates;

(*d*) that the vehicle or vehicles to which the permit relates are not driven in contravention of the provisions of section 72;

(*e*) that the provisions of this Act limiting the hours of work of drivers are observed in connection with any vehicle or vehicles to which the permit relates; and

(*f*) that the provisions of chapter VIII so far as they apply to the holder of the permit are observed.

Cancellation and suspension of permits.

60. (1) The transport authority which granted a permit may cancel the permit or may suspend it for such period as it thinks fit—

(*a*) on the breach of any condition specified in sub-section (3) of section 59, or of any condition contained in the permit, or

(*b*) if the holder of the permit uses or causes or allows a vehicle to be used in any manner not authorised by the permit, or

(*c*) if the holder of the permit ceases to possess the vehicle or vehicles covered by the permit, or

(*d*) if the holder of the permit has obtained the permit by fraud or misrepresentation:

Provided that no permit shall be cancelled unless an opportunity has been given to the holder of the permit to submit his explanation.

(2) Where a transport authority cancels or suspends a permit, it shall give to the holder in writing its reasons for the revocation or suspension.

Transfer of permit on death of holder.

61. (1) Where the holder of a permit dies, the person succeeding to the possession of the vehicles covered by the permit may, for a period of three months, use the permit as if it had been granted to himself:

Provided that such person has, within thirty days of the death of the holder, informed the transport authority which granted the permit of the death of the holder and of his own intention to use the permit:

Provided further that no permit shall be so used after the date on which it would have ceased to be effective without renewal in the hands of the deceased holder.

(2) The transport authority may, on application made to it within three months of the death of the holder of a permit, transfer the permit to the person succeeding to the possession of the vehicles covered by the permit.

Temporary permits.

62. (1) A Regional Transport Authority may at its discretion, and without following the procedure laid down in section 57, grant permits, to be effective for a limited period not in any case to exceed four months, to authorise the use of a transport vehicle temporarily—

(*a*) for the conveyance of passengers on special occasions such as to and from fairs and religious gatherings, or

(*b*) for the purposes of a seasonal business, or

(*c*) to meet a particular temporary need,

and may attach to any such permit any condition it thinks fit.

(2) A Regional Transport Authority may delegate all or any of its powers under this section to any one of its members.

Validation of permits for use outside region in which granted.

63. (1) Except as may be otherwise prescribed, a permit granted by the Regional Transport Authority of any one region shall not be valid in any other region, unless the permit has been countersigned by the Regional Transport Authority of that other region, and a permit granted in any one province shall not be valid in any other province unless countersigned by the Provincial Transport Authority of that other province or by the Regional Transport Authority concerned.

(2) A Regional Transport Authority when countersigning the permit may attach to the permit any condition which it might have imposed if it had granted the permit, and may likewise vary any condition attached to the permit by the Authority by which the permit was granted.

(3) The provisions of this chapter relating to the grant, revocation and suspension of permits shall apply to the grant, revocation and suspension of countersignatures of permits.

(4) Notwithstanding anything contained in sub-section (1), a Regional Transport Authority of one region may issue a temporary permit under clause (*a*) or clause (*c*) of sub-section (1) of section 62 to be valid in another region or province with the concurrence, given generally or for the particular occasion of the Regional Transport Authority of that other region or of the Provincial Transport Authority of that other province, as the case may be.

Appeals.

64. Any person—

(*a*) aggrieved by the refusal of the Provincial or a Regional Transport Authority to grant a permit, or by any condition attached to a permit granted to him, or

(*b*) aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof, or

(*c*) aggrieved by the refusal to transfer the permit to the person succeeding on the death of the holder of a permit, or

(*d*) aggrieved by the refusal of the Provincial or a Regional Transport Authority to countersign a permit, or by any condition attached to such countersignature, or

(*e*) aggrieved by the refusal of renewal of a permit, or

(*f*) being a local authority or police authority or an association which, or a person providing transport facilities who, having opposed the grant of a permit, is aggrieved by the grant thereof or by any condition attached thereto, or

(*g*) being the holder of a licence, who is aggrieved by the refusal of a Regional Transport Authority to grant an authorisation to drive a public service vehicle,

may, within the prescribed time and in the prescribed manner, appeal to the prescribed authority who shall give such person and the original authority an opportunity of being heard.

Restriction of hours of work of drivers.

65. (1) No person shall cause or allow any person who is employed by him for the purpose of driving a transport vehicle or who is subject to his control for such purpose to work—

(*a*) for more than five hours before he has had an interval of rest of at least half an hour; or

(*b*) for more than nine hours in one day; or

(*c*) for more than fifty-four hours in the week.

(2) The Provincial Government may by rule made under section 68 grant such exemptions from the provisions of sub-section (1) as it thinks fit, to meet cases of emergency or of delays by reason of circumstances which could not be foreseen.

(3) The Provincial Government may require persons employing any persons whose work is subject to any of the provisions of sub-section (1) to fix beforehand the hours of work of such persons so as to conform with those provisions, and may provide for the recording of the hours so fixed.

(4) No person shall work or shall cause or allow any other person to work outside the hours fixed or recorded for the work of such persons in compliance with any rule made under sub-section (3).

(5) The Provincial Government may prescribe the circumstances under which any period during which the driver of a vehicle although not engaged in work is required to remain on or near the vehicle may be deemed to be an interval for rest within the meaning of sub-section (1).

Voidance of contracts restrictive of liability.

66. Any contract for the conveyance of a passenger in a stage carriage or contract carriage, in respect of which a permit has been issued under this chapter, shall, so far as it purports to negative or restrict the liability of any person in respect of any claim made against that person in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability, be void.

Power to make rules as to stage carriages and contract carriages.

67. (1) A Provincial Government may make rules to regulate, in respect of stage carriages and contract carriages,—

(*a*) the conduct of persons licensed to act as drivers of, and the licensing of and the conduct of conductors of, such vehicles when acting as such; and

(*b*) the conduct of passengers in such vehicles.

(2) Without prejudice to the generality of the foregoing provision, such rules may—

(*a*) authorise the removal from such vehicle of any person infringing the rules by the driver or conductor of the vehicle, or, on the request of the driver or conductor, or any passenger by any police officer;

(*b*) require a passenger who is reasonably suspected by the driver or conductor of contravening the rules to give his name and address to a police officer or to the driver or conductor on demand;

(*c*) require a passenger to declare, if so requested by the driver or conductor, the journey he intends to take or has taken in the vehicle and to pay the fare for the whole of such journey and to accept any ticket provided therefor;

(*d*) require, on demand being made for the purpose by the driver or conductor or other person authorised by the owner of the vehicle, production during the journey and surrender at the end of the journey by the holder thereof of any ticket issued to him;

(*e*) require a passenger, if so requested by the driver or conductor, to leave the vehicle on the completion of the journey the fare for which he has paid;

(*f*) require the surrender by the holder thereof on the expiry of the period for which it is issued of a ticket issued to him;

(*g*) require the maintenance of complaint books in stage carriages and prescribe the conditions under which passengers can record any complaints in the same.

Power to make rules for the purposes of this Chapter.

68. (1) A Provincial Government may make rules for the purpose of carrying into effect the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power, rules under this section may be made with respect to all or any of the following matters, namely:—

(*a*) the period of appointment and the terms of appointment of and the conduct of business by Regional and Provincial Transport Authorities and the reports to be furnished by them;

(*b*) the conduct and hearing of appeals that may be preferred under this Chapter;

(*c*) the forms to be used for the purposes of this Chapter, including the forms of permits;

(*d*) the issue of copies of permits in place of permits lost or destroyed;

(*e*) the documents, plates and marks to be carried by transport vehicles, the manner in which they are to be carried and the languages in which any such documents are to be expressed;

(*f*) the badges and uniform to be worn by drivers and conductors of stage carriages and contract carriages;

(*g*) the fees to be paid in respect of permits, duplicate permits, plates and badges;

(*h*) the custody, production and cancellation on revocation or expiration of permits, and the return of permits which have become void or have been revoked;

(*i*) the conditions subject to which a permit issued in one region shall be valid in another region;

(*j*) the authorities to whom, the time within which and the manner in which appeals may be made;

(*k*) the construction and fittings of, and the equipment to be carried by, stage and contract carriages, whether generally or in specified areas;

(*l*) the determination of the number of passengers a stage or contract carriage is adapted to carry and the number which may be carried;

(*m*) the conditions subject to which goods may be carried on stage and contract carriages partly or wholly in lieu of passengers;

(*n*) the safe custody and disposal of property left in a stage or contract carriage;

(*o*) prohibiting the painting or marking of a stage or a contract carriage in such colour or manner as to induce any person to believe that the vehicle is used for the transport of mails;

(*p*) the conveyance in stage or contract carriages of corpses or persons suffering from any infectious or contagious disease or goods likely to cause discomfort or injury to passengers and the inspection and disinfection of such carriages, if used for such purposes;

(*q*) the provision of taxi meters on motor cabs requiring approval or standard types of taxi meters to be used and examining, testing and sealing taxi meters;

(*r*) prohibiting the picking up or setting down of passengers by stage or contract carriages at specified places or in specified areas or at places other than duly notified stands or halting places and requiring the driver of a stage carriage to stop and remain stationary for a reasonable time when so required by a passenger desiring to board or alight from the vehicle at a notified halting place;

(*s*) the requirements (including the provision of proper sanitary arrangements) which shall be complied with in any duly notified stand or halting place;

(*t*) requiring the owners of transport vehicles to notify any change of address or to report the failure of or damage to any vehicle used for the conveyance of passengers for hire or reward;

(*u*) requiring the person in charge of a stage carriage to carry any person tendering the legal or customary fare;

(*v*) the conditions under which and the types of containers or vehicles in which animals or birds may be carried and the seasons during which animals or birds may or may not be carried;

(*w*) the licensing of and the conduct of agents for the sale of tickets for travel by stage carriages;

(*x*) the inspection of transport vehicles and their contents and of the permits relating to them;

(*y*) the carriage of persons other than the driver in goods vehicles;

(*z*) the records to be maintained and the returns to be furnished by the owners of transport vehicles; and

(*za*) any other matter which is to be or may be prescribed.

CHAPTER V.

CONSTRUCTION, EQUIPMENT AND MAINTENANCE OF MOTOR VEHICLES.

General provision regarding construction and maintenance.

69. Every motor vehicle shall be so constructed and so maintained as to be at all times under the effective control of the person driving the vehicle.

Power to make rules.

70. (1) A Provincial Government may make rules regulating the construction, equipment and maintenance of motor vehicles and trailers.

(2) Without prejudice to the generality of the foregoing power, rules may be made under this section governing any of the following matters either generally in respect of motor vehicles or trailers or in respect of motor vehicles or trailers of a particular class or in particular circumstances, namely:—

(*a*) the width, height, length and overhang of vehicles and of the loads carried;

(*b*) seating arrangements in public service vehicles and the protection of passengers against the weather;

(*c*) the size, nature and condition of tyres;

(*d*) brakes and steering gear;

(*e*) the use of safety glass;

(*f*) signalling appliances, lamps and reflectors;

(*g*) speed governors;

(*h*) the emission of smoke, visible vapour, sparks, ashes, grit or oil;

(*i*) the reduction of noise emitted by or caused by vehicles;

(*j*) prohibiting or restricting the use of audible signals at certain times or in certain places;

(*k*) prohibiting the carrying of appliances likely to cause annoyance or danger;

(*l*) the periodical testing and inspection of vehicles by prescribed authorities;

(*m*) the particulars other than registration marks to be exhibited by vehicles and the manner in which they shall be exhibited; and

(*n*) the use of trailers with motor vehicles.

CHAPTER VI.

CONTROL OF TRAFFIC.

Limits of speed.

71. (1) No person shall drive a motor vehicle or cause or allow a motor vehicle to be driven in any public place at a speed exceeding the maximum speed fixed for the vehicle by or under this Act or by or under any law for the time being in force:

Provided that such maximum speed shall in no case exceed the maximum fixed for the vehicle in the Eighth Schedule.

(2) The Provincial Government or any authority authorised in this behalf by the Provincial Government may, if satisfied that it is necessary to restrict the speed of motor vehicles in the interests of public safety or convenience or because

of the nature of any road or bridge, by notification in the official Gazette, fix such maximum speed limits as it thinks fit for motor vehicles or any specified class of motor vehicles or for motor vehicles to which a trailer is attached, either generally or in a particular area or on a particular road or roads.

Limits of weight and limitations on use.

72. (1) The Provincial Government may prescribe conditions for the issue of permits for heavy transport vehicles by the Provincial or Regional Transport Authorities and may prohibit or restrict the use of such vehicles in any area or route within the province:

Provided that any permit issued before the commencement of this Act may be continued or renewed by the competent authority for a period not exceeding three years under the conditions upon which the permit was originally issued, unless the Provincial Government directs otherwise.

(2) Except as may be otherwise prescribed, no person shall drive or cause or allow to be driven in any public place any motor vehicle which is not fitted with pneumatic tyres.

(3) No person shall drive or cause or allow to be driven in any public place any motor vehicle or trailer—

(*a*) the unladen weight of which exceeds the unladen weight specified in the certificate of registration of the vehicle, or

(*b*) the laden weight of which exceeds the registered laden weight specified in the certificate of registration, or

(*c*) any axle weight of which exceeds the maximum axle weight specified for that axle in the certificate of registration.

(4) Where the driver or person in charge of a motor vehicle or trailer driven in contravention of sub-section (2) or clause (*a*) of sub-section (3) is not the owner, a Court may presume that the offence was committed with the knowledge of or under the orders of the owner of the motor vehicle or trailer.

Power to have vehicle weighed.

73. Any person authorised in this behalf by the Provincial Government may, if he has reason to believe that a goods vehicle or trailer is being used in contravention of section 72, require the driver to convey the vehicle to a weighing device, if any, within a distance of one mile from any point on the forward route or within a distance of five miles from the destination of the vehicle for weighment; and if on such weighment the vehicle is found to contravene in any respect the provisions of section 72 regarding weight, he may, by order in writing, direct the driver to convey the vehicle or trailer to the nearest place, to be specified in the notice, where facilities exist for the storage of goods, and not to remove the vehicle or trailer from that place until the laden weight or axle weight has been reduced or the vehicle has otherwise been treated so that it complies with section 72.

Power to restrict the use of vehicles.

74. The Provincial Government or any authority authorised in this behalf by the Provincial Government, if satisfied that it is necessary in the interests of public safety or convenience, or because of the nature of any road or bridge, may by notification in the official Gazette prohibit or restrict, subject to such exceptions and conditions as may be specified in the notification, the driving of motor vehicles or of any specified class of motor vehicles or the use of trailers either generally in a specified area or on a specified road.

Power to erect traffic signs.

75. (1) The Provincial Government or any authority authorised in this behalf by the Provincial Government may cause or permit traffic signs to be placed or erected in any public place for the purpose of regulating motor vehicle traffic.

(2) Traffic signs erected under sub-section (1) for any purpose for which provision is made in the Ninth Schedule shall be of the size, colour and type and shall have the meanings set forth in the Ninth Schedule, but the Provincial Government or any authority empowered in this behalf by the Provincial Government may make or authorise the addition to any sign set forth in the said Schedule, of transcriptions of the words, letters or figures thereon in such script as the Provincial Government may think fit, provided that the transcriptions shall be of similar size and colour to the words, letters or figures set forth in the Ninth Schedule.

(3) Except as provided by sub-section (1) no traffic sign shall, after the commencement of this Act, be placed or erected on or near any road; but all traffic signs erected prior to the commencement of this Act by any competent authority shall for the purposes of this Act be deemed to be traffic signs erected under the provisions of sub-section (1).

(4) A Provincial Government may, by notification in the official Gazette, empower any District Magistrate or Superintendent of Police to remove or cause to be removed any sign or advertisement which is so placed in his opinion as to obscure any traffic sign from view or any sign or advertisement which is in his opinion so similar in appearance to a traffic sign as to be misleading.

Parking places and halting stations.

76. The Provincial Government or any authority authorised in this behalf by the Provincial Government may, in consultation with the local authority having jurisdiction in the area concerned, determine places at which motor vehicles may stand either indefinitely or for a specified period of time, and may determine the places at which public service vehicles may stop for a longer time than is necessary for the taking up and setting down of passengers.

Main roads.

77. A Provincial Government or any authority authorised in this behalf by the Provincial Government may, by notification in the official Gazette or by the erection at suitable places of the appropriate traffic sign referred to in Part A of the Ninth Schedule, designate certain roads as main roads for the purposes of the regulations contained in the Tenth Schedule.

Duty to obey traffic signs.

78. Every driver of a motor vehicle shall drive the vehicle in conformity with any indication given by a traffic sign included in Part A of the Ninth Schedule and in conformity with the driving regulations set forth in the Tenth Schedule, and shall comply with all directions given him by any police officer for the time being engaged in the regulation of traffic in any public place.

Signals and signalling devices.

79. The driver of a motor vehicle shall on the occasions specified in the Eleventh Schedule make the signals specified therein:

Provided that the signal of an intention to turn to the right or left or to stop may be given by a mechanical or an electrical device of a prescribed nature affixed to the vehicle.

Vehicles with left hand control.

80. No person shall drive or cause or allow to be driven in any public place any motor vehicle with a left hand steering control unless it is equipped with a mechanical or electrical signalling device of a prescribed nature and in working order.

Leaving vehicle in dangerous position.

81. No person in charge of a motor vehicle shall cause or allow the vehicle or any trailer to remain at rest on any road in such a position or in such a condition or in such circumstances as to cause or be likely to cause danger, obstruction or undue inconvenience to other users of the road.

Riding on running board.

82. No person driving or in charge of a motor vehicle shall carry any person or permit any person to be carried on the running board or otherwise than within the body of the vehicle.

Obstruction of driver.

83. No person driving a motor vehicle shall allow any person to stand or sit or anything to be placed in such a manner or position as to hamper the driver in his control of the vehicle.

Stationary vehicles.

84. No person driving or in charge of a motor vehicle shall cause or allow the vehicle to remain stationary in any public place, unless there is in the driver's seat a person duly licensed to drive the vehicle or unless the mechanism has been stopped and a brake or brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver.

Pillion riding.

85. No driver of a two wheeled motor cycle shall carry more than one person in addition to himself on the cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the cycle behind the driver's seat.

Duty to produce licence and certificate of registration.

86. (1) The driver of a motor vehicle in any public place shall, on demand by any police officer in uniform, produce his licence for examination.

(2) The owner of a motor vehicle, or in his absence the driver or other person in charge of the vehicle, shall, on demand by a registering authority or any person authorised in this behalf by the Provincial Government, produce the certificate of registration of the vehicle and, where the vehicle is a transport vehicle, the certificate of fitness referred to in section 38.

(3) If the licence or certificates, as the case may be, are not at the time in the possession of the person to whom demand is made, it shall be a sufficient compliance with this section if such person produces the licence or certificates within ten days at any police station in British India which he specifies to the police officer or authority making the demand:

Provided that, except to such extent and with such modifications as may be prescribed, the provisions of this sub-section shall not apply to a driver driving as a paid employee, or to the driver of a transport vehicle or to any person required to produce the certificate of registration or the certificate of fitness of a transport vehicle.

Duty of driver to stop in certain cases.

87. (1) The driver of a motor vehicle shall cause the vehicle to stop and remain stationary so long as may reasonably be necessary—

(*a*) when required to do so by any police officer in uniform, or

(*b*) when required to do so by any person in charge of an animal if such person apprehends that the animal is, or being alarmed by the vehicle will become, unmanageable, or

(*c*) when the vehicle is involved in the occurrence of an accident to a person, animal or vehicle or of damage to any property, whether the driving or management of the vehicle was or was not the cause of the accident or damage,

and he shall give his name and address and the name and address of the owner of the vehicle to any person affected by any such accident or damage who demands it provided such person also furnishes his name and address.

(2) The driver of a motor vehicle shall, on demand by a person giving his own name and address and alleging that the driver has committed an offence punishable under section 116, give his name and address to that person.

(3) In this section the expression "animal" means any horse, cattle, elephant, camel, ass, mule, sheep or goat.

Duty of owner of motor vehicle to give information.

88. The owner of a motor vehicle the driver of which is accused of any offence under this Act shall, on the demand of any police officer authorised in this behalf by the Provincial Government, give all information regarding the name and address of and the licence held by the driver which is in his possession or could by reasonable diligence be ascertained by him.

Duty of driver in case of accident and injury to a person.

89. When any person is injured as the result of an accident in which a motor vehicle is involved, the driver of the vehicle or other person in charge of the vehicle shall—

(*a*) take all reasonable steps to secure medical attention for the injured person, and, if necessary, convey him to the nearest hospital, unless the injured person or his guardian, in case he is a minor, desires otherwise;

(*b*) give on demand by a police officer any information required by him, or, if no police officer is present, report the circumstances of the occurrence at the nearest police station as soon as possible, and in any case within twenty-four hours of the occurrence.

Inspection of vehicle involved in accident.

90. When any accident occurs in which a motor vehicle is involved, any person authorised in this behalf by the Provincial Government may, on production if so required of his authority, inspect the vehicle and for that purpose may enter at any reasonable time any premises where the vehicle may be, and may remove the vehicle for examination:

Provided that the place to which the vehicle is so removed shall be intimated to the owner of the vehicle, and the vehicle shall be returned without unnecessary delay.

Power to make rules.

91. (1) The Provincial Government may make rules for the purpose of carrying into effect the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the nature of the mechanical or electrical signalling devices which may be used on motor vehicles;

(*b*) the removal and the safe custody of vehicles including their loads which have broken down or which have been left standing or have been abandoned on roads;

(*c*) the installation and use of weighing devices;

(*d*) the exemption from all or any of the provisions of this Chapter of Fire Brigade vehicles, ambulances and other special classes of vehicle, subject to such conditions as may be prescribed;

(*e*) the maintenance and management of parking places and stands and the fees, if any, which may be charged for their use;

(*f*) prohibiting the driving down hill of a motor vehicle with the gear disengaged either generally or in a specified place;

(*g*) prohibiting the taking hold of or mounting of a motor vehicle in motion;

(*h*) prohibiting the use of foot-paths or pavements by motor vehicles;

(*i*) generally, the prevention of danger, injury or annoyance to the public or any person, or of danger or injury to property or of obstruction to traffic; and

(*j*) any other matter which is to be or may be prescribed.

CHAPTER VII.

MOTOR VEHICLES TEMPORARILY LEAVING OR VISITING BRITISH INDIA.

Power of Central Government to make rules.

92. (1) The Central Government may, by notification in the official Gazette, make rules for all or any of the following purposes, namely:—

(*a*) the grant and authentication of travelling passes, certificates or authorisations to persons temporarily taking motor vehicles out of British India to any place outside India or to persons temporarily proceeding out of British India to any place outside India and desiring to drive a motor vehicle during their absence from British India;

(*b*) prescribing the conditions subject to which motor vehicles brought temporarily into British India from outside India by persons intending to make a temporary stay in British India may be possessed and used in British India; and

(*c*) prescribing the conditions subject to which persons entering British India from any place outside India for a temporary stay in British India may drive motor vehicles in British India.

(2) No rule made under this section shall operate to confer on any person any immunity in any province from the payment of any tax levied in that province on motor vehicles or their users.

(3) Rules made under clauses (*b*) and (*c*) of sub-section (1) shall, in case of motor vehicles and persons entering British India from the French and Portuguese Settlements bounded by India, be applicable only to motor traffic to which the International Convention relating to motor traffic concluded at Paris on the 24th day of April, 1926, applies.

(4) Nothing in this Act or in any rule made thereunder by a Provincial Government relating to—

(*a*) the registration and identification of motor vehicles, or

(*b*) the requirements as to construction, maintenance and equipment of motor vehicles, or

(*c*) the licensing and the qualifications of drivers of motor vehicles

shall apply to any motor vehicle to which or to any driver of a motor vehicle to whom any rules made under clause (*b*) or clause (*c*) of sub-section (1) apply.

CHAPTER VIII.

INSURANCE OF MOTOR VEHICLES AGAINST THIRD PARTY RISKS.

Definitions.

93. In this Chapter—

(*a*) "authorised insurer" means an insurer in whose case the requirements of the Insurance Act, 1938, with respect to the registration of and deposits by insurers are complied with, and

(*b*) "certificate of insurance" means a certificate issued by an authorised insurer in pursuance of sub-section (4) of section 95; and includes where more than one certificate has been issued in connection with a policy, or where a copy of a certificate has been issued, all those certificates or that copy, as the case may be.

Necessity for insurance against third party risk.

94. (1) No person shall use except as a passenger or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter.

Explanation.—A person driving a motor vehicle merely as a paid employee, while there is in force in relation to the use of the vehicle no such policy as is

required by this sub-section, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such policy in force.

(2) This section shall not apply to any vehicle owned by or on behalf of the Central Government or a Provincial Government or a local authority notified in this behalf by the Provincial Government, or a State-owned railway, at any time when the vehicle is driven by a servant of the owner in the course of his employment, or is otherwise subject to the control of the owner.

Requirements of policies and limits of liability.

95. (1) In order to comply with the requirements of this chapter, a policy of insurance must be a policy which—

(*a*) is issued by a person who is an authorised insurer, and

(*b*) insures the person or classes of person specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not, except as may be otherwise provided under sub-section (3), be required—

(*i*) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment, or

(*ii*) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, or

(*iii*) to cover any contractual liability.

(2) Subject to the proviso to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely:—

(*a*) where the vehicle is a vehicle used or adapted to be used for the carriage of goods, a limit of twenty thousand rupees;

(*b*) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, in respect of persons other than passengers carried for hire or reward, a limit of twenty thousand rupees; and in respect of passengers a limit of twenty thousand rupees in all, and four thousand rupees in respect of an individual passenger, if the vehicle is registered to carry not more than six passengers excluding the driver or two thousand rupees in respect of an individual passenger, if the vehicle is registered to carry more than six passengers excluding the driver;

(*c*) where the vehicle is a vehicle of any other class, the amount of the liability incurred.

(3) A Provincial Government may prescribe that a policy of insurance shall in order to comply with the requirements of this chapter cover any liability arising under the provisions of the Workmen's Compensation Act, 1923, in respect of the death of or bodily injury to any paid employee engaged in driving or otherwise in attendance on or being carried in a motor vehicle.

(4) A policy shall be of no effect for the purposes of this chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance or a cover note in the prescribed form and containing the prescribed particulars of any conditions subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(5) Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes of person specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of person.

Duty of insurers to satisfy judgments against persons insured in respect of third party risks.

96. (1) If, after a certificate of insurance or a cover note has been issued under sub-section (4) of section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under clause (*b*) of sub-section (1) of section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:—

(*a*) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of section 105; or

(*b*) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—

(*i*) a condition excluding the use of the vehicle—

(*a*) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(*b*) for organised racing and speed testing, or

(*c*) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a public service vehicle or a goods vehicle, or

(*d*) without side-car being attached, where the vehicle is a motor cycle; or

(*ii*) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(*iii*) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(*c*) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where a certificate of insurance or cover note has been issued under sub-section (4) of section 95 to the person by whom a policy has been effected,

so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (*b*) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (*b*) of sub-section (1) of section 95, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(5) In this section the expressions "material fact" and "material particular" mean, respectively, a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer in entitled to avoid or cancel or has avoided or cancelled the policy.

(6) No insurer to whom the notice referred to in sub-section (2) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in sub-section (1) otherwise than in the manner provided for in sub-section (2).

Rights of third parties against insurers on insolvency of the insured.

97. (1) Where under any contract of insurance effected in accordance with the provisions of this chapter a person is insured against liabilities which he may incur to third parties then—

(*a*) in the event of the person becoming insolvent or making a composition or arrangement with his creditors, or

(*b*) where the insured person is a company, in the event of a winding up order being made or a resolution for a voluntary winding up being passed with respect to the company or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken by or on behalf of the holders of any debentures secured by a floating charge of any property comprised in or subject to the charge,

if, either before or after that event, any such liability is incurred by the insured person, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything to the contrary in any provision of law, be transferred to and vest in the third party to whom the liability was so incurred.

(2) Where an order for the administration of the estate of a deceased debtor is made according to the law of insolvency, then, if any debt provable in insolvency is owing by the deceased in respect of a liability to a third party against which he was insured under a contract of insurance in accordance with the provisions of this chapter, the deceased debtor's rights against the insurer in respect of that liability shall, notwithstanding anything to the contrary in any provision of law, be transferred to and vest in the person to whom the debt is owing.

(3) Any condition in a policy issued for the purposes of this chapter purporting either directly or indirectly to avoid the policy or to alter the rights of the parties thereunder upon the happening to the insured person of any of the events specified in clause (*a*) or clause (*b*) of sub-section (1) or upon the making of an order for the administration of the estate of a deceased debtor according to the law of insolvency shall be of no effect.

(4) Upon a transfer under sub-section (1) or sub-section (2) the insurer shall be under the same liability to the third party as he would have been to the insured person, but—

(a) if the liability of the insurer to the insured person exceeds the liability of the insured person to the third party, nothing in this chapter shall affect the rights of the insured person against the insurer in respect of the excess, and

(b) if the liability of the insurer to the insured person is less than the liability of the insured person to the third party, nothing in this chapter shall affect the rights of the third party against the insured person in respect of the balance.

Duty to give information as to insurance.

98. (1) No person against whom a claim is made in respect of any liability referred to in clause (b) of sub-section (1) of section 95 shall on demand by or on behalf of the person making the claim refuse to state whether or not he was insured in respect of that liability by any policy issued under the provisions of this chapter, or would have been so insured if the insurer had not avoided or cancelled the policy, nor shall he refuse, if he was or would have been so insured, to give such particulars with respect to that policy as were specified in the certificate of insurance issued in respect thereof.

(2) In the event of any person becoming insolvent or making a composition or arrangement with his creditors or in the event of an order being made for the administration of the estate of a deceased person according to the law of insolvency, or in the event of a winding up order being made or a resolution for a voluntary winding up being passed with respect to any company or of a receiver or manager of the company's business or undertaking being duly appointed or of possession being taken by or on behalf of the holders of any debentures secured by a floating charge on any property comprised in or subject to the charge, it shall be the duty of the insolvent debtor, personal representative of the deceased debtor or company, as the case may be, or the official assignee or receiver in insolvency, trustee, liquidator, receiver or manager, or person in possession of the property to give at the request of any person claiming that the insolvent debtor, deceased debtor or company is under such liability to him as is covered by the provisions of this chapter, such information as may reasonably be required by him for the purpose of ascertaining whether any rights have been transferred to and vested in him by section 97, and for the purpose of enforcing such rights, if any; and any such contract of insurance as purports whether directly or indirectly to avoid the contract or to alter the rights of the parties thereunder upon the giving of such information in the events aforesaid, or otherwise to prohibit or prevent the giving thereof in the said events, shall be of no effect.

(3) If, from the information given to any person in pursuance of sub-section (2) or otherwise, he has reasonable ground for supposing that there have or may have been transferred to him under this chapter rights against any particular insurer, that insurer shall be subject to the same duty as is imposed by the said sub-section on the persons therein mentioned.

(4) The duty to give the information imposed by this section shall include a duty to allow all contracts of insurance, receipts for premiums, and other relevant documents in the possession or power of the person on whom the duty is so imposed to be inspected and copies thereof to be taken.

Settlement between insurers and insured persons.

99. (1) No settlement made by an insurer in respect of any claim which might be made by a third party in respect of any liability of the nature referred to in clause (b) of sub-section (1) of section 95 shall be valid unless such third party is a party to the settlement.

(2) Where a person who is insured under a policy issued for the purposes of this chapter has become insolvent, or where, if such insured person is a company, a winding up order has been made or a resolution for a voluntary winding up has been passed with respect to the company, no agreement made between the insurer and the insured person after liability has been incurred to a third party and after the commencement of the insolvency or winding up, as the case may be, nor any waiver, assignment or other disposition made by or payment made to the insured person after the commencement aforesaid shall be effective to defeat the rights transferred to the third party under this chapter, but those rights shall be the same as if no such agreement, waiver, assignment or disposition or payment has been made.

Saving in respect of sections 97, 98 and 99.

100. (1) For the purposes of sections 97, 98 and 99, a reference to "liabilities to third parties" in relation to a person insured under any policy of insurance shall not include a reference to any liability of that person in the capacity of insurer under some other policy of insurance.

(2) The provisions of sections 97, 98 and 99 shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of an amalgamation with another company.

Insolvency of insured persons not to affect liability of insured or claims by third parties.

101. Where a certificate of insurance has been issued to the person by whom a policy has been effected, the happening in relation to any person insured by the policy of any such event as is mentioned in sub-section (1) or sub-section (2) of section 97 shall, notwithstanding anything in this chapter, not affect any liability of that person of the nature referred to in clause (*b*) of sub-section (1) of section 95; but nothing in this section shall affect any rights against the insurer conferred under the provisions of sections 97, 98 and 99 on the person to whom the liability was incurred.

Effect of death on certain causes of action.

102. Notwithstanding anything contained in section 306 of the Indian Succession Act, 1925, the death of a person in whose favour a certificate of insurance or cover note had been issued, if it occurs after the happening of an event which has given rise to a claim under the provisions of this chapter, shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer.

Effect of certificate of insurance.

103. When an insurer has issued a certificate of insurance in respect of a contract of insurance between the insurer and the insured person, then—

(*a*) if and so long as the policy described in the certificate has not been issued by the insurer to the insured, the insurer shall, as between himself and any other person except the insured, be deemed to have issued to the insured person a policy of insurance conforming in all respects with the description and particulars stated in such certificate; and

(*b*) if the insurer has issued to the insured the policy described in the certificate, but the actual terms of the policy are less favourable to persons claiming under or by virtue of the policy against the insurer either directly or through the insured than the particulars of the policy as stated in the certificate, the policy shall, as between the insurer and any other person except the insured, be deemed to be in terms conforming in all respects with the particulars stated in the said certificate.

104. (1) Whenever the period of cover under a policy of insurance issued under the provisions of this Chapter is terminated or suspended by any means before its expiration by effluxion of time, the insured person shall within seven days after such termination or suspension deliver to the insurer by whom the policy was issued the latest certificate of insurance given by the insurer in respect of the said policy, or, if the said certificate has been lost or destroyed, make an affidavit to that effect.

Duty to surrender certificate on cancellation of policy.

(2) Whoever fails to surrender a certificate of insurance or to make an affidavit, as the case may be, in accordance with the provisions of this section shall be punishable with fine which may extend to fifteen rupees for every day that the offence continues subject to a maximum of five hundred rupees.

105. Whenever a policy of insurance issued under the provisions of this Chapter is cancelled or suspended by the insurer who has issued the policy, the insurer shall within seven days notify such cancellation or suspension to the registering authority in whose records the registration of the vehicle covered by the policy of insurance is recorded or to such other authority as the Provincial Government may prescribe.

Duty of insurer to notify registering authority cancellation or suspension of the policy.

106. (1) Any person driving a motor vehicle in any public place shall on being so required by a police officer in uniform produce the certificate of insurance relating to the use of the vehicle:

Production of certificate of insurance.

Provided that if the driver of a motor vehicle within seven days from the date on which the production of the certificate of insurance was so required produces the certificate at such police station as may have been specified by him at the time its production was required he shall not be liable to conviction under this sub-section by reason only of failure to produce the certificate to the police officer.

(2) If, where owing to the presence of a motor vehicle in a public place an accident occurs involving bodily injury to another person, the driver of the vehicle does not at the time produce the certificate of insurance to a police officer, he shall produce the certificate of insurance at the police station at which he makes the report required by section 89:

Provided that no person shall be liable to conviction under this sub-section by reason only of failure to produce his certificate of insurance if within seven days from the occurrence of the accident he produces the certificate at such police station as may be specified by him to the police officer at the site of the accident or to the officer in charge of the police station at which he reported the accident.

(3) The owner of a motor vehicle shall give such information as he may be required by or on behalf of a police officer empowered in this behalf by the Provincial Government to give for the purpose of determining whether the vehicle was or was not being driven in contravention of section 94 and on any occasion when the driver was required under this section to produce his certificate of insurance.

(4) In this section the expression "produce his certificate of insurance" means produce for examination the relevant certificate of insurance or such other evidence as may be prescribed that the vehicle was not being driven in contravention of section 94.

Production of certificates of insurance on application for authority to use vehicle.

107. A Provincial Government may make rules requiring the owner of any motor vehicle when applying whether by payment of a tax or otherwise for authority to use the vehicle in a public place to produce such evidence as may be prescribed by those rules to the effect that either—

(*a*) on the date when the authority to use the vehicle comes into operation there will be in force the necessary policy of insurance in relation to the use of the vehicle by the applicant or by other persons on his order or with his permission, or

(*b*) the vehicle is a vehicle to which section 94 does not apply.

Co-operative insurance.

108. (1) A Provincial Government may, on the application of a co-operative society of public service vehicle owners registered or deemed to have been registered under the Co-operative Societies Act, 1912, or under an Act of a Provincial Legislature governing the registration of Co-operative Societies and subject to the control of the Registrar of Co-operative Societies of the province, allow the society to transact the business of an insurer for the purposes of this Chapter as if the society were an authorised insurer, subject to the following conditions, namely:—

(*a*) the society shall establish and maintain a fund of not less than twenty-five thousand rupees for the first fifty vehicles or fractional part thereof and *pro rata* for every additional vehicle in the possession of members of the society and the said fund shall be lodged in such custody as the Provincial Government may prescribe and shall not be available for meeting claims or other expenses except in the event of the winding up of the society;

(*b*) the liability of the society shall be limited as specified in clause (*b*) of sub-section (2) of section 95;

(*c*) the society shall, if required by the Provincial Government, re-insure against claims above a prescribed amount;

(*d*) the provisions of this Chapter, in so far as they relate to the protection of third parties and to the issue and production of certificates, shall apply in respect of any insurance effected by the society;

(*e*) an independent authority not associated with the society shall be appointed by the Provincial Government to facilitate and assist in the settling of claims against the society;

(*f*) the society shall operate on an insurance basis, that is to say,—

(*i*) it shall levy its premiums in respect of a period not exceeding twelve months, during which period the insured shall be held covered in respect of all accidents arising, subject to the limits of liability specified in clause (*b*) of sub-section (2) of section 95;

(*ii*) it shall charge premiums estimated to be sufficient, having regard to the risks, to meet the capitalised value of all claims arising during the period of cover, together with an adequate charge for expenses attaching to the issue of policies and to the settlement of claims arising thereunder;

(*g*) the society shall furnish to the Superintendent of Insurance the returns required to be furnished by insurers under the provisions of the Insurance Act, 1938, and the Superintendent of Insurance may exercise in respect thereof any of the powers exercisable by him in respect of returns made to him under the said Act; and

(*h*) any provisions of law applicable to the winding up of authorised insurers shall be equally applicable to the society.

(2) Except as provided in sub-section (1), the Insurance Act, 1938, shall not apply to any co-operative society of public service vehicle owners allowed to transact the business of an insurer under this section.

Duty to furnish particulars of vehicle involved in accident.

109. A registering authority or the officer in charge of a police station shall, if so required by a person who alleges that he is entitled to claim compensation in respect of an accident arising out of the use of a motor vehicle, or if so required by an insurer against whom a claim has been made in respect of any motor vehicle, furnish to that person or to that insurer, as the case may be, on payment of the prescribed fee any information at the disposal of the said authority or the said police officer relating to the identification marks and other particulars of the vehicle and the name and address of the person who was using the vehicle at the time of the accident or was injured by it.

Power to appoint persons to investigate and report on accidents.

110. A Provincial Government may, by notification in the official Gazette, appoint a person or a body of persons to investigate and report on accidents involving the death of or bodily injury to any person arising out of the use of motor vehicles and the extent to which their claims to compensation have been satisfied and to advise and assist such persons or their representatives in presenting their claims for compensation:

Provided that nothing in this section shall confer on any such person or body of persons the right to adjudicate in any way on the liability of the insurer or on the amount of damages to be awarded except at the express desire of the insurer concerned.

Power to make rules.

111. (1) The Central Government may make rules for the purpose of carrying into ffeect the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the forms to be used for the purposes of this Chapter;

(*b*) the making of applications for and the issue of certificates of insurance;

(*c*) the issue of duplicates to replace certificates of insurance lost or destroyed;

(*d*) the custody, production, cancellation and surrender of certificates of insurance;

(*e*) the records to be maintained by insurers of policies of insurance issued under this Chapter;

(*f*) the identification by certificates or otherwise of persons or vehicles exempted from the provisions of this Chapter;

(*g*) the furnishing of information respecting policies of insurance by insurers;

(*h*) the carrying into effect of the provisions of section 108;

(*i*) adapting the provisions of this Chapter to vehicles brought into British India by persons making only a temporary stay therein by applying those provisions with prescribed modifications; and

(*j*) any other matter which is to be or may be prescribed.

CHAPTER IX.

OFFENCES, PENALTIES AND PROCEDURE.

General provision for punishment of offences.

112. Whoever contravenes any provision of this Act or of any rule made thereunder shall, if no other penalty is provided for the offence, be punishable with fine which may extend to twenty rupees, or, if having been previously con-

victed of any offence under this Act he is again convicted of an offence under this Act, with fine which may extend to one hundred rupees.

Disobedience of orders, obstruction and refusal of information.

113. Whoever wilfully disobeys any direction lawfully given by any person or authority empowered under this Act to give such direction, or obstructs any person or authority in the discharge of any functions which such person or authority is required or empowered under this Act to discharge, or, being required by or under this Act to supply any information, withholds such information or gives information which he knows to be false or which he does not believe to be true, shall, if no other penalty is provided for the offence, be punishable with fine which may extend to two hundred rupees.

Offences relating to licences.

114. Whoever, being disqualified under this Act for holding or obtaining a licence, drives a motor vehicle in a public place or applies for or obtains a licence or, not being entitled to have a licence issued to him free of endorsement, applies for or obtains a licence without disclosing the endorsements made on a licence previously held by him or, being disqualified under this Act for holding or obtaining a licence, uses in British India a licence such as is referred to in sub-section (2) of section 9, shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both, and any licence so obtained by him shall be of no effect.

Driving at excessive speed.

115. (1) Whoever drives a motor vehicle in contravention of section 71 shall be punishable with fine which may extend to one hundred rupees.

(2) Whoever causes any person who is employed by him or is subject to his control in driving to drive a motor vehicle in contravention of section 71 shall be punishable with fine which may extend to two hundred rupees.

(3) No person shall be convicted of an offence punishable under sub-section (1) solely on the evidence of one witness to the effect that in the opinion of the witness such person was driving at a speed which was unlawful, unless that opinion is shown to be based on an estimate obtained by the use of some mechanical timing device.

(4) The publication of a time table under which, or the giving of any direction that, any journey or part of a journey is to be completed within a specified time shall, if in the opinion of the Court it is not practicable in the circumstances of the case for that journey or part of a journey to be completed in the specified time without infringing the provisions of section 71, be *prima facie* evidence that the person who published the time table or gave the direction has committed an offence punishable under sub-section (2).

Driving recklessly or dangerously.

116. Whoever drives a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the place where the vehicle is driven and the amount of traffic which actually is at the time or which might reasonably be expected to be in the place, shall be punishable on a first conviction for the offence with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, and for a subsequent offence if committed within three years of the commission of a previous similar offence with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Driving while under the influence of drink or drugs.

117. Whoever while driving or attempting to drive a motor vehicle is under the influence of drink or a drug to such an extent as to be incapable of exercising proper control over the vehicle, shall be punishable for a first offence with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both, and for a subsequent offence if committed within three years of the commission of a previous similar offence with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Driving when mentally or physically unfit to drive.

118. Whoever drives a motor vehicle in any public place when he is to his knowledge suffering from any disease or disability calculated to cause his driving of the vehicle to be a source of danger to the public, shall be punishable for a first offence with fine which may extend to two hundred rupees and for a second or subsequent offence with fine which may extend to five hundred rupees.

Punishment for abetment of certain offences.

119. Whoever abets the commission of an offence under section 116, 117 or 118, shall be punishable with the punishment provided for the offence.

Racing and trials of speed.

120. Whoever without the written consent of the Provincial Government permits or takes part in a race or trial of speed between motor vehicles in any public place shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to three hundred rupees, or with both.

Using vehicle in unsafe condition.

121. Any person who drives or causes or allows to be driven in any public place a motor vehicle or trailer while the vehicle or trailer has any defect, which such person knows of or could have discovered by the exercise of ordinary care and which is calculated to render the driving of the vehicle a source of danger to persons and vehicles using such place, shall be punishable with fine which may extend to two hundred and fifty rupees or, if as a result of such defect an accident is caused causing bodily injury or damage to property, with fine which may extend to five hundred rupees.

Sale of vehicle in or alteration of vehicle to a condition contravening this Act.

122. Whoever, being an importer of or dealer in motor vehicles, sells or delivers or offers to sell or deliver a motor vehicle or trailer in such condition that the use thereof in a public place would be in contravention of Chapter V or any rule made thereunder or alters the motor vehicle or trailer so as to render its condition such that its use in a public place would be in contravention of Chapter V or any rule made thereunder shall be punishable with fine which may extend to two hundred rupees:

Provided that no person shall be convicted under this section if he proves that he had reasonable cause to believe that the vehicle would not be used in a public place until it had been put into a condition in which it might lawfully be so used.

Using vehicle without permit.

123. (1) Whoever drives a motor vehicle or causes or allows a motor vehicle to be used or lets out a motor vehicle for use in contravention of the provisions of sub-section (1) of section 42 shall be punishable for a first offence with fine which may extend to five hundred rupees, and for a subsequent offence if committed within three years of the commission of a previous similar offence with a fine which shall not be less than one hundred rupees and may extend to one thousand rupees.

(2) Nothing in this section shall apply to the use of a motor vehicle in an emergency for the conveyance of persons suffering from sickness or injury or for the transport of materials for repair or of food or materials to relieve distress or of medical supplies for a like purpose:

Provided that the person using the vehicle reports such use to the Regional Transport Authority within seven days.

Driving vehicle exceeding permissible weight.

124. Whoever drives a motor vehicle or causes or allows a motor vehicle to be driven in contravention of the provisions of section 72 or of the conditions of any permit issued thereunder, or in contravention of any prohibition or restriction imposed under section 74 shall be punishable for a first offence with fine which may extend to one hundred rupees, and for a second or subsequent offence with fine which may extend to five hundred rupees.

Driving uninsured vehicle.

125. Whoever drives a motor vehicle or causes or allows a motor vehicle to be driven in contravention of the provisions of section 94 shall be punishable with imprisonment which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Taking vehicle without authority.

126. Whoever takes and drives away any motor vehicle without having either the consent of the owner thereof or other lawful authority shall be punishable with imprisonment which may extend to three months, or with fine which may extend to five hundred rupees, or with both:

Provided that no accused person shall be convicted under this section if the Court is satisfied that the accused acted in the reasonable belief that he had lawful authority or in the reasonable belief that the owner would in the circumstances of the case have given his consent if he had been asked therefor.

Unauthorised interference with vehicle.

127. Whoever otherwise than with lawful authority or reasonable excuse enters or mounts any stationary motor vehicle or tampers with the brake or any part of the mechanism of a motor vehicle shall be punishable with fine which may extend to one hundred rupees.

Power of arrest without warrant.

128. (1) A police officer in uniform may arrest without warrant any person who commits in his view an offence punishable under section 116 or section 117 or section 126:

Provided that any person so arrested in connection with an offence punishable under section 117 shall be subjected to a medical examination by a registered medical practitioner within two hours of his arrest or shall then be released from custody.

(2) A police officer in uniform may arrest without warrant—

(*a*) any person who being required under the provisions of this Act to give his name and address refuses to do so, or gives a name or address which the police officer has reason to believe to be false, or

(*b*) any person concerned in an offence under this Act or reasonably suspected to have been so concerned, if the police officer has reason to believe that he will abscond or otherwise avoid the service of a summons.

(3) A police officer arresting without warrant the driver of a motor vehicle shall, if the circumstances so require, take or cause to be taken any steps he may consider proper for the temporary disposal of the vehicle.

Power of police officer to impound document.

129. (1) Any police officer authorised in this behalf or other person authorised in this behalf by the Provincial Government may, if he has reason to believe that any identification mark carried on a motor vehicle or any license, permit, certificate of registration, certificate of insurance or other document produced to him by the driver or person in charge of a motor vehicle is a false document within the meaning of section 464 of the Indian Penal Code, seize the mark or document and call upon the driver or owner of the vehicle to account for his possession of or the presence in the vehicle of such mark or document.

(2) Any police officer authorised in this behalf by the Provincial Government may, if he has reason to believe that the driver of a motor vehicle who is charged with any offence under this Act may abscond or otherwise avoid the service of a summons, seize any license held by such driver and forward it to the Court taking cognizance of the offence.

(3) A police officer seizing a license under sub-section (2) shall give to the person surrendering the license a temporary acknowledgment therefor and such acknowledgment shall authorise the holder to drive until the licence has been returned to him or the Court has otherwise ordered.

Summary disposal of cases.

130. (1) A Court taking cognizance of an offence under this Act may, unless the offence is an offence specified in Part A of the Fifth Schedule, state upon the summons to be served on the accused person that he—

(*a*) may appear by pleader and not in person, or

(*b*) may by a specified date prior to the hearing of the charge plead guilty to the charge by registered letter and remit to the Court such sum not exceeding twenty-five rupees as the Court may specify.

(2) Where the offence dealt with in accordance with sub-section (1) is an offence specified in Part B of the Fifth Schedule, the accused person shall, if he pleads guilty to the charge, forward his licence to the Court with the letter containing his plea in order that the conviction may be endorsed on the license.

(3) Where an accused person pleads guilty and remits the sum specified and has complied with the provisions of sub-section (2), no further proceedings in respect of the offence shall be taken against him, nor shall he be liable to be disqualified for holding or obtaining a licence by reason of his having pleaded guilty.

Restriction on conviction.

131. No person prosecuted for an offence punishable under section 115 or section 116 shall be convicted unless—

(*a*) he was warned at the time the offence was committed that the question of prosecuting him would be taken into consideration, or

(*b*) within fourteen days from the commission of the offence, a notice specifying the nature of the offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence, or

(*c*) within twenty-eight days of the commission of the offence, a summons for the offence was served on him:

Provided that nothing in this section shall apply where the Court is satisfied that—

(*a*) the failure to serve the notice or summons referred to in this sub-section was due to the fact that neither the name and address of the accused nor the name and address of the registered owner of the vehicle could with reasonable diligence have been ascertained in time, or

(*b*) such failure was brought about by the conduct of the accused.

Jurisdiction of Courts.

132. No Court inferior to that of a Presidency Magistrate or a Magistrate of the second class shall try any offence punishable under this Act or any rule made thereunder.

CHAPTER X.

MISCELLANEOUS.

Publication of and commencement of rules.

133. (1) Every power to make rules given by this Act is subject to the condition of the rules being made after previous publication.

(2) All rules made under this Act shall be published in the official Gazette, and shall, unless some later date is appointed, come into force on the date of such publication.

(3) All rules made under this Act by the Central Government or by any Provincial Government shall be laid for not less than fourteen days before the Central or Provincial Legislature, as the case may be, as soon as possible after they are made, and shall be subject to such modifications as the Legislature may make during the session in which they are so laid.

Repeal.

134. (1) The Indian Motor Vehicles Act, 1914, is hereby repealed.

(2) Notwithstanding the repeal of the Indian Motor Vehicles Act, 1914, rules made by any Provincial Government under sub-section (2) of section 11 of that Act and rules made by the Governor-General in Council under section 14 of that Act, being rules in force at the commencement of this Act, shall subject to the provisions of sub-section (3) continue to be in force for a period of nine months from the commencement of this Act, unless before the expiry of that period they are cancelled by a Provincial Government or by the Central Government, as the case may be, by notification in the official Gazette.

(3) Notwithstanding the repeal of the Indian Motor Vehicles Act, 1914, rules made or purporting to be made by a Provincial Government under sub-section (2) of section 11 of that Act, requiring or relating to the insurance of motor vehicles, being rules in force at the commencement of this Act, shall, until Chapter VIII of this Act takes effect in the province, have effect as if enacted in this Act.

(4) Nothing contained in this Act shall, until the expiry of a period of nine months from the commencement of this Act, operate to invalidate any provisions relating to the taxation of motor vehicles contained in any Provincial enactment or rules made thereunder in force at the commencement of this Act.

THE SCHEDULES.

THE FIRST SCHEDULE.

FORMS.

FORM A.

[*See* section 7 (2).]

Form of application for licence to drive a motor vehicle.

I

Application.

I apply for a licence to enable me to drive,
as a paid employee

*otherwise than as a paid employee
*vehicles of the following description:—
(*a*) motor cycles,
(*b*) motor cars,

*Strike out whichever inapplicable.

(c) invalid carriages,
(d) motor cabs,
(e) delivery vans,
(f) light transport vehicles *including / excluding public service vehicles,
(g) heavy transport vehicles *including / excluding public service vehicles,
(h) tractors,
(i) road-rollers,
(j) locomotives,
(k) a vehicle of a special type (description attached) constructed or adapted to be driven by me.

II

Particulars to be furnished by the applicant.

1. Full name and name of father..
2. Permanent address...
3. Temporary address...
4. Age at date of application..
5. Particulars of any licence previously held by applicant.....................................
....
6. Particulars and date of every conviction which has been ordered to be endorsed on any licence held by the applicant.
7. Have you been disqualified for obtaining a licence to drive? If so, for what reason?
8. Have you been subjected to a driving test as to your fitness or ability to drive a vehicle in respect of which a licence to drive is applied for? If so, give date, testing authority and result of test.

III

Declaration as to physical fitness of applicant.

The applicant is required to answer "Yes" or "No" in the space provided opposite each question.

(a) Do you suffer from epilepsy, or from sudden attacks of disabling giddiness or fainting?

(b) Are you able to distinguish with each eye at a distance of 25 yards in good daylight (with glasses, if worn) a motor car number plate containing seven letters and figures?

(c) Have you lost either hand or foot or are you suffering from any defect in movement, control, or muscular power of either arm or leg?

(d) Do you suffer from colour blindness or night blindness?

(e) Do you suffer from a defect of hearing?

(f) Do you suffer from any other disease or disability likely to cause your driving of a motor vehicle to be a source of danger to the public?

If so, give particulars.

I declare that to the best of my information and belief the particulars given in section II and the declaration made in section III hereof are true.

NOTE.—An applicant who answers "Yes" to questions (b) and (c) in the declaration and "No" to the other questions may claim to be subjected to a test as to his competency to drive vehicles of a specified type or types.

Date....................19 . *Signature or Thumb Impression of applicant.*

Certificate of test of ability to drive.

The applicant has passed / failed in the test specified in the Third Schedule to the Motor Vehicles Act, 1939. The test was conducted on a† on (date).

Signature of Testing Authority,
Duplicate Signature or Thumb Impression of applicant.

FORM B.

[*See* section 11 (2).]

Form of application for renewal of driving licence.

I hereby apply for a renewal of the license under the Motor Vehicle Act, 1939, which was issued to me on the..............................by.............................. (state title of licensing authority).

* Strike out whichever in applicable.
† Here enter description of vehicle.

I hereby declare that I am not subject to any disease or disability likely to cause my driving of a motor vehicle to be a source of danger to the public.

Date...............19 . *Signature of Applicant.*

FORM C.

[*See* section 7 (3) and section 12.]

Form of medical certificate in respect of an applicant for a licence to drive any transport vehicle or to drive any vehicle as a paid employee.

(To be filled up by a registered medical practitioner.)

1. What is the applicant's apparent age? ....

2. Is the applicant, to the best of your judgment, subject to epilepsy, vertigo or any mental ailment likely to affect his efficiency? ....

3. Does the applicant suffer from any heart or lung disorder which might interfere with the performance of his duties as a driver? ....

4. (*a*) Is there any defect of vision? If so, has it been corrected by suitable spectacles? ....

(*b*) Does the applicant suffer from night blindness or colour blindness? ....

(*c*) Does the applicant suffer from a degree of deafness which would prevent his hearing the ordinary sound signals? ....

5. Has the applicant any deformity or loss of members which would interfere with the efficient performance of his duties as a driver? ....

6. Does he show any evidence of being addicted to the excessive use of alcohol, tobacco or drugs? ....

7. Is he, in your opinion, generally fit as regards (*a*) bodily health, and (*b*) eyesight? ....

8. Marks of identification.

I certify that the best of my knowledge and belief the applicant.................... is the person hereinabove described, and that the attached photograph is a reasonably correct likeness.

(*Signature*)...............

[Space for photograph.]

Name...................

Designation...............

NOTE.—Special attention should be directed to distant vision and to the condition of the arms and hands and the joints of both extremities.

FORM D.

[*See* section 8 (*1*).]

Driving Licence.

No. .... 19....

(Name) ....

son|daughter of (father's name)..

of (permanent address)..

....

(temporary address)..

Photograph if necessary.

Signature or thumb impression.

is licensed to drive, throughout British India, vehicles of the following description:—*

(a) Motor cycle.
(b) Motor car.
(c) Motor cab.
(d) Delivery van.
(e) Light transport vehicle.
(f) Heavy transport vehicle.
(g) Locomotive.
(h) Tractor.
(i) Invalid carriage.
(j) Road-roller.
(k) A motor vehicle hereunder described:—

....

He is also authorised to drive as a paid employee*.

This licence is valid from.................................to ....

Signature and designation of Licensing Authority.

Date.........................19 .

Authorisation to drive a public service vehicle.

So long as this licence is valid and is renewed from time to time, the holder is authorised to drive a public service vehicle within the province of...............................

Date......................19 . *Signature and designation of prescribed authority.*

And within the province of...............

Date......................19 . *Signature and designation of prescribed authority.*

And within the province of..................

Date......................19 . *Signature and designation of prescribed authority.*

This licence is hereby renewed up to *Signature of Licensing Authority.*

the......................day of....19 . ...
the......................day of....19 . ...
the......................day of....19 . ...
the......................day of....19 . ...
the......................day of....19 . ...

ENDORSEMENTS.

Date	Section and Rule.	Fine or other punishment	Signature of Endorsing Authority

FORM E.

[*See* section 24 (*1*).]

Form of Application for the Registration of a Motor Vehicle.

1. Full name, name of father, and address of person to be registered as registered owner.....................................
2. Class of vehicle...
3. Type of body...
4. Maker's name...
5. Year of manufacture..
6. Number of cylinders..
7. Horse power..
8. Maker's classification or, if not known, wheel-base..........
9. Chassis number...
10. Engine number...
11. Seating capacity (including driver).........................
12. Unladen weight..

*To be struck out if inapplicable.

13. Particulars of previous registration and registered number (if any).................
....

Additional particulars to be completed only in the case of transport vehicle other than motor cabs—

14. Number, description and size of tyres—
(a) front axle.......................lbs.
(b) rear axle.........................lbs.
(c) any other axle...................lbs.

15. Maximum laden weight........lbs.

16. Maximum axle weight—
(a) front axle.................... lbs.
(b) rear axle..................... lbs.
(c) any other axle................ lbs.

The above particulars are to be filled in for a rigid frame motor vehicle of two or of three axles, for an articulated vehicle of three axles, or, to the extent applicable, for a trailer (other than the trailer to be registered as part of an articulated vehicle) as the case may be. Where a second trailer or additional trailers are to be registered with an articulated motor vehicle, the following particulars are to be furnished for each such trailer:—

17. Type of body...
18. Unladen weight...
19. Number, description and size of tyres on the axle.....................................
20. Maximum axle weight..

Dated....................*19* . *Signature of applicant.*

Explanation.—An articulated vehicle means a tractor to which a trailer is attached in such a manner that part of the trailer is superimposed on and part of the weight of the trailer is borne by the tractor.

NOTE.—The motor vehicle above described is held by the person to be registered as the registered owner, under a hire purchase agreement with...

Signature of owner.

Signature of Hire Purchase Company.

FORM F.

[*See* section 36 (*1*).]

Document to be furnished by the maker or authorised assembler in the case of transport vehicles other than motor cabs.

Certified that the.................................vehicle, Chassis No................ and Engine No................is designed for maximum weights as follows when fitted with the tyre-equipment specified below:—

Maximum laden weight.................. lbs.
Maximum weight front axle.............. lbs.
Maximum weight rear axle.............. lbs.
Maximum weight any other axle.......... lbs.
Tyres—
Front wheels....................
Rear wheels.....................
Other wheels....................

Date........................ *Signature of maker or authorised assembler.*

Special certificate to be furnished by an assembler.

Certified that I am authorised by the maker of the vehicle described above to issue this certificate.

Signature of authorised assembler.

FORM G.

[*See* section 24 (*2*).]

Form of Certificate of Registration.

Registered number................
Brief description of vehicle,
(*e.g.*, Ford touring car, Chevrolet 22 seater bus, Albion lorry, trailer, etc.) Name, name of father, and address of Registered Owner...
....

Transferred to *Signature of registering authority.*

Transferred to *Signature of registering authority.*

Signature of registering authority.

Detailed description.

1. Class of vehicle..
2. Maker's name..
3. Type of body..
4. Year of manufacture..
5. Number of cylinders..
6. Chassis number..
7. Engine number..
8. Horse power..
9. Maker's classification or, if not known, wheel-base..............................
10. Seating capacity (including driver)..
11. Unladen weight..

Additional particulars in the case of all transport vehicles other than motor cabs—

12. Registered laden weight..
13. Number, description and size of tyres—
    (*a*) front axle........................
    (*b*) rear axle........................
    (*c*) any other axle........................
14. Registered axle weight—
    (*a*) front axle........................lbs.
    (*b*) rear axle........................lbs.
    (*c*) any other axle........................lbs.

Additional particulars of alternative or additional trailer or trailers registered with an articulated vehicle—

15. Type of body..
16. Unladen weight..lbs. ....
17. Number, description and size of tyres on the axle..................................
18. Registered axle weight..lbs. ....

Date........................*19* . *Signature of registering authority.*

NOTE.—The motor vehicle above described is held by the person registered as the registered owner under a hire purchase agreement with....................................

Date........................*19* . *Signature of registering authority.*

FORM H.

[*See* sections 38 and 39 (2).]

Certificate of fitness (applicable in the case of transport vehicles only.)

Vehicle No............is certified as complying with the provisions of Chapter V of the Motor Vehicles Act, 1939, and the rules made thereunder. This certificate will expire on............................

Date....................*19* . *Signature and Designation of Inspecting Authority.*

The certificate of fitness is hereby renewed—

up to........................19 . ...
up to........................19 . ...
up to........................19 . ...

Signature of Inspecting Authority.

THE SECOND SCHEDULE.

[*See* section 7 (5).]

I. Diseases and Disabilities absolutely disqualifying a person for obtaining a Licence to drive a motor vehicle.

1. Epilepsy.

2. Lunacy.

3. Heart disease likely to produce sudden attacks of giddiness or fainting.

4. Inability to distinguish with each eye at a distance of twenty-five yards in good day-light (with the aid of glasses, if worn) a series of seven letters and figures in white on a black ground of the same size and arrangement as those of the registration mark of a motor car.

5. A degree of deafness which prevents the applicant from hearing the ordinary sound signals.

6. Colour-blindness.

7. Night-blindness.

II. Diseases and Disabilities absolutely disqualifying a person for obtaining a Licence to drive a public service vehicle.

1. Leprosy.

THE THIRD SCHEDULE.

[*See* section 7 (6) (a) and 17 (6).]

TEST OF COMPETENCE TO DRIVE.

Part I.

The candidate shall satisfy the person conducting the test that he is able to—

1. Start the engine of the vehicle.
2. Move away straight ahead or at an angle.
3. Overtake, meet, or cover the path of other vehicles and take an appropriate course.
4. Turn right and left corners correctly.
5. Stop the vehicle in an emergency and normally, and in the latter case bring it to rest at an appropriate part of the road.

6. Drive the vehicle backwards and whilst so doing enter a limited opening either to the right or left.

7. Cause the vehicle to face in the opposite direction by means of forward and reverse gears.

8. Give by hand and by mechanical means (if fitted to the vehicle), or, in the case of a disabled driver for whom it is impracticable or undesirable to give signals by hand, by mechanical means, in a clear and unmistakable manner, appropriate signals at appropriate times to indicate his intended actions.

9. Act correctly and promptly on all signals given by traffic signs and traffic controllers, and take appropriate action on signs given by other road users.

NOTE.—(*i*) Requirements 6 and 7 are not applicable in the case of a motor-cycle or tricycle not equipped with means for reversing.

(*ii*) Requirements 6, 7 and 8 are not applicable in the case of invalid carriages.

Part II.

The candidate shall satisfy the person conducting the test that he is cognizant of the provisions of sections 81, 82, 83, 84 and 85 and of the Tenth Schedule; that he knows the meaning of the traffic signs specified in the Ninth Schedule; and, if he has not been medically examined, that he is not so deaf as to be unable to hear the ordinary sound signals, and is able to distinguish with each eye at a distance of twenty-five yards in good daylight (with the aid of glasses, if worn) a registration mark containing seven letters and figures.

THE FOURTH SCHEDULE.

[*See* sections 14 (1) and 39 (1) and (3).]

Authorities entitled to grant Licences to drive, and to Register Motor Vehicles, the property of the Central Government, and Registration Marks for such vehicles.

PART A.

The authorities specified in the second column may grant licences in respect of vehicles, the property of the Department of the Central Government specified in the first column.

Defence Department of the Central Government.	1. District Commanders. 2. Commanders of independent brigades. 3. Officers commanding units having mechanically propelled vehicles in their charge. 4. Commanders, Royal Engineers.

PART B.

The authorities specified in the second column may register motor vehicles, the property of the Department of the Central Government specified in the first column, and may grant certificates of fitness in respect of such vehicles.

Defence Department of the Central Government.	The Master General of the Ordinance in India.

PART C.

Registration marks for vehicles registered under section 39.

A broad arrow above two figures representing the last two figures of the year of purchase of the vehicle followed by not more than four figures.

THE FIFTH SCHEDULE.

[*See* sections 19 (2) and (3) and 130.]

Offences on conviction of which an Endorsement shall be made on the Licence of the person effected.

PART A.

1. Driving recklessly or dangerously (section 116).
2 Driving while under the influence of drink or drugs (section 117).
3. Abetment of an offence under section 116 or 117 (section 119).
4. Taking part in unauthorised race or trial of speed (section 120).
5. Driving when disqualified (section 18).
6. Obtaining or applying for a licence without giving particulars of endorsement (section 114).
7. Failing to stop on the occurrence of an accident (section 87).
8. Altering a licence or using an altered licence.
9. Any offence punishable with imprisonment in the commission of which a motor vehicle was used.

PART B.

1. Driving without a licence, or without a licence which is effective, or without a licence applicable to the vehicle driven (section 3).
2. Allowing a licence to be used by another person [section 6 (2)].
3. Driving at excessive speed (section 115).
4. Driving when mentally or physically unfit to drive (section 118).
5. Abetment of an offence punishable under section 115 or 118.
6. Refusing or failing within specified time to produce licence (section 86).
7. Failing to stop when required (section 87).
8. Driving an unregistered vehicle (section 22).
9 Driving a transport vehicle not covered by a certificate of fitness (section 38).
10. Driving in contravention of any rule made under section 70 (2) (*g*) relating to speed governors.
11. Driving a vehicle exceeding the permissible limit of weight (section 124).
12. Failure to comply with a requisition made under section 73.
13. Using a vehicle in unsafe condition (section 121).
14. Driving a transport vehicle in contravention of section 42.

THE SIXTH SCHEDULE.

[*See* sections 24 (3) and 29 (2).]

Registration Marks.

One of the groups of letters specified in the second column followed by any one other letter shall be used as the registration mark for a vehicle in the province specified in the first column.

Assam	AS.
Bengal . . .	BG, BL.
Bihar . . .	BR.
Bombay . . .	BM, BY.
Central Provinces and Berar .	CP.
Madras . .	MD, MS.
North-West Frontier Province .	FP.
Orissa . . .	OR.
Sind . . .	KA.
Punjab . . .	PB, PJ.
United Provinces . .	UP, US.
Ajmer-Merwara . .	AJ.
Coorg . . .	CG.
Delhi . . .	DL.

Note.—These letters shall be followed by not more than four figures, and the letters and figures shall be shown—

1. In the case of transport vehicles .	In black on a white ground.
2. In the case of temporary registrations (section 25) . . .	In red on a yellow ground.
3. In the case of registration marks allotted to dealers [section 41 (2) (*k*)]	In white on a red ground.
4. In other cases . . .	In white on a black ground.

THE SEVENTH SCHEDULE.

[*See* section 37 (2).]

Maximum Axle Weights permissible for Transport Vehicles.

TABLE A.

For each low pressure pneumatic tyre fitted to a wheel on the axle, of a nominal size—	The permissible weight in pounds is—	For each low pressure pneumatic tyre fitted to a wheel on the axle, of a nominal size—	The permissible weight in pounds is
5.00-17	980	7.50-18	2,450
5.25-17	1,060	7.50-20	2,650
5.25-18	1,100	7.50-24	2,650
5.50-17	1,140	8.25-18	2,900
5.50-18	1,195	8.25-20	3,100
5.50-20	1,225	8.25-22	3,100
6.00-16	1,200	8.25-24	3,100
6.00-17	1,350	9.00-15	2,650
6.00-18	1,450	9.00-18	3,300
6.00-20	1,550	9.00-20	3,550
6.25-16	1,300	9.00-22	3,550
6.50-16	1,400	9.00-24	3,650
6.50-17	1,550	9.75-15	3,175
6.50-18	1,700	9.75-18	3,900
6.50-20	1,850	9.75-20	4,200
7.00-15	1,500	9.75-22	4,200
7.00-16	1,675	9.75-24	4,400
7.00-17	1,850	10.50-20	4,850
7.00-18	2,050	10.50-22	5,000
7.00-20	2,200	10.50-24	5,200
7.50-15	1,700	11.25-20	5,450
7.50-16	2,050	11.25-22	5,800
7.50-17	2,150	11.25-24	6,050

TABLE B.

For each high pressure pneumatic tyre fitted to a wheel on the axle, of a nominal size—	The permissible weight in pounds is—	For each high pressure pneumatic tyre fitted to a wheel on the axle, of a nominal size—	The permissible the weight in pounds is—
		36×7	3,300
30×5	2,000	38×7	3,300
33×5	2,000	36×8	4,000
34×5	2,000	38×8	4,200
35×5	2,000	40×8	4,400
32×6	2,650	38×9	4,850
34×6	2,650	40×9	5,100
36×6	2,650	42×9	5,300
32×6½	2,950	40×10	5,700
32×7	3,000	44×10	6,150
34×7	3,300		

Explanation.—The figures "5.00-17", etc., in Table A represent, respectively, the nominal sectional diameter of the tyre and the diameter of the wheel rim; and the figures "30×5", etc., in Table B represent, respectively, the over-all diameter of wheel and tyre and the nominal sectional diameter of the tyre, all figures being in inches. The actual sectional diameter of the tyre when mounted on its appropriate rim and inflated shall in no case be less than the nominal sectional diameter.

Note—Tyres may be calibrated in so-called metric sizes, for example, "170×20". In that case the first number represents the sectional diameter of the tyres in millimetres and the second number represents the diameter of the rim in inches. The permissible weight in pounds for each such tyre shall be determined by dividing the nominal sectional diameter of the tyre in millimetres by the figure 25·4, the quotient being the nominal sectional diameter in inches. The permissible weight given in Table A for the nearest equivalent nominal sectional diameter in inches and the actual rim-diameter shall be the permissible weight for that tyre.

THE EIGHTH SCHEDULE.

(*See* section 71.)

Limits of Speed for Motor Vehicles.

Class of Vehicle.	Maximum speed per hour. *Miles.*
1. Passenger vehicles, that is to say, vehicles constructed solely for the carriage of passengers and their effects:—	
(*a*) if all the wheels are fitted with pneumatic tyres and the vehicle is not drawing a trailer:—	
(*i*) if the vehicle is a motor cycle, motor car or motor cab.	No limit.
(*ii*) if the vehicle is a public service vehicle other than a motor cab	30
(*b*) if the vehicle, being a motor car or motor cab, is drawing two-wheeled trailer of a laden weight not exceeding 1,700 pounds *avoirdupois*, and if all the wheels of the vehicle and trailer are fitted with pneumatic tyres . .	30
(*c*) any other vehicle, including an invalid carriage . .	20
2. Goods vehicles, that is to say, vehicles constructed or adapted for use or used for the conveyance of goods:—	
(*a*) if all the wheels are fitted with pneumatic tyres and the vehicle is a light transport vehicle and is not drawing a trailer	25
(*b*) in any other case	15
3. Tractors:—	
(*a*) if drawing not more than one trailer and all the wheels of the tractor and trailer are fitted with pneumatic tyres. .	15
(*b*) in any other case	6
4. Locomotives, whether drawing a trailer or not	6

THE NINTH SCHEDULE.

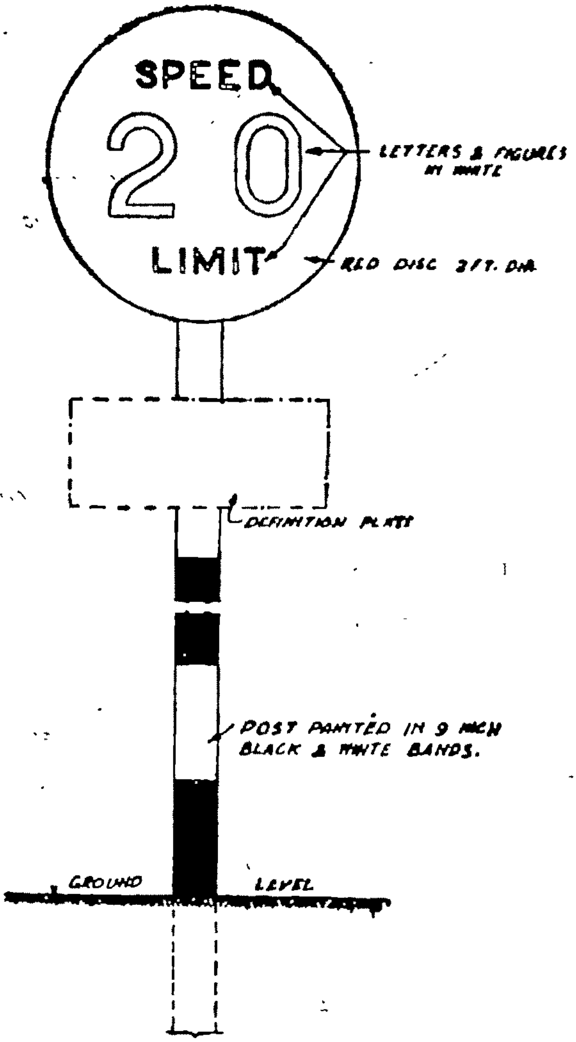
(*See* sections 75, 77 and 78.)

TRAFFIC SIGNS.

PART A.—MANDATORY SIGNS.

NO. 1

SPEED LIMIT



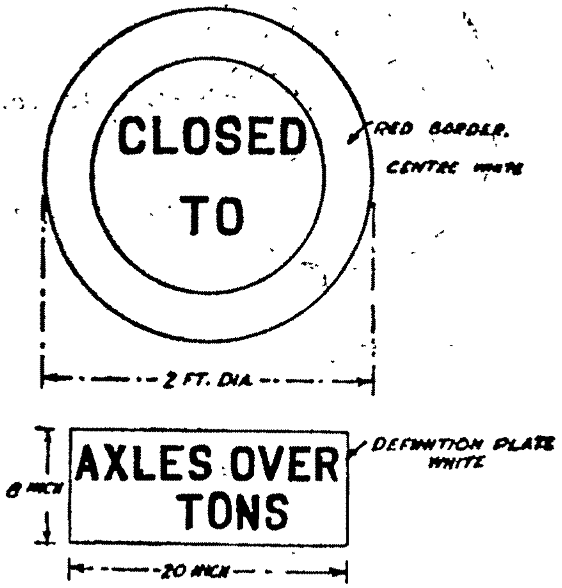
Note:—

(1) The figure 20 is given merely as an example. The actual figures will be as prescribed in each case where this sign is used.

(2) The general design of the post is given for guidance.

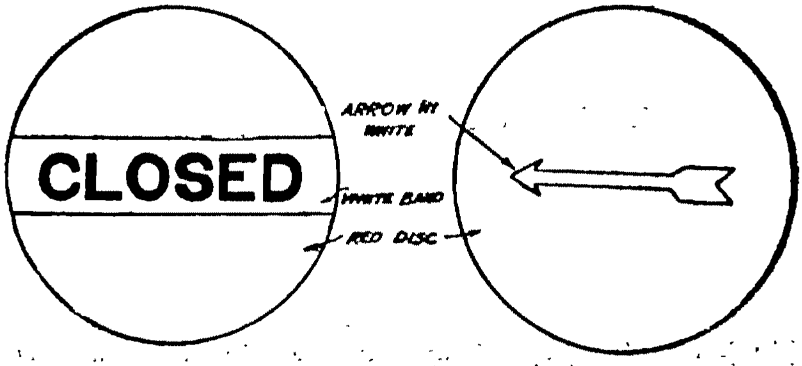
(3) Where the speed limit is, or is to be, imposed only on a certain class or classes of motor vehicle the class or classes will be specified on the "definition plate". Where in addition to a general speed limit applicable to other motor vehicles a special speed limit is, or is to be, imposed on vehicles of a certain class or classes, the general speed limit will be specified on the disc and the special speed limit together with the class or classes of vehicle to which it applies will be specified on the "definition plate".

NO. 2
WEIGHT LIMIT

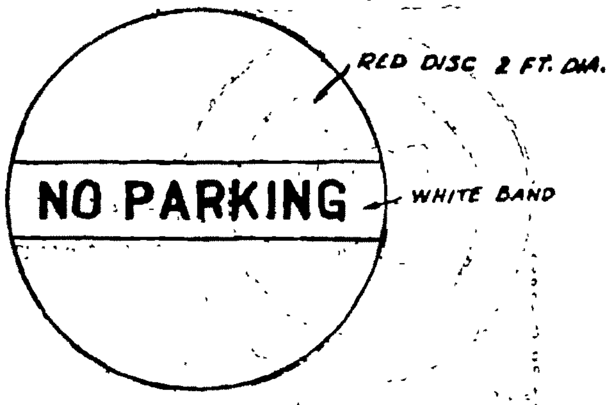


NO. 3
TOTAL PROHIBITION

NO. 4
DIRECTION SIGN



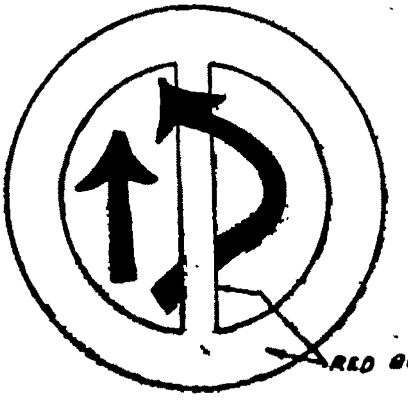
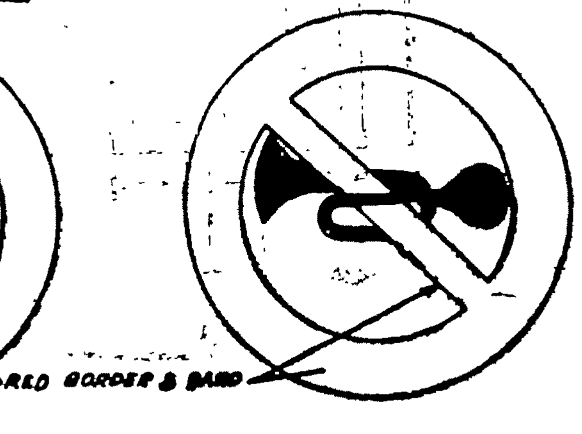
NO. 5
NO PARKING



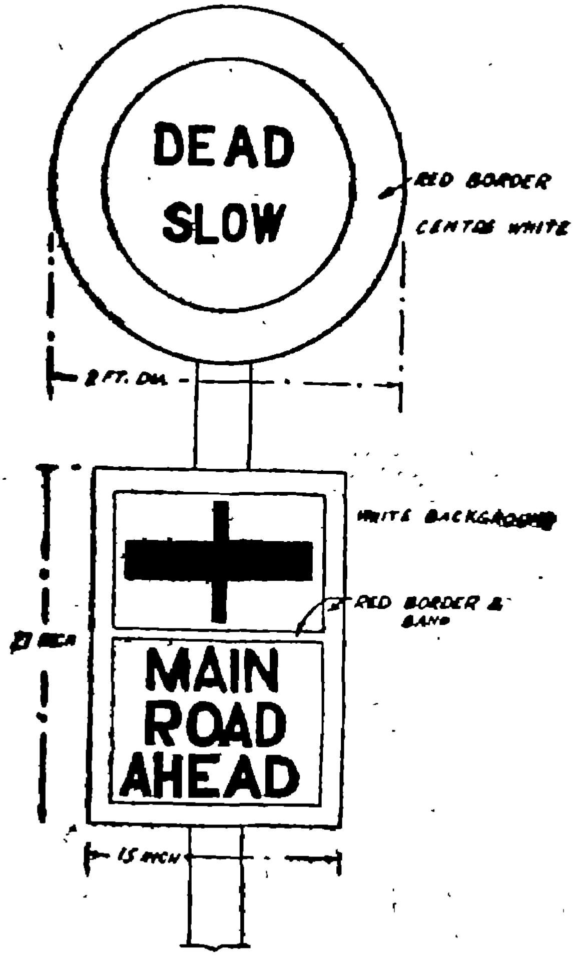
Note.—Sign No. 5 as here set forth may be amplified by instructions inscribed upon a definition plate placed below it as in the general arrangement set forth in Sign No. 1 of this Part. Upon the definition plate may be set forth the times during which parking is prohibited. In like manner an arrow-head inscribed on the definition plate will indicate that parking is prohibited on that part of the street or road lying to the side of the sign to which the arrow-head points.

NO. 6
OVERTAKING PROHIBITED

NO 7
USE OF SOUND SIGNALS PROHIBITED

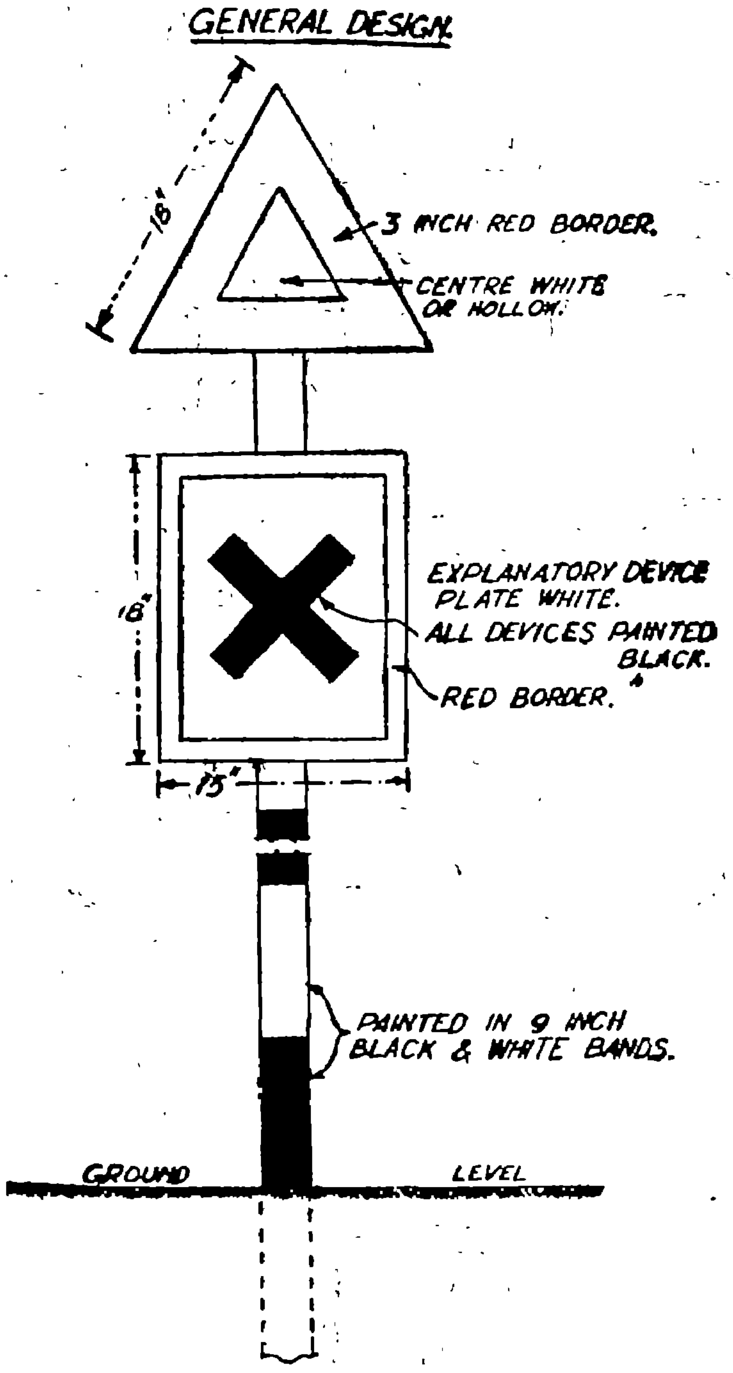



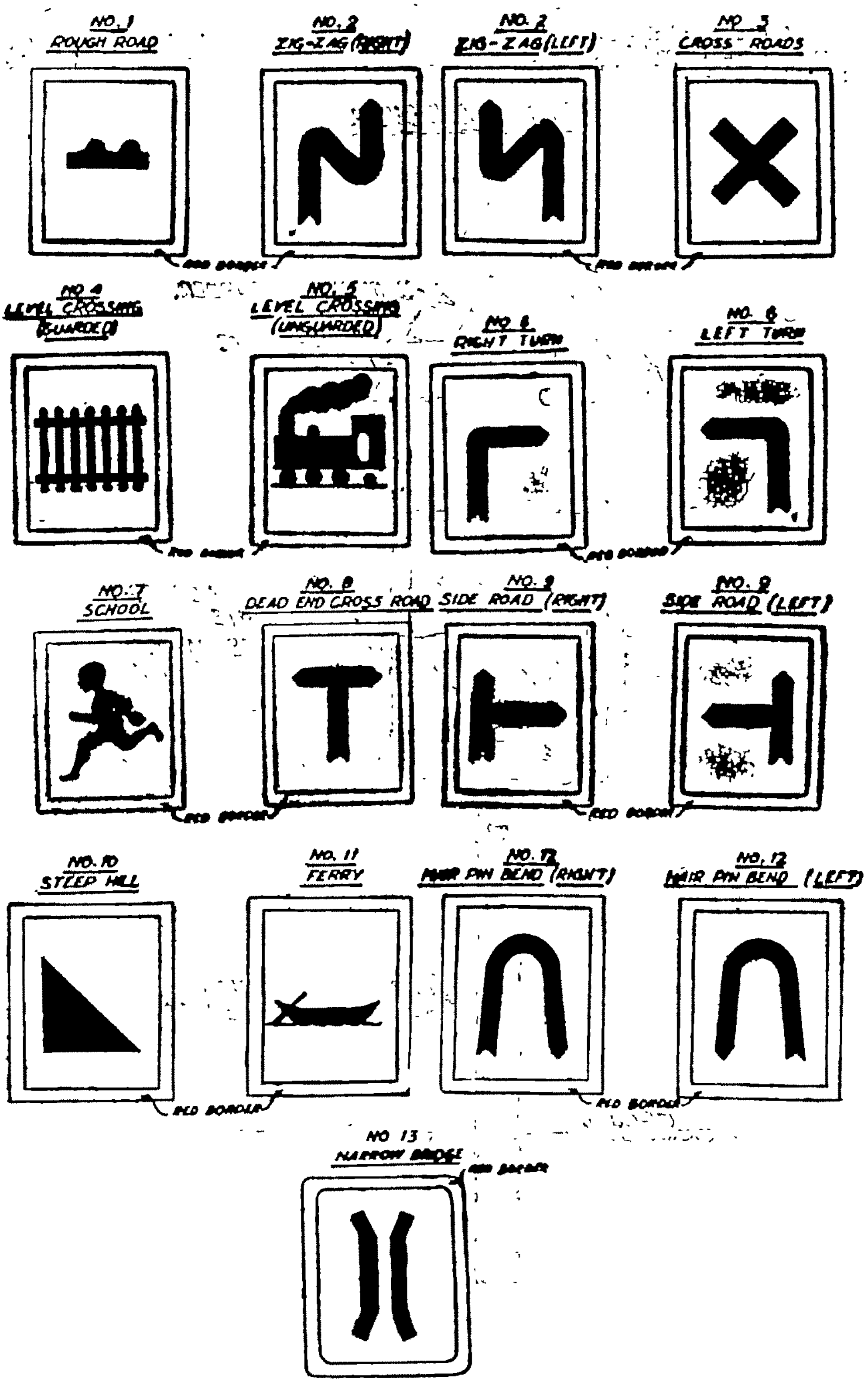
NO 8
MAIN ROAD AHEAD



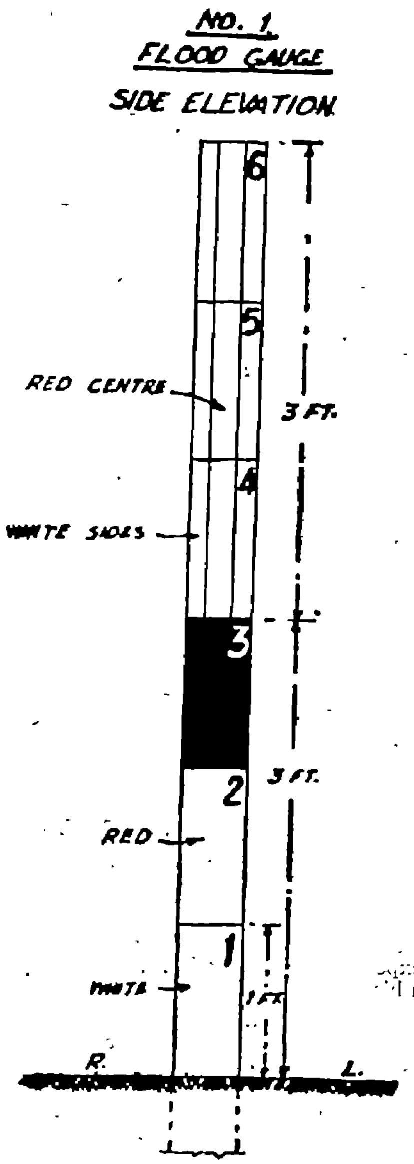
PART B.—CAUTIONARY SIGNS.

The signs of this Part shall be used in conjunction with a red triangular plate, the centre of which shall be either hollow or painted white, in the manner indicated in the general design reproduced below.

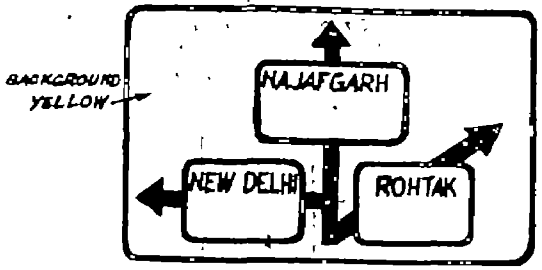



NO. 1
ROUGH ROAD
NO. 2
ZIG-ZAG (RIGHT)
NO. 2
ZIG-ZAG (LEFT)
NO. 3
CROSS ROADS
NO. 4
LEVEL CROSSING (GUARDED)
NO. 5
LEVEL CROSSING (UNGUARDED)
NO. 6
RIGHT TURN
NO. 6
LEFT TURN
NO. 7
SCHOOL
NO. 8
DEAD END CROSS ROAD
NO. 9
SIDE ROAD (RIGHT)
NO. 9
SIDE ROAD (LEFT)
NO. 10
STEEP HILL
NO. 11
FERRY
NO. 12
HAIR PIN BEND (RIGHT)
NO. 12
HAIR PIN BEND (LEFT)
NO 13
NARROW BRIDGE
RED BORDER

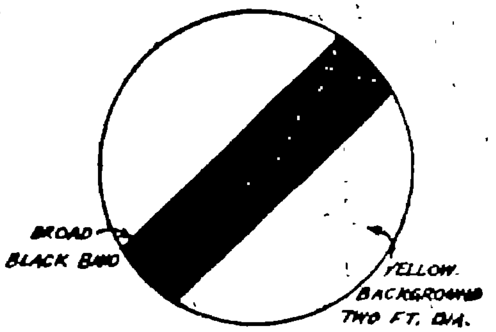
PART C.—INFORMATORY SIGNS.



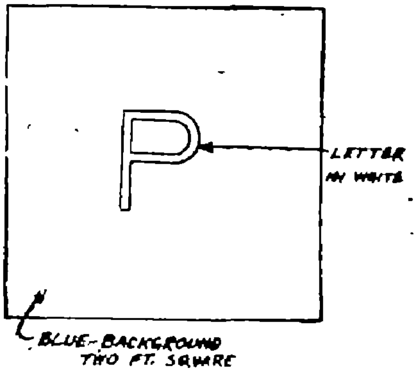
NO. 2
ROAD JUNCTION APPROACH.



NO. 3
END OF SPEED LIMIT.



NO. 4
PARKING SIGN.



THE TENTH SCHEDULE.

(*See* sections 77 and 78.)

DRIVING REGULATIONS.

1. The driver of a motor vehicle shall drive the vehicle as close to the left hand side of the road as may be expedient, and shall allow all traffic which is proceeding in the opposite direction to pass him on his right hand side.

2. Except as provided in regulation 3, the driver of a motor vehicle shall pass to the right of all traffic proceeding in the same direction as himself.

3. The driver of a motor vehicle may pass to the left of a vehicle the driver of which having indicated an intention to turn to the right has drawn to the centre of the road and may pass a tram-car or other vehicle running on fixed rails, whether travelling in the same direction as himself or otherwise, on either side:

Provided that in no case shall he pass a tram-car at a time or in a manner likely to cause danger or inconvenience to other users of the road or pass on the left hand side a tram-car, which when in motion would be travelling in the same direction as himself, while the tram-car is at rest for the purpose of setting down or taking up passengers.

4. The driver of a motor vehicle shall not pass a vehicle travelling in the same direction as himself—

(*a*) if his passing is likely to cause inconvenience or danger to other traffic proceeding in any direction, or

(*b*) where a point or corner or a hill or an obstruction of any kind renders the road ahead not clearly visible

5. The driver of a motor vehicle shall not, when being overtaken or being passed by another vehicle, increase speed or do anything in any way to prevent the other vehicle from passing him.

6. The driver of a motor vehicle shall slow down when approaching a road intersection, a road junction or a road corner, and shall not enter any such intersection or junction until he has become aware that he may do so without endangering the safety of persons thereon.

7. The driver of a motor vehicle shall on entering a road intersection, if the road entered is a main road designated as such, give way to the vehicles proceeding along that road, and in any other case give way to all traffic approaching the intersection on his right hand.

8. The driver of a motor vehicle shall, when passing or meeting a procession or a body of troops or police on the march or when passing workmen engaged on road repair, drive at a speed not greater than fifteen miles an hour.

9. The driver of a motor vehicle shall—

(a) when turning to the left, drive as close as may be to the left hand side of the road from which he is making the turn and of the road which he is entering;

(b) when turning to the right, draw as near as may be to the centre of the road along which he is travelling and cause the vehicle to move in such a manner that—

(i) as far as may be practicable it passes beyond, and so as to leave on the driver's right hand, a point formed by the intersection of the centre lines of the intersecting roads; and

(ii) it arrives as near as may be at the left hand side of the road which the driver is entering.

THE ELEVENTH SCHEDULE.

(*See* section 79.)

SIGNALS.

1. When about to turn to the right or to drive to the right hand side of the road in order to pass another vehicle or for any other purpose, a driver shall extend his right arm in a horizontal position outside of and to the right of his vehicle with the palm of the hand turned to the front.

2. When about to turn to the left or to drive to the left hand side of the road, a driver shall extend his right arm and rotate it in an anti-clockwise direction.

3. When about to slow down, a driver shall extend his right arm with the palm downward and to the right of the vehicle and shall move the arm so extended up and down several times in such a manner that the signal can be seen by the driver of any vehicle which may be behind him.

4. When about to stop, a driver shall raise his right forearm vertically outside of and to the right of the vehicle, palm to the front.

5. When a driver wishes to indicate to the driver of a vehicle behind him that he desires that driver to overtake him, he shall extend his right arm and hand horizontally outside of and to the right of the vehicle and shall swing the arm backwards and forwards in a semi-circular motion.

THE INDIAN COTTON CESS (AMENDMENT) ACT, 1939.

ACT No. V OF 1939.

[*17th February, 1939.*

An Act further to amend the Indian Cotton Cess Act, 1923

WHEREAS it is expedient further to amend the Indian Cotton Cess Act, 1923, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called the INDIAN COTTON CESS (AMENDMENT) ACT, 1939.

Amendment of section 2, Act XIV of 1923.

2. In section 2 of the Indian Cotton Cess Act, 1923, (hereinafter referred to as the said Act),—

(a) the word "and" at the end of clause (e) shall be omitted; and

(*b*) after clause (*f*), the following clause shall be added, namely:—

"(*g*) a reference to British India includes a reference to Berar".

Amendment of section 4, Act XIV of 1923.

3. In clause (*viii*) of section 4 of the said Act, for the word "ten" the word "eleven" and for the words "one to represent the industry in Bombay" the words "two to represent the industry in Bombay" shall be substituted.

THE INDIAN MERCHANT SHIPPING (AMENDMENT) ACT, 1939.

ACT NO. VI OF 1939.

[*17th February, 1939.*

An Act further to amend the Indian Merchant Shipping Act, 1923.

WHEREAS it is expedient further to amend the Indian Merchant Shipping Act, 1923, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN MERCHANT SHIPPING (AMENDMENT) ACT, 1939.

Amendment of section 62, Act XXI of 1923.

2. In section 62 of the Indian Merchant Shipping Act, 1923, sub-section (2) shall be re-numbered as sub-section (3) and the following shall be inserted as sub-section (2), namely:—

"(2) The provisions of clauses (*b*) and (*c*) of sub-section (1) shall not apply to so much of the wages of a seaman as have been or are hereafter assigned by way of contribution to any fund approved in this behalf by the Central Government, the main purpose of which is the provision of benefits for seamen on retirement; and the provisions of clauses (*a*) and (*d*) of sub-section (1) shall not apply to anything done or to be done for giving effect to such an assignment."

THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1939.

ACT NO. VII OF 1939.

[*17th February, 1939.*

An Act further to amend the Indian Income-tax Act, 1922.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1939.

(2) This section and Part I shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint, and Part II shall come into force on such subsequent date, not later than two years from the date appointed for the coming into force of Part I, as the Central Government may, in like manner, appoint:

Provided that sub-clauses (*iii*) and (*iv*) of clause (*b*) of section 11 shall not take effect earlier than the 1st day of April, 1940.

PART I.

Amendment of section 2, Act XI of 1922.

2. In section 2 of the Indian Income-tax Act, 1922 (hereinafter referred to as the said Act),—

(*a*) in clause (3), before the word "Assistant", in both places where it occurs, the word "Appellate" shall be inserted;

(*b*) after clause (6) the following clause shall be inserted, namely:—

(6-A) 'dividend' includes—

(*a*) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;

(*b*) any distribution by a company of debentures or debenture-stock, to the extent to which the company possesses accumulated profits, whether capitalised or not;

(*c*) any distribution made to the shareholders of a company out of accumulated profits of the company on the liquidation of the company:

Provided that only the accumulated profits so distributed which arose during the six previous years of the company preceding the date of liquidation shall be so included; and

(*d*) any distribution by a company on the reduction of its capital to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not:

Provided that 'dividend' does not include a distribution in respect of any share issued for full cash consideration which is not entitled in the event of liquidation to participate in the surplus assets, when such distribution is made in accordance with sub-clause (*c*) or (*d*).

Explanation.—The words 'accumulated profits', wherever they occur in this clause, shall not include 'capital profit'.";

(*c*) existing clause (6-A) shall be re-numbered as clause (6-B) and, in that clause, as so re-numbered, for the words and figures "the Indian Contract Act, 1872;" the words and figures "the Indian Partnership Act, 1932:" shall be substituted, and the following words shall be added, namely:—

"provided that the expression 'partner' includes any person who being a minor has been admitted to the benefits of partnership;";

(*d*) after clause (6-B), as so re-numbered, the following clauses shall be inserted, namely:—

"(6-C) 'income' includes anything included in 'dividend' as defined in clause (6A) and anything which under *Explanation 2* to sub-section (1) of section 7 is a profit received in lieu of salary for the purposes of that sub-section and any sum deemed to be profits under the second proviso to clause (*vii*) of sub-section (2) of section 10 and the profits of any business of insurance carried on by a mutual insurance company computed in accordance with Rule 9 in the Schedule;

(6-D) 'Inspecting Assistant Commissioner' means a person appointed to be an Inspecting Assistant Commissioner of Income-tax under section 5;";

(*e*) in clause (9), after the word "family", the words "and a local authority" shall be inserted;

(*f*) in clause (11),—

(i) after the word "means" the following words shall be inserted, namely:—

"in respect of any separate source of income, profits and gains";

(ii) for the proviso to sub-clause (*a*) the following proviso shall be substituted, namely:—

"Provided that where an assessee has once been assessed in respect of a particular source of income, profits and gains, he shall not in respect of that source exercise this option so as to vary the meaning of the expression 'previous year' as then applicable to him except with the consent of the Income-tax Officer and upon such conditions as the Income-tax Officer may think fit; or";

(iii) after sub-clause (*b*) the following shall be added, namely:—

"or

(*c*) where a business, profession or vocation has been newly set up in the financial year preceding the year for which the assessment is to be made, the period from the date of the setting up of the business, profession or vocation to the 31st day of March next following or to the last day of the period determined under sub-clause (*b*), or, if the accounts of the assessee are made up to some other date than the 31st day of March and the case is not one for which a period has been determined by the Central Board of Revenue under sub-clause (*b*), then, at the option of the assessee, the period from the date of the setting up of the business, profession or vocation to such other date:

Provided that when such other date does not fall between the setting up of the business, profession or vocation and the next following 31st day of March, it shall be deemed that there is no previous year; and

when the assessee is a partner in a firm, 'previous year' in respect of his share of the income, profits and gains of the firm means the previous year as determined for the assessment of the income, profits and gains of the firm;"; and

(*g*) in clause (15), for the words "from all sources to which this Act applies" the words, brackets and figures "referred to in sub-section (1) of section 4" shall be substituted, for the word and figures "section 16" the words "this Act" shall be substituted, and the following words shall be added, namely:—

" 'total world income' includes all income, profits and gains wherever accruing or arising except income to which, under the provisions of sub-section (3) of section 4, this Act does not apply; and".

Amendment of section 3, Act XI of 1922.

3. In section 3 of the said Act, the words "applicable to the total income of an assessee" shall be omitted; for the words "all income, profits and gains" the words "the total income" shall be substituted, and for the words "company, firm and other association of individuals" the words "company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually" shall be substituted.

Amendment of section 4, Act XI of 1922.

4. In section 4 of the said Act,—

(*a*) for sub-sections (1) and (2) the following sub-sections shall be substituted, namely:—

"(1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—

(*a*) are received or are deemed to be received in British India in such year by or on behalf of such person, or

(*b*) if such person is resident in British India during such year,—

(*i*) accrue or arise or are deemed to accrue or arise to him in British India during such year, or

(ii) accrue or arise to him without British India during such year, or

(iii) having accrued or arisen to him without British India before the beginning of such year and after the 1st day of April, 1933, are brought into or received in British India by him during such year; or

(*c*) if such person is not resident in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year:

Provided that there shall not be included in any assessment for the year ending on the 31st day of March, 1940, both the amount of the income, profits and gains referred to in sub-clause, (*ii*) of clause (*b*) and the amount of the income, profits and gains referred to in sub-clause (*iii*) of clause (*b*) but only the greater of these two amounts:

Provided further that, in the case of a person not ordinarily resident in British India, income, profits and gains which accrue or arise to him without British India shall not be so included unless they are derived from a business controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during such year:

Provided further that if in any year the amount of income accruing or arising without British India exceeds the amount brought into British India in that year, there shall not be included in the assessment of the income of that year so much of such excess as does not exceed four thousand five hundred rupees.

Explanation 1.—Income, profits and gains accruing or arising without British India shall not be deemed to be received in or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in a balance-sheet prepared in British India.

Explanation 2.—Income which would be chargeable under the head 'Salaries' if payable in British India and not being pension payable without India shall be deemed to accrue or arise in British India wherever paid if it is earned in British India.

Explanation 3.—A dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India.

(2) For the purposes of sub-section (1), where a husband is not resident in British India, remittances received by his wife resident in British India out of any part of his income which is not included in his total income shall be deemed to be income accruing in British India to the wife.";

(*b*) in sub-section (3),—

(i) for the words "This Act shall not apply to the following classes of income" the words "Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them" shall be substituted;

(ii) after clause (i) the following clause shall be inserted, namely:—

"(ia) Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and—

(*a*) the business is carried on in the course of the carrying out of a primary purpose of the institution, or

(*b*) the work in connection with the business is mainly carried on by beneficiaries of the institution.";

(iii) to clause (iii) the following words shall be added, namely:—

"except income from a trade or business carried on by the authority so far as that income is not income arising from the supply of a commodity or service within its own jurisdictional area";

(iv) in clause (iv), for the figures "1897" the figures "1925" shall be substituted;

(v) clause (v) shall be omitted;

(vi) to the last paragraph the following words shall be added, namely:—

", but nothing contained in clause (i), clause (*ia*) or clause (*ii*) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public".

Insertion of new sections 4-A and 4-B in Act XI of 1922.

5. After section 4 of the said Act and in Chapter I the following sections shall be inserted, namely:—

Residence in British India.

"4-A. For the purposes of this Act—

(*a*) any individual is resident in British India in any year if he—

(i) is in British India in that year for a period amounting in all to one hundred and eighty-two days or more; or.

(ii) maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to one hundred and eighty-two days or more in that year, and is in Britsh India for any time in that year; or

(iii) having within the four years preceding that year been in British India for a period of or for periods amounting in all to three hundred and sixty-five days or more, is in British India for any time in that year otherwise than on an occasional or casual visit;

(*b*) a Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India; and

(*c*) a company is resident in British India in any year (*a*) if the control and management of its affairs is situated wholly in British India in that year, or (*b*) if its income arising in British India in that year exceeds its income arising without British India in that year.

Ordinary residence.

4-B. For the purposes of this Act—

(*a*) an individual is 'not ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of, or for periods amounting in all to, more than two years;

(*b*) a Hindu undivided family is deemed to be ordinarily resident in British India if its manager is ordinarily resident in British India;

(*c*) a company, firm or other association of persons is ordinarily resident in British India if it is resident in British India."

Substitution of new section for section 5, Act XI of 1922.

6. For section 5 of the said Act the following section shall be substituted, namely:—

Income-tax authorities.

"5. (1) There shall be the following classes of Income-tax authorities for purposes of this Act, namely:—

(*a*) the Central Board Revenue,

(*b*) Commissioners of Income-tax,

(*c*) Assistant Commissioners of Income-tax who may be either Appellate Assistant Commissioners of Income-tax or Inspecting Assistant Commissioners of Income-tax.

(*d*) Income-tax Officers.

(2) The Central Government may appoint a Commissioner of Income-tax for any area specified in the order of appointment, and may appoint Commissioners of Income-tax, not more than three in all, each to discharge, without reference to area, and to the exclusion of any Commissioner appointed for any area, the functions of a Commissioner in respect of any cases or classes of cases assigned to him by the Central Board of Revenue.

(3) The Central Government may appoint for any area as many Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers as it thinks fit.

(4) Appellate Assistant Commissioners of Income-tax shall be under the direct control of the Central Board of Revenue and shall perform their functions in respect of such persons or classes of persons and of such incomes or classes of income and in respect of such areas as the Central Board of Revenue may direct, and, where two or more Appellate Assistant Commissioners have been appointed for the same area, in accordance with any orders which the Central Board of Revenue may make for the distribution and allocation of the work to be performed.

(5) Inspecting Assistant Commissioners of Income-tax and Income-tax Officers shall perform their functions in respect of such persons or classes of persons and of such incomes or classes of income and in respect of such areas as the Commissioner of Income-tax may direct, and, where two or more Inspecting Assistant Commissioners of Income-tax or Income-tax Officers have been appointed for the same area, in accordance with any orders which the Commissioner of Income-tax may make for the distribution and allocation of the work to be performed. The Commissioner may, with the previous approved of the Central Board of Revenue, by general or special order in writing, direct that the powers conferred on the Income-tax Officer and the Appellate Assistant Commissioner by or under this Act shall, in respect of any specified case or class of cases, be exercised by the Inspecting Assistant Commissioner and the Commissioner, respectively, and, for the purposes of any case in respect of which such order applies, references in this Act or in any rules made hereunder to the Income-tax Officer and the Appellate Assistant Commissioner shall be deemed to be references to the Inspecting Assistant Commissioner and the Commissioner, respectively.

(6) The Central Board of Revenue may, by notification in the official Gazette, empower Commissioners of Income-tax, Appellate or Inspecting Assistant Commissioners of Income-tax and Income-tax Officers to perform such functions in respect of such classes of persons or such classes of income and for such area as may be specified in the notification, and thereupon the functions so specified shall cease within the specified area to be performed in respect of the specified classes of persons or classes of income by the other authorities appointed under sub-sections (2) and (3).

(7) Assistant Commissioners of Income-tax and Income-tax Officers shall, for the purposes of this Act, be subordinate to the Commissioner of Income-tax for the area in which they perform their functions, or where they perform functions assigned to them by a Commissioner of Income-tax appointed without reference to area, to that Commissioner.

(8) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue:

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions."

Amendment of section 6, Act XI of 1922.

7. In section 6 of the said Act, for clauses (iii), (iv), (v) and (vi) the following clauses shall be substituted, namely:—

"(iii) Income from property.

(iv) Profits and gains of business, profession or vocation.

(v) Income from other sources."

Amendment of section 7, Act XI of 1922.

8. In sub-section (1) of section 7 of the said Act,—

(*a*) the words "received by him" shall be omitted;

(*b*) for the words "which are paid by or on behalf of the Crown" the words "which are due to him from, whether paid or not, or are paid by or on behalf of, the Crown" shall be substituted;

(*c*) for the words "by or on behalf of any private employer" the following words shall be substituted, namely:—

"any private employer; and for the purposes of this sub-section advances by way of loan or otherwise of income chargeable under this head shall be deemed to be salary due on the date when the advance is received:

Provided that the tax shall not be payable in respect of any sum which the assessee by the conditions of his employment is required to spend out of his remuneration wholly, necessarily and exclusively in the performance of his duties:";

(*d*) in the existing proviso after the word "Provided" the word "further" shall be inserted;

(*e*) after the proviso the following further proviso shall be inserted, namely:—

"Provided further that where tax is deductible at the source under section 18, the assessee shall not be called upon to pay the tax himself unless he has received the salary without such deduction."; and

(*f*) the existing *Explanation* shall be numbered *Explanation 1*, and after that *Explanation*, the following *Explanation* shall be added, namely:—

"*Explanation 2*.—A payment due to or received by an assessee from an employer or former employer or from a provident or other fund at or in connection with the termination of his employment, whether or not the employment is then terminated or to be terminated, is to the extent to which it does not consist of contributions by the assessee or interest on such contributions a profit received in lieu of salary for the purposes of this sub-section, unless the payment is made solely as compensation for loss of employment and not by way of remuneration for past services:

Provided that nothing herein contained shall render liable to income-tax any payment from a provident fund to which the Provident Funds Act, 1925, applies, or any payment from a recognised provident fund within the meaning of Chapter IX-A if such payment is exempted from payment of income-tax under the provisions of Chapter IX-A, or any payment from an approved super-annuation fund within the meaning of Chapter IX-B made on the death of a beneficiary or in lieu of or in commutation of an annuity, or by way of refund of contributions on the death of a beneficiary or on his leaving the employment in connection with which the fund is established."

Amendment of section 8, Act XI of 1922.

9. In section 8 of the said Act, to the first proviso the following shall be added, namely:—

"or in respect of any interest payable on money borrowed for the purpose of investment in the securities by the assessee except interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, unless in respect of interest which is so chargeable tax has been paid or deducted under section 18, or unless there is a person in British India who may be appointed an agent under section 43 in respect of such interest".

Amendment of section 9, Act XI of 1922.

10. In section 9 of the said Act,—

(*a*) in sub-section (1),—

(i) for the words "under the head 'Property'" the words "under the head 'Income from Property'" shall be substituted, and for the words "his business" the words "any business, profession or vocation carried on by him the profits of which are assessable to tax" shall be substituted;

(ii) for clause (iv) the following clause shall be substituted, namely:—

"(iv) where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge; where the property is subject to an annual charge not being a capital charge, the amount of such charge; where the property is subject to a ground rent, the amount of such ground rent; and where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital:

Provided that no allowance shall be made in respect of any interest or annual charge payable without British India and chargeable under this Act, not being interest on a loan issued for public subscription before the 1st day of April, 1938, except interest or a charge on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent for the payee in British India who may be assessed under section 43;";

(iii) for clause (vii) the following clause shall be substituted, namely:—

"(vii) in respect of vacancies, that part of the net annual value, after deducting the foregoing allowances, which is proportional to the period during which the property is wholly unoccupied or, where the property is let out in parts, that portion of the net annual value, after deducting the foregoing allowances appropriate to any vacant part, which is proportional to the period during which such part is wholly unoccupied;";

(iv) the proviso shall be omitted;

(*b*) after sub-section (2) the following sub-section shall be added, namely:—

"(3) Where property is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with this section shall be included in his total income."

Amendment of section 10, Act XI of 1922.

11. In section 10 of the said Act,—

(*a*) in sub-section (1), for the word "Business" where it first occurs, the words "Profits and gains of business, profession or vocation" shall be substituted, and for the word "business", in all other places where it occurs throughout the section, the words "business, profession or vocation" shall be substituted;

(*b*) in sub-section (2),—

(i) in clause (i), for the words "proportional part" the words "proportional annual value of the part" shall be substituted;

(ii) in clause (iii), the words "where the payment of interest thereon is not in any way dependent on the earning of profits" shall be omitted; and to the clause the following proviso shall be added, namely:—

"Provided that no allowance shall be made under this clause in any case for any interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, except interest on which tax has been paid or from which tax has been deducted under section 18 or in respect of which there is an agent in British India who may be assessed under section 43 or, in the case of a firm, for any interest paid to a partner of the firm;";

(iii) in clause (vi),—

(*a*) for the words "original cost thereof to the assessee" the words "written down value thereof" shall be substituted;

(*b*) in clause (*b*) of the proviso, after the words "in any year" the words and figures "not being a year which ended prior to the 1st day of April, 1939," shall be inserted;

(iv) for clause (vii) the following clause shall be substituted, namely:—

"(vii) in respect of any machinery or plant which has been sold or discarded, the amount by which the written down value of the machinery or plant exceeds the amount for which the machinery or plant is actually sold or its scrap value:

Provided that such amount is actually written off in the books of the assessee:

Provided further that where the amount for which any such machinery or plant is sold exceeds the written down value, the excess shall be deemed to be profits of the previous year in which the sale took place;";

(v) clauses (viia) (viii) and (viiia) shall be re-numbered, respectively, clause (viii), clause (ix) and clause (x), and in clause (*c*) of the proviso to the clause re-numbered clause (x), for the word "businesses," the words "businesses, professions or vocations" shall be substituted;

(vi) after clause (x), as as re-numbered by this Act, the following clause shall be inserted, namely:—

(xi) when the assessee's accounts in respect of any part of his business, profession or vocation are not kept on the cash basis, such sum, in respect of bad and doubtful debts, due to the assessee in respect of that part of his business, profession or vocation, and in the case of an assessee carrying on a banking or money-lending business, such sum in respect of loans made in the ordinary course of such business as the Income-tax Officer may estimate to be irrecoverable but not exceeding the amount actually written off as irrecoverable in the books of the assessee:

Provided that if the amount ultimately recovered on any such debt or loan is greater than the difference between the whole debt or loan and the amount so allowed, the excess shall be deemed to be a profit of the year in which it is recovered, and if less, the deficiency shall be deemed to be a business expense of that year;";

(vii) existing clause (ix) shall be re-numbered (xii), and in that clause, for the brackets and words "(not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains" the brackets and words "(not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation" shall be substituted and the proviso at the end of that clause shall be omitted;

(*c*) for sub-section (3) the following sub-sections shall be substituted, namely:—

"(3) Where any building, machinery, plant or furniture in respect of which any allowance is due under clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (2) is not wholly used for the purposes of the business, profession or vocation, the allowance shall be restricted to the fair proportional part of the amount which would be allowable if such building, machinery, plant or furniture was wholly so used.

(4) Nothing in clause (ix) or clause (xii) of sub-section (2) shall be deemed to authorise the allowance of any sum paid on account of any cess, rate or tax levied on the profits or gains of any business, profession or vocation or assessed at a proportion of or otherwise on the basis of any such profits or gains; and nothing in clause (xii) of sub-section (2) shall be deemed to authorise—

(*a*) any allowance in respect of a payment which is chargeable under the head 'Salaries' if it is payable without British India and tax has not been paid thereon nor deducted therefrom under section 18; or

(*b*) any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm; or

(*c*) any allowance in respect of a payment to a provident or other fund established for the benefit of employees unless the employer has made effective arrangements to scure that tax shall be deducted at source from any payments made from the fund which are taxable under the head 'Salaries'.

(5) In sub-section (2), 'paid' means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section; 'plant' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purposes of the business, profession or vocation; and 'written down value' means—

(*a*) in the case of assets acquired in the previous year, the actual cost to the assessee;

(*b*) in the case of assets acquired before the previous year but after the commencement of the Indian Income-tax (Amendment) Act, 1939, the actual cost to the assessee less all depreciation allowable to him under this section;

(*c*) in the case of assets acquired before the commencement of the Indian Income-tax (Amendment) Act, 1939, the actual cost to the assessee less for each financial year since acquisition the amount of depreciation applicable to the assets at the rates in force for each such year since the 1st day of April, 1922, and at the rates in force on the 1st day of April, 1922, for each such year prior to that date:

Provided that where the provisions of the proviso to sub-section (2) of section 26 are applicable, the actual cost to the assessee referred to in clauses (*a*), (*b*) and (*c*) shall be the actual cost to the person succeeded in the business, profession or vocation:

Provided further that there shall not be so deducted from the actual cost any depreciation allowance or part of any depreciation allowance which was due for a year which ended prior to the 1st day of April, 1939, but to which full effect was not given owing to the absence of profits or gains chargeable for that year, or owing to the profits or gains so chargeable being less than the allowance.

(6) A trade, professional or similar association performing specific services for its members for remuneration definitely related to those services shall be deemed for the purpose of this section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly.

(7) Notwithstanding anything to the contrary contained in section 8, 9, 10, 12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to this Act."

Omission of section 11, Act XI of 1922.

12. Section 11 of the said Act shall be omitted.

Amendment of section 12, Act XI of 1922

13. In section 12 of the said Act,—

(*a*) in sub-section (1), for the words "Other sources" the words "Income from other sources" shall be substituted, and for the words "and from every source to which this Act applies" the words "which may be included in his total income" shall be substituted;

(*b*) in sub-section (2), for the words "provided that no allowance shall be made on account of any personal expenses of the assessee" the following shall be substituted, namely:—

"provided that no allowance shall be made on account of—

(*a*) any personal expenses of the assessee, or

(*b*) any interest chargeable under this Act which is payable without British India, not being interest on a loan issued for public subscription before the 1st day of April, 1938, or not being interest on which tax has been paid or from which tax has been deducted under section 18, or

(*c*) any payment which is chargeable under the head 'Salaries', if it is payable without British India and tax has not been paid thereon nor deducted therefrom under section 18.";

(*c*) after sub-section (2) the following sub-section shall be added, namely:—

"(3) Where an assessee lets on hire machinery, plant or furniture belonging to him, he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of sub-section (2) of section 10."

Insertion of new section 12-A in Act XI of 1922.

14. After section 12 of the said Act the following section shall be inserted, namely:—

Managing Agency Commission.

12-A. Where a managing agent of a company is liable under an agreement made for adequate consideration to share managing agency commission with a third party or parties, the said agent and the said party or parties shall file a declaration showing the proportion in which such commission is shared between them, and on proof to the satisfaction of the Income-tax Officer of the facts contained in such declaration such agent and each such party shall be chargeable only on the share to which such agent or party is entitled under the agreement."

Amendment of section 13, Act XI of 1922.

15. In section 13 of the said Act, the figures "11" shall be omitted.

Amendment of section 14, Act XI of 1922.

16. For sub-section (2) of section 14 of the said Act the following sub-section shall be substituted, namely:—

"(2) The tax shall not be payable by an assessee—

(*a*) if a partner of an unregistered firm, in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in clause (*b*) of sub-section (1) of section 16 on which the tax has already been paid by the firm; or

(*b*) if a member of an association of persons other than a Hindu undivided family, a company or a firm, in respect of any portion of the amount which he is entitled to receive from the association on which the tax has already been paid by the association."

Amendment of section 15, Act XI of 1922.

17. In section 15 of the said Act,—

(*a*) in sub-section (1), for the figures "1897" the figures "1925" shall be substituted, and for the words "by an assessee in respect of any sums paid by him to effect an insurance on his own life or on the life of his wife, or in respect of a contract for a deferred annuity on his own life or on the life of his wife" the words "in respect of any sums paid by an assessee to effect an insurance on the life of the assessee or on the life of a wife or husband of the assessee or in respect of a contract for a deferred annuity on the life of the assessee or on the life of a wife or husband of the assessee" shall be substituted;

(*b*) in sub-section (3), for the word "proviso" the words "second proviso" shall be substituted, and for the words "one-sixth of the total income of the assessee" the following words shall be substituted, namely:—

"in the case of an individual, one-sixth of the total income of the assessee, or six thousand rupees, whichever is less, and in the case of a Hindu undivided family, one-sixth of the total income of the assessee, or twelve thousand rupees, whichever is less".

Amendment of section 16, Act XI of 1922.

18. In section 16 of the said Act,—

(*a*) for sub-sections (1) and (2) the following sub-sections shall be substituted, namely:—

"(1) In computing the total income of an assessee—

(*a*) any sums exempted under the second proviso to sub-section (1) of section 7, the second and third provisoes to section 8, sub-section (2) of section 14 and section 15 shall be included;

(*b*) when the assessee is a partner of a firm, then, whether the firm has made a profit or a loss, his share (whether a net profit or a net loss) shall be taken to be any salary, interest, commission or other remuneration payable to him by the firm in respect of the previous year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction of any interest, salary, commission or other remuneration payable to any partner in respect of the previous year:

Provided that if his share so computed is a loss, such loss may be set off or carried forward and set off in accordance with the provisions of section 24;

(*c*) all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Indian Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disponer shall be deemed to be income of the settlor or disponer, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor:

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settlor, disponer or transferor, or in any way gives the settlor, disponer or transferor a right to reassume power directly or indirectly over the income or assets:

Provided further that the expression 'settlement or disposition' shall for the purposes of this clause include any disposition, trust, covenant, agreement, or arrangement, and the expression 'settlor or disponer' in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made:

Provided further that this clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the settlor or disponer derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him.

(2) For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him, and shall be increased by the amount of income-tax (but not super-tax) payable thereon calculated at the rate applicable to the total income of a company for the financial year in which the dividend is paid, credited or distributed or deemed to have been paid, credited or distributed:

Provided that when any portion of the profits and gains of the company out of which such dividend has been paid, credited or distributed or deemed to have been paid, credited or distributed was not liable to income-tax in the hands of the company, the income-tax to be added under this section shall be calculated upon only such proportion of the dividend as the amount of the profits and gains of the company liable to income-tax bears to the total profits and gains of the company.";

(*b*) in sub-clause (iv) of clause (*a*) of sub-section (3), after the words "by such individual" the words "otherwise than for adequate consideration" shall be inserted;

(*c*) in clause (*b*) of sub-section (3), for the words "association of individuals" the words "person or association of persons" shall be substituted, the words "consisting of such individual and his wife" shall be omitted, for the words "to the association" the words "otherwise than for adequate consideration to the person or association" shall be substituted, and to the clause the words "for the benefit of his wife or a minor child or both" shall be added.

Substitution of new section for section 17, Act XI of 1922.

19. For section 17 of the said Act the following section shall be substituted, namely:—

Determination of tax payable in certain special cases.

"17. (1) Where a person is not resident in British India, and is a British subject as defined in section 17 of the British Nationality and Status of Aliens Act, 1914, or a subject of a State in India or Burma, the tax, including super-tax, payable by him or on his behalf on his total income shall be an amount bearing to the total amount of the tax including super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income; and in the case of any other non-resident person, the income-tax payable by him or on his behalf on his total income shall be at the maximum rate and the super-tax payable thereon shall be an amount bearing to the total amount of super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his total world income.

(2) Where there is included in the total income of any assessee any income (including income from a share in an unregistered firm, if assessed as such) exempted from tax by or under the provisions of this Act, the income-tax excluding super-tax payable by the assessee shall be an amount bearing to the total amount of the income-tax excluding super-tax which would have been payable on the total income had no part of it been exempted the same proportion as the unexempted portion of the total income bears to the total income."

Amendment of section 18, Act XI of 1922.

20. In section 18 of the said Act,—

(*a*) in sub-section (2), for the words "but not super-tax" the words "and super-tax" shall be substituted, and for the words "at the rate applicable to the estimated income of the assessee under this head" the words "at a rate representing the average of the rates applicable to the estimated total income of the assessee under this head" shall be substituted;

(*b*) after sub-section (2-A) the following sub-section shall be inserted, namely:—

"(2-B) Any person responsible for paying any income chargeable under the head 'Salaries' to a person not resident in British India shall at the time of payment deduct income-tax at the maximum rate and also super-tax at the rate or rates applicable to the estimated income of the assessee under this head.";

(*c*) in the proviso to sub-section (3), after the words "the total income" the words "or the total world income" shall be inserted and for the words "herein referred to" the words, brackets, figure and letter "referred to in this sub-section or in sub-section (2-B), as the case may be," shall be substituted;

(*d*) after sub-section (3) the following sub-section shall be inserted, namely:—

"(3-A) Any person responsible for paying to a person not resident in British India any interest not being 'Interest on Securities', or any other sum chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay income-tax thereon as an agent, deduct income-tax at the maximum rate.";

(*e*) existing sub-sections (3-A), (3-B), (3-C) and (3-D) shall be re-numbered, respectively, (3-B), (3-C), (3-D) and (3-E);

MADRAS ACTS, 1939.

THE MADRAS REGISTRATION OF BIRTHS AND DEATHS (AMENDMENT) ACT, 1939.

ACT No. I OF 1939.

[*14th February, 1939.*

An Act to amend the Madras Registration of Births and Deaths Act, 1899, *for a certain purpose.*

WHEREAS it is expedient to amend the Madras Registration of Births and Deaths Act, 1899, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS REGISTRATION OF BIRTHS AND DEATHS (AMENDMENT) ACT, 1939.

Amendment of section 19, Madras Act III of 1899.

2. In sub-section (1) of section 19 of the Madras Registration of Births and Deaths Act, 1899, for the words "the Tahsildar" in the first place where they occur, the words "a Tahsildar or Deputy Tahsildar", and for the words "the Tahsildar" in the second place where they occur, the words "the Tahsildar or Deputy Tahsildar" shall be substituted.

THE MADRAS ELEMENTARY EDUCATION (AMENDMENT) ACT, 1939.

ACT No. II OF 1939.

[*14th February, 1939.*

An Act further to amend the Madras Elementary Education Act, 1920, *the Madras Local Boards and Elementary Education (Amendment) Act,* 1934, *and the Madras Elementary Education (Amendment) Act,* 1935, *for certain purposes.*

WHEREAS it is expedient further to amend the Madras Elementary Education Act, 1920, the Madras Local Boards and Elementary Education (Amendment) Act, 1934, and the Madras Elementary Education (Amendment) Act, 1935, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE MADRAS ELEMENTARY EDUCATION (AMENDMENT) ACT, 1939.

(2) It shall come into force on such date as the Provincial Government may, by notification in the Official Gazette, appoint.

Amendment of section 3, Madras Act VIII of 1920.

2. In section 3 of the Madras Elementary Education Act, 1920 (hereinafter referred to as the said Act)—

(i) in clause (ii), for the words "'District Educational Officer' and 'Inspectress of Girls' Schools'", the words "and 'District Educational Officer'", and for the words "District Educational Officer or Inspectress of Girls' Schools", the words "or District Educational Officer" shall be substituted;

(ii) clause (iii) shall be omitted; and

(iii) in clause (vi), for the words and figures "under section 41", the words "by the Director of Public Instruction or by such authority as may be empowered by him in this behalf" shall be substituted.

Repeal of Chapter II, Madras Act VIII of 1920.

3. Chapter II of the said Act shall be omitted.

Amendment of section 38, Madras Act VIII of 1920.

4. In sub-section (1) of section 38 of the said Act, the words "the district educational council and" shall be omitted.

Repeal of Chapter IV, Madras Act VIII of 1920.

5. Chapter IV of the said Act shall be omitted.

Amendment of section 45, Madras Act VIII of 1920.

6. In sub-section (1) of section 45 of the said Act, for the words "through the district educational council", the words "through the Director of Public Instruction" shall be substituted.

Amendment of section 45-A, Madras Act VIII of 1920.

7. In sub-section (1) of section 45-A of the said Act, the words "the district educational council and" shall be omitted.

Amendment of section 47, Madras Act VIII of 1920.

8. In the proviso to sub-section (2) of section 47 of the said Act, for the words "the District Educational Council", the words "the District Educational Officer" shall be substituted.

Repeal of Chapter VI, Madras Act VIII of 1920

9. Chapter VI of the said Act shall be omitted.

Amendment of section 56, Madras Act VIII of 1920.

10. In sub-section (2) of section 56 of the said Act—

(i) clauses (*c*), (*d*) and (*e*) shall be omitted;

(ii) in clause (*f*), the words "by district educational councils" shall be omitted; and

(iii) clause (i) shall be omitted.

Amendment of Schedule, Madras Act II of 1934.

11. Rules 9 and 10 of the Schedule to the Madras Local Boards and Elementary Education (Amendment) Act, 1934, shall be omitted.

Repeal of section 13, Madras Act XI of 1935.

12. Section 13 of the Madras Elementary Education (Amendment) Act, 1935, shall be omitted.

Audit of accounts of district educational councils up to the commencement of the Act.

13. The accounts of every district educational council up to the date on which this Act comes into force, shall be examined and audited by an officer appointed by the Provincial Government in that behalf.

Continuance of orders according recognition or admitting schools to aid.

14. All orders of recognition in respect of elementary schools and all orders admitting elementary schools to aid, made or deemed to have been made by a district educational council before the commencement of this Act under sections 41 and 42 of the said Act respectively, shall be deemed to have been made by the Director of Public Instruction or by such authority as may be empowered by him after this Act comes into force to grant recognition to elementary schools or to admit elementary schools to aid, as the case may be, and any such order shall be liable to cancellation or modification as if it had been made after the commencement of this Act.

Orders of a district educational council fixing the number of free places deemed to be those of the District Educational Officer.

15. All orders passed by a district educational council before the commencement of this Act under the proviso to sub-section (2) of section 47 of the said Act fixing the number of free places, shall have effect as if they had been passed after such commencement by the District Educational Officer.

Devolution of properties and rights of district educational councils to Provincial Government and continuance of proceedings pending at the commencement of the Act.

16. (1) All property and all rights of whatever kind used, enjoyed or possessed by, and all interests of whatever kind owned by, or vested in, or held in trust by, or for, any district educational council constituted under the said Act, including all moneys standing to the credit of the fund referred to in section 28 of the said Act, as well as all liabilities legally subsisting against such council shall, on and from the date of the commencement of this Act, pass to the Provincial Government.

(2) All proceedings taken by or against any district educational council and pending at the commencement of this Act may, after such commencement, be continued, subject to the provisions of this Act, by or against the Provincial Government or by or against such authority as may be designated by them in this behalf.

(3) Any remedy by way of application, suit or appeal available to or against a district educational council at the commencement of this Act shall, after such commencement, be available, subject to the provisions of this Act, to or against the Provincial Government.

Power of Provincial Government to suspend action.

17. The repeal of section 21 of the said Act by this Act shall not be deemed to affect the powers of the Provincial Government to act under that section in respect of any resolution passed or order issued by any district educational council or the president thereof before the commencement of this Act, or in respect of any act which is about to be done or is being done at such commencement.

Power to remove difficulties in giving effect to Act.

18. If any difficulty arises in giving effect to the provisions of this Act or of the said Act as amended by this Act, the Provincial Government as occasion may require, may, by order, do anything which appears to them to be necessary for the purpose of removing the difficulty.

THE MADRAS PUBLIC HEALTH ACT, 1939.

ACT No. III OF 1939.

[*28th February, 1939.*

An Act to make provision for advancing the Public Health of the Province of Madras.

WHEREAS it is expedient to make provision for advancing the public health of the Province of Madras; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title and extent.

1. (1) This Act may be called THE MADRAS PUBLIC HEALTH ACT, 1939.

(2) It extends to the whole of the Province of Madras.

Commencement.

2. (1) The provisions of this Act, except Chapter IX and Part III of Chapter X, shall come into force in the whole of the Province of Madras at once.

(2) The Government may, from time to time, by notification, extend all or any of the provisions of Chapter IX to any local area in the Province of Madras, and may cancel or modify any such notification.

(3) (*a*) The provisions of Part III of Chapter X shall come into force at once—

(i) in the City of Madras; and

(ii) in every local area which has been, or may hereafter be, declared to be a municipality under the Madras District Municipalities Act, 1920.

(*b*) The Government may, from time to time, by notification, extend the provisions of Part III of Chapter X to any other local area in the Province of Madras, and may cancel or modify any such notification.

Definitions. 3. In this Act, unless there is anything repugnant in the subject or context—

(1) "Building" includes—

(*a*) a house, out-house, stable, latrine, godown, shed, hut, wall (other than a boundary wall not exceeding eight feet in height) and any other such structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever;

(*b*) a structure on wheels or simply resting on the ground without foundations; and

(*c*) a ship, vessel, boat, tent, van and any other such structure used for human habitation.

(2) "Cattle" includes elephants, camels, mules, asses, horses, cows, bulls, bullocks, buffaloes, sheep, goats and pigs and the young ones of these species.

(3) "Dairy" includes—

(*a*) any farm, cattle-shed, milk-store, milk-shop, or other place from which milk is sold or supplied for sale, or in which milk is kept for sale or manufactured for sale into butter, ghee, cheese, cream, curds, buttermilk, or dried, sterilized or condensed milk; and

(*b*) in relation to a dairyman who does not occupy any premises for the sale of milk, any place in which he keeps the vessels used by him for the storage or sale of milk, but does not include—

(i) a shop or place in which milk is sold for consumption on the premises only; or

(ii) a shop or place from which milk is sold or supplied for sale in hermetically closed and unopened receptacles in the same original condition in which it was first received in such shop or place.

(4) "Dairyman" includes any person who sells milk, whether wholesale or by retail.

(5) "Drain" means a house-drain or a drain of any other description, and includes a sewer, tunnel, culvert, ditch, channel or any other device for carrying off sullage, sewage, offensive matter, polluted water, rain water, or subsoil water.

(6) "Drug" means any substance used as medicine whether for internal or external use, or any substance used in the composition or preparation of such medicine.

(7) "Dwelling house" means a building constructed, used or adapted to be used, wholly or principally, for human habitation or in connexion therewith.

(8) "Executive Authority" means the Commissioner, Chairman, President, or other functionary of the local authority concerned, who is vested with general executive powers under the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, or the Madras Local Boards Act, 1920, as the case may be.

(9) "Executive Officer" means the paid officer, if any, of the local authority who is vested with general executive powers in the local area for which such authority is constituted under the Madras City Municipal Act, 1919, or the Madras District Municipalities Act, 1920, or the Madras Local Boards Act, 1920, as the case may be.

(10) "Factory" means any premises including the precincts thereof, wherein any industrial, manufacturing or trade process is carried on with the aid of steam, water, oil, gas, electrical or any other form of power which is mechanically transmitted and is not generated by human or animal agency.

(11) "Filth" means—

(*a*) nightsoil and other contents of latrines, cesspools and drains;

(*b*) dung and the refuse or useless or offensive material thrown out in consequence of any process of manufacture, industry or trade; and

(*c*) putrid and putrefying substances.

(12) "Food" includes every article consumed or used by man, for food, drink, or chewing, and all materials used or admixed in the composition or preparation of such article and shall also include flavouring and colouring matter and condiments.

(13) "Government" means the Provincial Government as defined in clause (43-*a*) of section 3 of the General Clauses Act, 1897.

(14) "Health Officer" means the Health Officer employed by the local authority concerned and if there is no such officer, the Health Officer of the district.

(15) "House-drain" means any drain actually used, or intended to be used, for the drainage of one or more premises.

(16) "Hut" means any building which is constructed principally of wood, mud, leaves, grass, thatch, or metallic sheets, and includes any temporary structure of whatever size or any small building of whatever material made which the local authority may declare to be a hut for the purposes of this Act.

(17) "Infectious disease" means an infectious disease as defined in section 52 and includes notified disease as defined in section 62.

(18) "Latrine" includes privy, water-closet and urinal, whether public or private, or whether open or flush out.

(19) "Local area" means the area within the jurisdiction of a local authority.

(20) "Local authority" means—

(*a*) in the City of Madras, the Corporation of Madras;

(*b*) in any other municipal area, the municipal council concerned;

(*c*) in any area in a district as defined in the Madras Local Boards Act, 1920, which is comprised within the jurisdiction of a panchayat, the panchayat concerned; and

(*d*) in the case of all areas in a district defined as aforesaid, which are not comprised within the jurisdiction of a panchayat, the district board concerned.

(21) "Lodging house" means a hotel, a boarding house, a choultry, dharmasala or rest-house not maintained by the Government or a local authority, an unlicensed emigration depot, or any place where casual visitors are received and provided with sleeping accommodation, with or without food, on payment, but does not include—

(*a*) a students' hostel under public or recognized control, or

(*b*) a house licensed under section 125 for accommodating visitors to a fair or festival, or

(*c*) retiring rooms provided in railway premises for the use of passengers or railway servants.

(22) "Magistrate" does not include an honorary or a village magistrate.

(23) "Milk" means the milk of a cow, buffalo, goat, ass, or other animal and includes cream, skimmed milk, separated milk, and condensed, sterilized or desiccated milk, or any other product of milk.

(24) "Notification" means a notification in the Official Gazette.

(25) "Nuisance" includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing or disturbance to rest or sleep or which is or may be dangerous to life or injurious to the health or property of the public or the people in general who dwell or occupy property in the vicinity or persons who may have occasion to use any public right.

(26) "Occupier" includes—

(*a*) any person for the time being paying or liable to pay to the owner the rent or any portion of the rent of the land or building or part of the same in respect of which the word is used or damages on account of the occupation of such land, building or part; and

(*b*) a rent-free occupant.

(27) "Offensive matter" includes—

(*a*) filth as defined in clause (11);

(*b*) sewage as defined in clause (33); and

(*c*) dirt, house sweepings, spittings including chewed betel and tobacco, kitchen or stable refuse, broken glass or pottery, debris and waste paper.

(28) "Offensive trade" means any trade in which the substances dealt with are, or are likely to become, a nuisance.

(29) "Owner" includes the person for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager or receiver for another person or estate or for any religious or charitable purposes, the rent or profits of the property in connexion with which the word is used.

(30) "Prescribed" means prescribed by the Government by rules made under this Act.

(31) "Private street" means any street, road, square, court, alley, lane, passage or riding-path which is not a "public street", but does not include a pathway made by the owner of premises on his own land to secure access to, or the convenient use of, such premises.

(32) "Public street" means any street, road, square, court, alley, lane, passage or riding-path, whether a thoroughfare or not, over which the public have a right of way and includes—

(*a*) the roadway over any public bridge or causeway;

(*b*) the footway attached to any such street, public bridge or causeway; and

(*c*) the drains attached to any such street, public bridge or causeway and the land whether covered or not by any pavement, veranda, or other structure which lies on either side of the roadway up to the boundaries of the adjacent property whether that property is private property or property belonging to the Crown.

(33) "Sewage" means nightsoil and other contents of latrines, cesspools or drains and includes trade effluents and discharges from manufactories of all kinds.

(34) "Street" means a public or a private street.

(35) "Urban local area" means the area within the jurisdiction of an urban local authority.

(36) "Urban local authority" means—

(*a*) the Corporation of Madras; or

(*b*) a municipal council; or

(*c*) any panchayat notified by the Government as an urban local authority for the purposes of this Act, so long as the notification remains in force.

(37) "Venereal disease" means syphilis, gonorrhœa, soft chancre, venereal granuloma or lympho granuloma.

(38) "Water-course" includes any river, stream or channel, whether natural or artificial, other than a drain.

(39) "Workplace" means any premises including the precincts thereof (not being a factory or a workshop), wherein is carried on any industrial, manufacturing or trade process, at which not less than five persons are employed for wages or any other remuneration.

(40) "Workshop" means any premises including the precincts thereof (not being a factory), wherein any article or part of an article is made, repaired, altered, ornamented, finished or otherwise adapted for use on a commercial basis and not less than five persons are employed for that purpose for wages or any other remuneration.

CHAPTER II.

CONTROLLING AUTHORITIES AND THEIR POWERS.

Public Health Board.

Constitution of the Public Health Board.

4. (1) As soon as may be after the commencement of this Act, the Government shall cause to be constituted for the Province of Madras a Public Health Board consisting of the following members, namely:—

(*a*) the Minister for Public Health;

(*b*) the Minister for Local Administration;

(*c*) three Members of the Madras Legislature nominated by the Government;

(*d*) the Surgeon-General with the Government of Madras;

(*e*) the Director of Public Health;

(*f*) the Sanitary Engineer; and

(*g*) one other officer of the Government nominated by the Government.

(2) Members nominated under clause (*c*) of sub-section (1) shall hold office for a period of one year from the date of nomination, but shall be eligible for re-nomination.

(3) The Minister for Public Health shall be the President of the Public Health Board and the Director of Public Health shall be its Secretary.

Functions of the Public Health Board.

5. (1) The Public Health Board shall advise the Government on such matters as the Government may from time to time refer to it.

(2) The meetings of the Board and the mode of transaction of business at such meetings shall be governed by such regulations as may be framed by it.

(3) The proceedings of the Board shall not be invalidated by reason of any vacancy in the office of the President, the Secretary, or a member.

Powers of the Government and of the Director of Public Health.

Powers of the Government and of the Director of Public Health and his staff.

6. (1) The Government shall have power to inspect, control and superintend the operations of local authorities under this Act.

(2) The Government may, from time to time, define the powers to be exercised, and the duties to be performed, by the Director of Public Health or any member of his staff for the purposes of sub-section (1).

(3) Nothing contained in sub-sections (1) and (2) shall be deemed to affect, or derogate from, any powers possessed by the Government or the District Collector under any other law for the time being in force.

Powers of the Director of Public Health to advise local authorities.

7. The Director of Public Health may, from time to time as occasion requires, recommend for adoption, by any local authority, such measures as may be necessary for improving the public health administration in the local area, or for safeguarding the public health therein:

Provided that if on account of financial or other reasons, any local authority is unable to carry out such measures, or if there is any difference of opinion between the local authority and the Director, the matter shall be referred to the Government whose decision shall be final.

Public Health Establishments of Local Authorities.

Public Health staff in local areas.

8. (1) The public health establishment of every local authority (other than the Corporation of Madras) shall be on such scale as the Government may from time to time direct.

(2) The authorities who may make appointments to the public health establishments referred to in sub-section (1), the conditions of service of the members of such establishments, and the duties of such members shall, notwithstanding anything contained in the Madras District Municipalities Act, 1920, or the Madras Local Boards Act, 1920, be governed by regulations, not inconsistent with this Act, made by the Government. Such regulations may lay down the extent to which the Director of Public Health shall have disciplinary control over the members of such public health establishments.

Appointment of the Health Officer.

9. (1) A local authority shall, if so required by the Government, include the post of a Health Officer in its establishment schedule.

(2) Notwithstanding anything contained in the Madras District Municipalities Act, 1920, or the Madras Local Boards Act, 1920, the Government—

(*a*) shall appoint the Health Officers of all the local authorities (other than the Corporation of Madras) in respect whereof a direction is issued under sub-section (1); and

(*b*) may recover from each such local authority, the whole or such proportion of the salary and allowances paid to the Health Officer, and such contribution towards his leave allowances, pension and provident fund as the Government may, by general or special order, determine.

Appointment of temporary Health Officers in emergencies.

10. (1) In the event of the prevalence or threatened outbreak of any infectious disease in any local area, or of any unusual mortality therein, the Government may, by order, appoint temporarily for such period as may be specified therein, one or more additional Health Officers, for the treatment of such infectious disease and preventing it from spreading, or for investigating the cause of, and preventing, such mortality, as the case may be.

(2) For the purpose of sub-section (1) the Government may appoint any medical practitioner registered under the Madras Medical Registration Act, 1914, either on an honorary basis or on such salary or allowances or both as the Government may fix. The salary and allowances shall be payable from the funds of the local authority.

Delegation of powers of Health Officer.

11. The Government may, by general or special order, authorize any officer of the Government or of a local authority, to exercise such of the powers of a Health Officer under this Act, in such area, and subject to such restrictions, limitations and conditions and to such control and revision, as may be specified in such order.

Appointment of persons to carry out the provisions of this Act.

12. (1) Notwithstanding anything contained in this Act or in any other Act or Acts governing the local authority or authorities concerned, the Government may, by general or special order, appoint any person or persons to carry out such provisions of this Act, and in such areas, as may be specified in the order.

(2) The expenses incurred by such person or persons in doing so shall be met from the funds of the local authority or authorities concerned, either wholly or in part, and, where more than one local authority is concerned, in such proportions, as may be determined by the Government.

Powers of Director of Public Health over public health staff of local authorities.

13. (1) Subject to such rules as may be prescribed including rules for consultation with the executive authorities concerned, the Director of Public Health shall have power—

(*a*) to transfer any member of the public health establishment of a local authority to the public health establishment of another local authority; and

(*b*) in times of emergency, to assign one or more members of the public health establishment of one local authority for temporary duty in the area of another local authority.

(2) Nothing contained in clause (*a*) of sub-section (1) shall apply to the Corporation of Madras.

(3) In the case referred to in clause (*b*) of sub-section (1), the local authority within whose jurisdiction the member or members of the public health establishment of another local authority are working, shall pay for the period of such temporary duty, the salary and allowances of such member or members and such contribution towards their leave allowances, pension and provident fund as the Government may, by general or special order, determine.

Health Officer's control over public health staff.

14. (1) The Health Officer in charge of any local area shall exercise supervision and control over all other members of the public health establishment in such area.

(2) (*a*) Save as otherwise provided in this Chapter or in any rules or regulations made under it, all appointments, transfers and punishments of the members of the public health establishment under the supervision and control of the Health Officer shall be made by the Health Officer, subject to the approval of the executive authority.

(*b*) If for any reason the executive authority disagrees with the orders of the Health Officer under clause (*a*), the executive authority shall refer the matter to the Government whose decision shall be final.

Local authority to provide adequate facilities to the Health Officer.

15. Every local authority shall provide its Health Officer with such clerical assistance, office accommodation, furniture, equipment, stationery, and forms as may in the opinion of the Director of Public Health be necessary for the proper conduct of the business of such Health Officer.

Authorization of Health Officer to perform the functions of executive authority in public health matters.

16. Notwithstanding anything contained in the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, the Madras Local Boards Act, 1920, the Madras Prevention of Adulteration Act, 1918, and the Places of Public Resort Act, 1888, the Health Officer of a local authority shall perform such of the functions, and discharge such of the duties, of its executive authority in regard to public health matters under any of the provisions applicable to such local authority contained in the Acts aforesaid, subject to such appeal and control as the Government may, by general or special order, determine.

CHAPTER III.

WATER-SUPPLY.

Local authority to provide potable water.

17. (1) Every local authority may, and if the Government so direct shall, provide or arrange for the provision of a sufficient supply of drinking water for consumption by the inhabitants of the area within its jurisdiction.

(2) The local authority shall, so far as may be practicable, make adequate provision for securing—

(*a*) that the water-supply is continuous throughout the year, and

(*b*) that the water supplied is at all times wholesome and fit for human consumption.

(3) A local authority may also provide or arrange for the provision of a sufficient supply of water for other domestic purposes or for non-domestic purposes.

Power of Government to direct local authority to execute water-works.

18. (1) If in the opinion of the Government, a local area does not possess a sufficient supply of wholesome water fit for the consumption of its inhabitants, they may direct the local authority concerned, either singly or in combination with the local authority or authorities having jurisdiction over any local area or areas in the neighbourhood which are similarly situated, to execute within such time as the Government may fix, such works as may be directed by the Government for providing a sufficient supply of wholesome water fit for human consumption.

(2) A local authority may, with the previous sanction of the Government—

(*a*) construct, lay, or erect filters, reservoirs, engines, conduits, pipes or other works without the limits of its local area, for supplying such area with water;

(*b*) purchase or take on lease any water-work, or any water, or any right to store or to take or convey water, either within or without the limits of its local area; and

(*c*) contract with any local authority or other person or agency for the supply of water.

(3) A local authority may, with the previous sanction of the Government, by public notice, declare any lake, stream, spring, well, tank, reservoir, pond, or other source of water-supply, whether within or without the limits of its local area (other than a source under the control of the Government), from which water is or may be made available for the use of the public in the local area for domestic purposes, to be a source of public water-supply for such purposes and every such source shall thereafter be under the control of the local authority, only to the extent necessary for such purposes.

Power of Government to divert water from water-main belonging to a local authority.

19. The Government shall have power to take water from any water-main belonging to, or in the control of, a local authority for supplying water to any other area, subject to such payment being made to the local authority concerned and subject also to such other conditions as the Government may consider reasonable:

Provided that before taking action under this section, the Government shall communicate to the local authority the grounds on which they propose to do so, fix a reasonable period for the local authority to show cause against the proposal, and consider its explanations or objections, if any.

Power of Collector in regard to water-supply.

20. (1) The Collector of the district, or any other officer appointed by the Government in this behalf, may cause inquiries to be made in any local area or part thereof, with a view to ascertaining—

(*a*) whether the source of water-supply for such local area or part is contaminated from any cause against which effective means of protection can be taken, and

(*b*) whether the provision of any additional source or sources of water-supply is necessary for such local area or part.

(2) The Collector or other officer aforesaid may, after taking into consideration the result of such inquiries, by notice, direct that any source of water-supply be cleaned, improved, repaired or otherwise protected from contamination, or that such additional source or sources of water-supply be provided, as the case may be:

Provided that before issuing a notice under this sub-section, the Collector or other officer shall give the authorities or persons affected, a reasonble opportunity to make any representations they may wish to make and consider the same.

(3) Against any direction issued by the Collector or other officer under sub-section (2), an appeal shall lie to the Government whose decision shall be final.

(4) (*a*) Every notice issued under sub-section (2) shall specify the nature and extent of the works to be executed, the estimated cost thereof, and the authority or authorities or the person or persons by whom, and the period within which, they are to be executed.

(*b*) The notice shall either—

(i) be published in the prescribed manner; or

(ii) be served on the local authority or on the person owning or having control over the source of water-supply, as the case may be, in the prescribed manner.

(5) If the directions contained in any notice issued under sub-section (2) have not been satisfactorily complied with, the officer issuing the notice may himself cause the works specified in the notice to be executed, provided that he may, on sufficient cause being shown, extend the period specified in the notice, or modify or rescind any direction contained therein.

(6) (*a*) If a water-tax is imposed in the local area, the cost of carrying out the works specified in the notice issued under sub-section (2), whether such works are executed by the authority or person specified therein or under sub-section (5) by the officer issuing the notice, shall be borne by the local authority concerned.

(*b*) If no water-tax is imposed in the local area, such cost shall be borne by the inhabitants of the local area who, on inquiry, are found to be benefited by the works or shall be shared between such inhabitants and the local authority concerned in such proportions as may be determined by the Government.

Explanation.—For the purposes of this sub-section, 'water-tax' means—

(*a*) a tax levied under section 25 of this Act, or

(*b*) a water and drainage-tax levied under section 81 (1) (*b*) of the Madras District Municipalities Act, 1920, or under section 99 (1) (*b*) of the Madras City Municipal Act, 1919, or

(*c*) a tax levied under section 75 (2) of the Madras Local Boards Act, 1920, for the specific purpose of executing, maintaining or improving any work for the supply of water.

Power of Director of Public Health to direct local authority to improve water-supply.

21. If the Director of Public Health is satisfied upon investigation that any source of public water-supply in a local area is contaminated or is subject to imminent risk of contamination by reason of unsatisfactory location, protection, construction, operation or maintenance, and speedy remedy or immediate prevention is, in his opinion, desirable, he may, by order, direct the local authority to take such measures as may be specified therein; and the local authority shall take action accordingly.

Railway administrations to submit samples of drinking water for analysis.

22. In the case of any railway in the Province of Madras, the Government may, by general or special order, require the authority administering the railway to submit for analysis, to such person or institution, in such manner, and at such intervals, as may be prescribed, samples of drinking water supplied by such authority at any station or stations on such railway. For such analysis, the authority aforesaid shall pay to the Government such fee as may be prescribed by them.

Rules for the protection and periodical examination of water-supply.

23. The Government shall have power to make rules providing for the protection and periodical examination of sources of water-supply in the Province.

Health Officer's powers in regard to insanitary sources.

24. (1) The Health Officer may at any time by written notice require that the owner of, or any person having control over, any lake, stream, spring, well, tank, reservoir, pond or other source of water-supply which is used for drinking, bathing or washing clothes shall, whether the same is private property or not, within a reasonable time to be specified in the notice, or in any case falling under clause (*d*) within such time as may be specified in the notice not being less than thirty-six hours from the receipt thereof—

(*a*) keep and maintain any such source of supply in such manner as the Health Officer may direct; or

(*b*) cleanse any such source of water-supply from silt, refuse and vegetation; or

(*c*) protect any such source of water-supply from pollution by surface drainage in such manner as the Health Officer may direct; or

(*d*) fill in, repair, protect or enclose in such manner as the Health Officer may direct, any such source of water-supply, if for want of sufficient repair, protection or enclosure, such source of water-supply is in his opinion dangerous to the health or safety of the public or of any persons having occasion to use or to pass or approach the same; or

(*e*) desist from using, and from permitting others to use, for drinking purposes any such source of water-supply if, in the opinion of the Health Officer, the water is unfit for drinking; or

(*f*) close any such source of water-supply, either temporarily or permanently, or fill up, enclose or fence the same in such manner as the Health Officer considers sufficient to prevent the use thereof for drinking purposes, if in his opinion the water is unfit for drinking; or

(*g*) drain off or otherwise remove from any such source of water-supply, or from any land or premises or receptacle or reservoir attached or adjacent thereto, any stagnant water which the Health Officer considers to be either injurious to health or offensive to the neighbourhood:

Provided that the provisions of clauses (*a*) and (*b*) shall not apply to a stream:

Provided further that a notice shall not be issued under clause (*f*) unless a notice has first been issued under clause (*e*) and the source of water-supply in question continues to be used for drinking purposes notwithstanding the issue of

such notice, and the Health Officer considers that such use cannot be prevented otherwise than by the issue of a notice under clause (*f*).

(2) If the owner or person having control as aforesaid fails or neglects to comply with any notice issued under sub-section (1) within the time specified therein, the Health Officer may, if immediate action is necessary to protect the health or safety of any person or persons, at once proceed to execute the work specified in such notice; and all the expenses incurred in respect thereof by the Health Officer shall be paid by the owner of, or person having control over, such source of water-supply, and shall be recoverable as if it were a tax due to the local authority concerned:

Provided that in the case of any private source the water of which is used by the public or by any section of the public as of right, the expenses which have been incurred by the Health Officer or which, in the opinion of the local authority, have been necessarily incurred by the owner of, or person having control over, the source of water-supply shall be paid from the funds of the local authority.

Levy of water-tax and earmarking the proceeds for water-works.

25. (1) Any local authority may with the previous sanction of the Government, and shall, if so directed by them, levy within its area or any part thereof, any tax which may be necessary for providing water-supply in such area or part.

(2) Any tax levied under sub-section (1) may be a new tax levied on such basis and assessed and realized in such manner as may be sanctioned or directed by the Government, or may be a tax or additional tax levied under any head of taxation specified in any law for the time being in force governing the local authority concerned in which case all the provisions of such law relating to the incidence, assessment or realization of a tax under such head or in any manner connected therewith shall be applicable to the tax or additional tax, with such modifications and restrictions, if any, as may be prescribed.

(3) (*a*) The rates at which any tax may be levied under this section shall be determined by the local authority with the previous sanction of the Government in case the tax is levied by the local authority of its own motion, and by the Government in case the tax is levied at their direction.

(*b*) The local authority may with the previous sanction of the Government and shall, if so directed by them, alter the rates at which any such tax is to be levied.

(4) (*a*) Every local authority levying a tax under this section shall earmark the net revenue therefrom for expenditure on the execution, maintenance and improvement of works of water-supply in the local area or part thereof within which it is levied.

(*b*) Such revenue shall be expended in accordance with such orders as may be issued by the Government in this behalf.

(5) Nothing contained in this section shall be deemed to affect the power of the Corporation of Madras to levy a water and drainage tax under section 99 (1) (*b*) of the Madras City Municipal Act, 1919, or of any municipality governed by the Madras District Municipalities Act, 1920, to levy a water and drainage tax under section 81 (1) (*b*) of that Act.

New house not to be occupied without adequate water-supply.

26. No owner of any dwelling-house which may be constructed or reconstructed after the commencement of this Act in any urban local area shall occupy it, or cause or permit it to be occupied, until he has obtained a certificate from an officer of the Public Health Department of the local authority concerned, not below the rank of Health or Sanitary Inspector, that there is within the house, or within a reasonable distance therefrom, a supply of wholesome water sufficient for the domestic purposes of the inmates of the house.

CHAPTER IV.

DRAINAGE.

Local authority to maintain public drains.

27. (1) Every urban local authority shall, so far as the funds at its disposal may permit, provide and maintain a sufficient and satisfactory system of public drains for the effectual draining of its local area.

(2) If, in the opinion of the Government, any local area or part thereof should, for any special reason, be provided with a system of public drains or with any other means of drainage, they may direct the local authority to provide or execute, within such time as may be fixed by them in this behalf, such works as may be considered necessary by them.

(3) The local authority shall at all times keep in good repair all drains, cesspools and the like vested in or belonging to them.

Power of Health Officer to require drains to be constructed.

28. (1) If any premises are in the opinion of the Health Officer without sufficient means of effectual drainage, he may, by notice, direct the owner of such premises to construct a drain leading therefrom to the nearest public drain or other place set apart by the local authority for the discharge of sewage:

Provided that—

(*a*) the cost of constructing that portion of the drain which is situated more than one hundred feet from the said premises, shall be paid from out of the funds of the local authority concerned; and

(*b*) if, in the opinion of the Health Officer, there is no public drain or other place set apart for the discharge of sewage within a reasonable distance of such premises, he may, by notice, require the owner of the premises to construct—

(i) a closed cesspool, tank, filter or other work of such material, size and description, as he may direct; and

(ii) a house-drain communicating with such closed cesspool, tank, filter or other work.

(2) Where by reason of a local authority changing its system of drainage or undertaking a new system of drainage, it becomes necessary for the owner of any premises to reconstruct or alter any drain, the cost of the reconstruction or alteration of such drain shall be borne wholly by the local authority, or wholly by the owner, or partly by the local authority and partly by the owner, in accordance with such rules as may be prescribed.

Drains in private streets

29. Where a house-drain belonging to one or more premises has been laid in any private street which is common to more than one premises and the Health Officer considers it desirable that any other premises should be drained into such drain, he may, by notice, require the owner of such premises to connect his house-drain with such first-mentioned drain; and the owner or owners of such first-mentioned drain shall thereupon be bound to permit such connexion to be made:

Provided that no such connexion shall be made—

(*a*) except upon such terms as may be mutually agreed upon between or among the owners concerned, or

(*b*) in default of such agreement, except upon such terms as may be laid down by the local authority and in particular, until any payment which may be directed by the local authority to be made to the owner or owners concerned, has been duly made.

Drainage for huts.

30. (1) Drains for the drainage of huts shall be of such size and description, and be constructed of such material, as may be considered by the Health Officer to be practicable,

having regard to the circumstances of the locality and the position of the nearest public drain or other place set apart by the local authority for the discharge of sewage.

(2) If the Health Officer considers that a new drain should be constructed for the benefit of the occupants of any hut, he may, by notice, require the owner of the land on which such hut stands, to construct such drain and such owner shall construct such drain, and cause it to be cleansed and repaired to the satisfaction of the Health Officer.

Drainage of court, yard, alley, passage, etc.

31. For the purpose of efficiently draining any land or building, the Health Officer may, by notice, require the owner of any court, yard, alley, lane, passage or open space—

(*a*) to pave the same with such material and in such manner as may be approved by the Health Officer and to keep such paving in proper repair; or

(*b*) to raise the level of such court, yard, alley, lane, passage or open space.

Explanation.—It shall be open to the Health Officer to require that in any case both the measures specified in clauses (*a*) and (*b*) of this section shall be taken.

Construction and closure of cesspools.

32. (1) No person shall construct a cesspool—

(*a*) beneath any part of any building or within fifty feet of any tank, reservoir, water-course or well or within such other distance therefrom as the Health Officer may consider to be practicable having regard to the circumstances of the locality; or

(*b*) within any local area, or outside such area but within three hundred feet of any reservoir used for the storage of filtered water to be supplied to such area, except upon a site and in a position which have been approved in writing by the Health Officer.

(2) The Health Officer may, at any time, by notice, require any person within whose premises any cesspool is constructed in contravention of sub-section (1) to remove such cesspool or to fill it up with such material as may be approved by him.

Prohibition of occupation of new building without drains.

33. No owner of any building constructed or reconstructed after the commencement of this Act in any urban local area shall occupy it, or cause or permit it to be occupied, until he has obtained a certificate from the Health Officer that the building has been provided with sufficient means of drainage.

Sullage or sewage not to be let out into streets.

34. No person having control over any building or land shall cause or allow—

(*a*) the water of any sink, sewer, latrine or sanitary convenience, or any other liquid or other matter which is, or is likely to become, offensive, to run or drain into, or to be thrown or put upon, any street or open space or to soak through any external wall; or

(*b*) any offensive matter from any sewer, latrine or sanitary convenience, to run, drain or be thrown into a surface drain in any street.

Injurious refuse not to be discharged into public drain.

35. No person shall, save as may be generally or specially prescribed, throw, empty, or turn, or suffer or permit to be thrown, emptied or turned or to pass, into any public drain, or into any drain communicating with a public drain—

(a) any matter likely to injure the drain or to interfere with the free flow of its contents, or to affect prejudicially the treatment and disposal of such contents; or

(b) any liquid being refuse or steam or other liquid which is, either alone or in combination with the contents of the drain, dangerous, or the cause of a nuisance, or prejudicial to health; or

(c) any explosive or inflammable substance.

Pollution of water-courses prohibited.

36. No person shall, save as may be generally or specially prescribed—

(1) put, or cause to be put, or cause to fall or flow or be carried, or knowingly permit to be put or to fall or flow or be carried, into any water-course—

(a) any solid or liquid sewage matter, or

(b) any poisonous, noxious or polluting liquid proceeding from any manufactory or manufacturing process, or

(2) put, or cause to be put, or cause to fall or be carried, or knowingly permit to be put or to fall or be carried, into any water-course, so as, either singly or in combination with other similar acts of the same or any other person, to interfere with the due flow of such water-course, or to pollute the water therein, the solid refuse of any manufactory, manufacturing process or quarry, or any rubbish or cinders, or any other waste or putrid solid matter, or

(3) commit nuisance in or in the neighbourhood of any water-course.

CHAPTER V.

SANITARY CONVENIENCES.

Obligation of local authority to provide public sanitary conveniences.

37. Every local authority shall provide and maintain in proper and convenient places a sufficient number of sanitary conveniences for the use of the public and cause all such places to be kept in proper order so as not to be a nuisance or injurious to health.

New houses to be provided with sanitary conveniences.

38. If in any local area any building intended for human habitation is constructed or is reconstructed after being pulled down to or below the ground floor, the owner thereof shall provide such sanitary conveniences and in such positions as the Health Officer may, by notice, require.

Additional sanitary conveniences.

39. (1) If any building intended for human habitation is without any sanitary convenience or if, in the opinion of the Health Officer, the sanitary convenience or conveniences provided therein are insufficient, having regard to the number of persons occupying the building, or are inefficient, or are objectionable on sanitary grounds, he may, by notice in writing, require the owner of such building—

(a) to provide such sanitary conveniences or such additional sanitary conveniences and in such positions, as may be specified in the notice; or

(b) to make such structural or other alterations as may be specified in the notice.

(2) Every owner of the ground on which a group of six or more huts stands shall provide such latrine accommodation, in such positions, and within such time as the Health Officer may, by notice, require, for the use of the inhabitants of such group of huts.

Mode of construction of latrines.

40. (1) All latrines shall—

(a) be so constructed as to screen persons using the same and the filth from the view of persons passing by or residing in the neighbourhood; and

(*b*) be maintained, repaired, altered and used in accordance with the rules and by-laws made under this Act.

(2) If any latrine opening on any street, whether such latrine be erected before or after the commencement of this Act, is so placed or constructed as to be a nuisance or offensive to public decency, the Health Officer may, by notice in writing, require the owner to remove it or to carry out such improvements therein and within such time as may be specified in the notice.

(3) When any latrine is used in common by the occupiers of two or more premises or by the members of two or more families, no person shall injure or improperly foul any such latrine or anything used in connexion therewith.

CHAPTER VI.

Abatement of Nuisances.

Certain things to be nuisances.

41. Without prejudice to the generality of the definition of the expression "nuisance" contained in clause (25) of section 3, the following shall be deemed specifically to be nuisances for the purposes of this Chapter:—

(1) any premises in such a state as to be prejudicial to health or a nuisance;

(2) any pond, pool, ditch, gutter, water-course, water-trough, latrine, cess-pool, drain or ashpit which is so foul or in such a state as to be prejudicial to health or a nuisance;

(3) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;

(4) any accumulation or deposit of refuse or other matter which is prejudicial to health or a nuisance;

(5) any factory (not being a factory governed by the provisions of the Factories Act, 1934), workshop or workplace, which is not provided with sufficient means of ventilation, or in which sufficient ventilation is not maintained, or which is not kept clean or not kept free from noxious effluvia, or which is so over-crowded while work is carried on as to be prejudicial to the health of those employed therein;

(6) any fireplace or furnace which does not as far as practicable consume the smoke arising from the combustible used therein, and which is used for working engines by steam, or in any mill, factory, dyehouse, brewery, bake-house or gaswork, or in any manufacturing or trade process whatsoever;

(7) any chimney sending forth smoke in such quantity as to be a nuisance; and

(8) any noise, vibration, dust, cinders, irritating smell or offensive odour produced by a factory, workshop or workplace which is a nuisance to the neighbourhood.

Detection of nuisance.

42. Every urban local authority shall—

(*a*) cause its local area to be inspected from time to time with a view to ascertain what nuisances exist therein calling for abatement under the powers conferred on such authority by this Act; and

(*b*) enforce the provisions of this Act in order to abate such nuisances.

Information regarding nuisance.

43. Any person aggrieved by a nuisance in any local area may give information of the same to the Health Officer or any other officer of the public health establishment of the local authority.

Power of Health Officer to abate nuisance.

44. If the Health Officer is satisfied, whether upon information given under section 43 or otherwise of the existence of a nuisance, he may, by notice, require the person by whose act, default or sufferance the nuisance arises or

continues, or, if that person cannot be found, the owner or occupier of the premises on which the nuisance arises or continues, to abate the nuisance and to execute such works and take such steps as may be necessary for that purpose:

Provided that—

(a) where the nuisance arises from any defect of a structural character, the notice shall be served on the owner of the premises; and

(b) where the person causing the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act, default or sufferance of the owner or the occupier of the premises, the Health Officer may himself forthwith do what he considers necessary to abate the nuisance and to prevent a recurrence thereof.

Power of local authority to abate nuisance.

45. If the person on whom a notice to abate a nuisance has been served under section 44 makes default in complying with any of its requirements within the time specified therein, or if the nuisance although abated within such time is, in the opinion of the local authority, likely to recur on the same premises, the local authority may arrange for the execution of any works necessary to abate the nuisance, or to prevent its recurrence, as the case may be, and may recover the cost from such person as if it were a tax due to the local authority.

Provision regarding house rendered unfit for occupation by reason of nuisance.

46. Where a house or other building is, in the opinion of the Health Officer, unfit for human habitation by reason of a nuisance existing therein, he may apply to a Magistrate (not being a Magistrate of the third class) to prohibit the use of such house or building for human habitation until it is rendered fit therefor.

Disposal of articles removed while abating nuisance.

47. (1) A local authority may sell any materials which have been removed by it from any premises (including any street), when executing works under this Chapter or otherwise carrying into effect the provisions thereof, if such materials are not claimed and taken away by the owner before the expiration of seven days from the date on which they were removed by the local authority.

(2) A local authority selling any materials under sub-section (1) shall pay the sale-proceeds to the person to whom the materials belonged, after deducting therefrom the amount of any expenses recoverable from him by such authority.

(3) The provisions of this section shall not apply to any offensive matter removed by a local authority under the Act governing such authority.

Powers of entry and inspection.

48. The executive authority or any officer of the Public Health Department of the Government or of the local authority, not below the rank of Health or Sanitary Inspector, may enter and inspect any premises for the purpose of enforcing any of the provisions contained in this Chapter:

Provided that—

(a) no such entry shall be made between sunset and sunrise except when a nuisance is caused by anything done or omitted to be done in the premises between sunset and sunrise;

(b) no dwelling house shall be so entered without the consent of the occupier thereof, unless he has received at least twenty-four hours previous notice of the intention to make such entry;

(c) sufficient notice shall in every case be given to enable the inmates of any apartment appropriated to women to withdraw to some part of the premises where their privacy may be preserved; and

(*d*) due regard shall be paid, so far as may be compatible with the exigencies of the purpose of the entry, to the social and religious usages of the persons residing in the premises.

Power of Government in case of default by local authority.

49. If the local authority or its Health Officer makes default in doing its or his duty under this Act in regard to the abatement or prevention of nuisances, the Government may authorize any of their officers to perform such duty and for that purpose to exercise any specified powers of the local authority or of its Health Officer or of both, in the local area concerned and the expenses incurred by such officers shall be met from the funds of the local authority.

Nuisance caused by act or omission outside local area.

50. If a nuisance under this Act within, or affecting any part of, a local area, appears to be wholly or partly caused by some act or default committed or taking place outside such local area, the local authority may take or cause to be taken against any person in respect of such act or default any proceedings in relation to nuisances, authorized by this Act in the like cases and with the like incidents and consequences as if the act or default were committed or took place wholly within such local area.

Prohibition of the deposit of rubbish, etc., in street, etc.

51. (1) No person shall deposit, or cause or suffer any member of his family or household to deposit, any carcasses of animals, any dust, dirt, dung, ashes or refuse or filth of any kind, any animal matter, any broken glass, earthenware or other rubbish, or any other thing which is or may be a nuisance, in any street or in any arch under a street, or in any drain beside a street, or on any open space (not being private property); or on any quay, jetty or landing place, or on any part of the sea-shore, or on the bank of any water-course, except in such receptacles as may be provided or at such places, in such manner and at such hours, as may be fixed by the Health Officer.

(2) No person shall ease himself, or cause, permit or suffer any member of his family or household to ease himself, in any such street, arch, drain, open space, quay, jetty, landing place, sea-shore or bank aforesaid.

(3) Any person easing himself in any private open space shall immediately cover up the excreta with earth.

CHAPTER VII.

PREVENTION, NOTIFICATION AND TREATMENT OF DISEASES.

Part I.

Infectious diseases in general.

Infectious diseases.

52. For the purposes of this Part, 'infectious disease' means (*a*) acute influenzal pneumonia, (*b*) anthrax, (*c*) cerebro-spinal fever, (*d*) chickenpox, (*e*) cholera, (*f*) diphtheria, (*g*) enteric fever, (*h*) leprosy, (*i*) measles, (*j*) plague, (*k*) rabies, (*l*) relapsing fever, (*m*) scarlet fever, (*n*) smallpox, (*o*) tuberculosis, (*p*) typhus or (*q*) any other disease which the Government may from time to time, by notification declare to be an infectious disease either generally throughout the Province or in such part or parts thereof as may be specified in the notification.

Appointment of additional health staff.

53. (1) In the event of the prevalence or threatened outbreak of any infectious disease in any local area, or of any unusual mortality therein, the local authority concerned shall provide such additional staff, medicines, appliances, equipment and other things as may, in the opinion of the Health Officer, be necessary for the treatment of such infectious disease and preventing it from

spreading, or for investigating the cause of such mortality, and preventing it, as the case may be:

Provided that, if the local authority does not agree with the opinion of the Health Officer, the matter shall be referred to the Director of Public Health whose decision shall be final.

(2) In the event aforesaid, if the Health Officer considers that immediate action is necessary in the interests of public health, he may, notwithstanding anything contained in sub-section (1), appoint such additional staff and obtain such medicines, appliances, equipment and other things as may be necessary; and the expenses incurred in respect thereof shall be met from the funds of the local authority.

(3) Every appointment made under sub-section (2) shall be reported forthwith to the executive authority and by such authority to the local authority concerned at its next meeting.

Provision and maintenance of isolation hospitals and wards.

54. (1) (*a*) The local authority may, and if so required by the Government shall, provide or cause to be provided, hospitals, wards or other places for the reception and treatment of persons suffering from infectious diseases.

(*b*) For the purpose of the reception and treatment of such persons a local authority may—

(i) itself build such hospitals, wards or places of reception, or

(ii) contract for the use of any such hospital or part of a hospital or place of reception, or

(iii) enter into an agreement with any person having the management of any such hospital, for the reception and treatment therein of persons suffering from infectious diseases.

(*c*) For the purpose aforesaid, two or more local authorities may in combination provide a common hospital or place of reception.

(2) A local authority shall not be deemed to have discharged its obligation under sub-section (1) unless the hospitals, wards or places of reception in question are maintained in accordance with such general or special orders as may from time to time be issued by the Director of Public Health.

Provision of ambulances, etc.

55. A local authority may, and if so required by the Director of Public Health shall, -

(*a*) provide and maintain suitable conveyances, with sufficient attendants and other requisites, for the free carriage of persons suffering from any infectious disease; and

(*b*) provide proper places and apparatus and establishment, for the disinfection of conveyances, clothing, bedding or other articles which have been exposed to infection; and when any conveyances, clothing, bedding or articles are brought to any such place for disinfection, may cause them, at its discretion, to be disinfected, either free of charge, or on payment of such fee as it may fix.

Medical practitioners to give information of certain infectious diseases.

56. Every medical practitioner who in the course of his practice becomes cognizant of the existence of any case of enteric fever or tuberculosis in any private or public dwelling other than a public hospital shall, if the case has not been already reported, give information of the same with the least practicable delay—

(*a*) in municipal areas, to the executive authority, the Health Officer or a Sanitary Inspector; and

(*b*) in non-municipal areas, to the Health Officer, a Health or Sanitary Inspector or the village headman.

Explanation.—In this section, 'medical practitioner' includes a hakim or vaidya, whether registered or not.

Prohibition of the use of water from suspected source.

57. (1) If it appears to the Health Officer that the water in any tank, well or other place, if used for drinking or any other domestic purpose, is likely to engender or cause the spread of any infectious disease, he may, by public notice, prohibit the removal or use of the said water generally or for any specified domestic purpose.

(2) No person shall remove or use any water in respect of which any such notice has been issued in contravention of the terms thereof.

Removol of infected person to hospital.

58. (1) If it appears to the Health Officer that any person is suffering from an infectious disease, and that such person—

(*a*) (i) is without proper lodging or accommodation, or

(ii) is lodged in a place occupied by more than one family, or

(iii) is without medical supervision directed to the prevention of the spread of the disease, or

(iv) is in a place wheie his presence is a danger to the people in the neighbourhood; and

(*b*) should be removed to a hospital or other place at which patients suffering from such disease are received for treatment,

the Health Officer may remove such person or cause him to be removed to such hospital or place.

(2) If any woman who, according to custom, does not appear in public, is removed to any such hospital or place—

(i) the removal shall be effected in such a way as to preserve her privacy; and

(ii) special accommodation in accordance with the custom afoiesaid shall be provided for her in such hospital or place.

(3) No person shall leave, or be taken away from, any hospital or other place referred to in sub-section (1) without the permission of the medical officer-in-charge or of the Health Officer.

(4) Whoever—

(*a*) obstructs the removal of any person to any hospital or other place under sub-section (1), or

(*b*) leaves, or takes away any person from, any such hospital or place in contravention of sub-section (3),

shall be punished with imprisonment which may extend to three months, or with fine, or with both.

Prohibition of the exposure of other persons to infection.

59. (1) No person who knows that he is suffering from an infectious disease not specified in Part II of this Chapter shall expose othei persons to the risk of infection by his presence or conduct in—

(*a*) any market, theatre or other place of entertainment or assembly, or

(*b*) any school, college, play-ground or such other place, or

(*c*) any hotel, hostel, boarding house, choultry, rest-house, or club, or

(*d*) any factory or shop.

Explanation.—A person shall be deemed to know that he is suffering from an infectious disease within the meaning of this sub-section if he has been informed by the Health Officer or any other officer of the Public Health Department of the Government or of a local authority, not below the rank of Health or Sanitary Inspector, or a medical practitioner registered under the Madras Medical Registration Act, 1914, that he is so suffering.

(2) No person who has the care of a person whom he knows to be suffering from an infectious disease not specified in Part II of this Chapter shall cause or permit that person to expose others to the risk of infection by his presence or conduct in any place referred to in sub-section (1).

Infected persons not to engage in certain trades and occupations.

60. No person shall, while suffering from, or in circumstances in which he is likely to spread, any infectious disease—

(a) make, carry or offer for sale, or take any part in the business of making, carrying or offering for sale, any article of food for human consumption; or

(b) engage in any other occupation without a special permit from the Health Officer of the local authority concerned or otherwise than in accordance with the conditions specified therein.

Prevention of infectious diseases transmissible from animals.

61. If, in any local area, any infectious disease transmissible to man breaks out or is in the opinion of the Health Officer likely to break out, amongst cattle, or other animals, it shall be the duty of the Health Officer to recommend to the local authority the adoption of such measures as he may deem necessary for suppressing or mitigating the disease or for preventing the outbreak or threatened outbreak thereof; and the local authority shall consider such recommendations and take such action thereon as to it may seem suitable.

Part II.

Notified Infectious Diseases.

Notified diseases.

62. In this Part, notified disease means,

(a) cerebro-spinal fever,
(b) chicken-pox,
(c) ch lera,
(d) diphtheria,
(e) leprosy,
(f) measles,
(g) plague,
(h) rabies,
(i) scarlet fever,
(j) smallpox,
(k) typhus, or

(l) any other disease which the Government may from time to time by notification declare to be a notified disease for the purposes of this Part either generally throughout the Province or in such part or parts thereof as may be specified in the notification.

Occupation of houses to prevent the spread of infection.

63. (1) The Health Officer may, in cases of emergency, with the sanction of the District Collector, enter upon, occupy and use, or depute any person to enter upon, occupy and use, without having recourse to the provisions of the Land Acquisition Act, 1894, any building or place which, in the opinion of the Health Officer, is required, and is suitable for any purposes connected with the prevention or control of infection from a notified disease:

Provided that, if the building or place is occupied, notice shall be given in writing to the occupant, or be conspicuously affixed on such building or place, not less than thirty-six hours before it is entered upon.

(2) The owner or lessee of such building or place shall be entitled to compensation for any damage or expenses incurred and to a reasoanble rent for the period during which it had been occupied or used for any of the purposes referred to in sub-section (1). Such compensation and rent shall be fixed by the District Collector.

(3) The Health Officer shall, when any such building or place ceases to be occupied or used for any of the purposes aforesaid, cause it to be thoroughly disinfected and cleansed.

Information regarding notified disease.

64. Every medical practitioner who, in the course of his practice, becomes cognizant of the existence of any notified disease in any private or public dwelling other than a public hospital and

every manager of any factory or public building, every keeper of a lodging house, every head of a family and every owner or occupier of a house, who knows or has reason to believe that any person in any premises under his management, control or occupation is suffering from, or has died of, a notified disease,

shall, if the case has not been already reported, give information of the same with the least practicable delay—

(a) in municipal areas, to the executive authority, the Health Officer or a Sanitary Inspector, and

(b) in non-municipal areas, to the Health Officer, a Health or Sanitary Inspector or the village headman.

Explanation.—In this section, 'medical practitioner' includes a hakim or vaidya, whether registered or not.

Power of entry of local officers to take preventive measures.

65. (1) The Health Officer or any person authorized by him in this behalf may—

(a) at all reasonable hours, inspect with or without assistants any place in which any notified disease is reported or suspected to exist, without notice in the case of factories, workshops, workplaces, offices, bnsiness places and the like and after giving such notice as may appear to him reasonable in other cases, including dwelling houses; and

(b) take such measures as he may consider necessary to prevent the spread of such disease beyond such place.

(2) The powers conferred by sub-section (1) on the Health Officer may, in municipal areas, be exercised also by the executive authority or any person authorized by such authority.

Destruction of hut or shed to prevent spread of infection.

66. (1) If it appears to the Health Officer that the destruction of any hut or shed is necessary to prevent the spread of any notified dise se, he may, after giving to the owner and the occupier of such hut or shed such previous notice of his intention as may in the circumstances of the case appear to him reasonable, take measures for having such hut or shed and all the materials thereof destroyed.

(2) Such compensation as the local authority may consider reasonable, shall be paid to any person who in its opinion sustains loss by the destruction of any hut or shed under the powers conferred by sub-section (1); but save as provided in this sub-section, no claim for compensation shall lie for any loss or damage caused by any exercise of the powers aforesaid.

Closure of lodging houses.

67. If, on the application of the Health Officer, a Magistrate (not being a Magistrate of the third class) is satisfied that it is necessary in the interests of public health that a lodging house or any place where articles of food are sold, or prepared, stored, or exposed for sale, or distributed, should be closed on account of the existence or recent occurrence in such lodging house or place of a case of notified disease, the Magistrate may, by order, direct it to be closed until the expiry of such period as may be specified in the order or until it is certified by the Health Officer to be free from infection.

Infected clothes not to be sent to laundry.

68. No person shall—

(1) send or take to any laundry or public wash-house or any public water-course, tank or well, for the purpose of being washed, or to any place for

the purpose of being cleaned, any clothing, bedding or other article which he knows to have been exposed to infection from any notified disease, unless such article has been disinfected by, or to the satisfaction of, the Health Officer, or a registered medical practitioner, or unless under instructions from such a person, it is sent with proper precautions to a laundry for the purpose of disinfection with notice that it has been exposed to infection; or

(2) place or cause or permit to be placed in any dust-bin or other receptacle for the deposit of refuse any matter which he knows to have been exposed to infection from a notified disease and which has not been disinfected.

Infected persons not to use public conveyance.

69. (1) No person who knows that he is suffering from a notified disease shall—

(*a*) enter any public conveyance used for the conveyance of passengers at separate fares or

(*b*) enter any other public conveyance,

without previously notifying the owner, driver or conductor thereof that he is so suffering.

(2) No person having the care of a person whom he knows to be suffering from a notified disease shall permit that person to be carried—

(*a*) in any public conveyance used for the conveyance of passengers at separate fares, or

(*b*) in any other public conveyance,

without previously notifying the owner, driver or conductor thereof that the person is so suffering.

(3) The owner, driver, or conductor of a public conveyance used for the conveyance of passengers at separate fares shall not convey therein a person whom he knows to be suffering from a notified disease, at any time when a passenger not suffering from such disease is being conveyed therein:

Provided that a person suffering from a notified disease may be conveyed in the public conveyance aforesaid, in such cases of emergency and subject to such restrictions and safeguards as may be notified by the Government.

(4) The owner or driver of any other public conveyance may refuse to convey therein any person suffering from a notified disease until he has been paid a sum sufficient to cover any loss and expense which will be incurred by reason of the provisions of the next succeeding sub-section.

(5) If a person suffering from a notified disease is conveyed in a public conveyance, the person in charge thereof shall as soon as practicable give notice to the Health Officer of the local area in which the conveyance is usually kept and before permitting any other person to enter the conveyance shall cause it to be disinfected.

(6) The local authority when so requested by the person in charge of a public conveyance in which a person suffering from a notified disease has been conveyed shall provide for its disinfection.

Letting or sub-letting a building occupied by an infected person.

70. No person shall, without a special permit from the Health Officer, let or sub-let, or permit or suffer any prospective tenant to enter, a building in which he knows or has reason to know that a person has been suffering from a notified disease, within the three months immediately preceding.

Prohibition of the exposure of other persons to infection.

71. (1) No person who knows that he is suffering from a notified disease shall expose other persons to the risk of infection by his presence or conduct in—

(*a*) any street or public place, or

(*b*) any market, theatre or other place of entertainment or assembly, or

(*c*) any school, college, play-ground or such other place, or
(*d*) any hotel, hostel, boarding house, choultry, rest-house, or club, or
(*e*) any factory or shop.

Explanation.—A person shall be deemed to know that he is suffering from a notified disease within the meaning of this sub-section if he has been informed by the Health Officer or any other officer of the Public Health Department of the Government or of a local authority, not below the rank of Health or Sanitary Inspector, or a medical practitioner registered under the Madras Medical Registration Act, 1914, that he is so suffering.

(2) No person who has the care of a person whom he knows to be suffering from a notified disease shall cause or permit that person to expose others to the risk of infection by his presence or conduct in any place referred to in sub-section (1).

Forbidding work in infected premises.

72. (1) If a case of notified disease occurs on any premises, the Health Officer may, whether the person suffering from the disease has been removed from the premises or not, make an order forbidding any work to which this section applies, to be given out to any person living or working on those premises or in such part thereof as may be specified in the order, and any order so made may be served on the occupier of the factory from which the work is given out or on any contractor employed by such occupier.

(2) An order under this section may be expressed to be operative for a specified time or until the premises or any part thereof specified in the order have been disinfected to the satisfaction of the Health Officer, or may be expressed to be inoperative so long as any other reasonable precautions specified in the order are taken.

(3) This section applies to the making, cleaning, washing, altering, ornamenting, finishing or repairing of wearing apparel and any work incidental thereto, and to such other classes of work as may from time to time be notified by the Director of Public Health.

Prohibition of use of public library by infected person.

73. No person who knows that he is suffering from a notified disease shall take any book, or cause any book to be taken for his use, or use any book taken, from any public or circulating library.

Disposal of bodies of persons dying while suffering from notified disease.

74. (1) No person having the charge or control of the body of any person who has died while suffering from a notified disease shall permit or suffer persons to come unnecessarily into contact with, or proximity to, the body.

(2) No person shall, without the sanction in writing of an officer of the Public Health Department of the Government or of the local authority concerned, not below the rank of Health or Sanitary Inspector, retain in any premises (elsewhere than in a public mortuary) for more than twelve hours the body of any person who has died while suffering from any notified disease.

(3) (*a*) If any such body (not being a body kept in a mortuary) remains undisposed of for more than twelve hours without the sanction referred to in sub-section (2), or

if the dead body of any person is retained in any building so as to endanger the health of the inmates of such building, or of any adjoining or neighbouring building,

any Magistrate may, on the application of any officer referred to in sub-section (2), order the body to be removed and disposed of within a specified time.

(*b*) A Magistrate may, in the case of the body of a person who has died while suffering from a notified disease, or in any other case in which he considers the immediate disposal of the body necessary, direct the body to be so disposed of, unless the friends or the relatives of the deceased undertake the disposal of the body within a time specified in the order.

(*c*) The expenses of the removal and disposal of any body under clause (*a*) or clause (*b*) shall be borne by the local authority; but such expenses may be recovered, as if it were a tax due to it, by the local authority from any person who would have been legally liable therefor but for such removal and disposal, unless in the opinion of the local authority he is too poor to do so.

(4) (*a*) If any person dies in a hospital or a place of temporary accommodation for the sick, while suffering from a notified disease, and the Health Officer certifies that in his opinion it is desirable, in order to prevent the spread of infection, that the body should not be removed from such hospital or place except for the purpose of being taken direct to a burial or burning ground or a crematorium for being forthwith buried or cremated, no person shall remove the body from the hospital or place except for such a purpose.

(*b*) When the body is removed for the purpose aforesaid, it shall forthwith be taken direct to a burial or burning ground or a crematorium, and there buried or cremated with the least practicable delay.

(5) Without the permission of the Health Officer or a Magistrate, no person shall cause or permit to be carried in a public conveyance the dead body of any person who has died while suffering from a notified disease.

Power of Magistrate to prohibit an assembly of fifty or more persons.

75. In the event of the prevalence of a notified disease in any local area, on the application of the Health Officer, any Magistrate, not being a Magistrate of the third class, having local jurisdiction shall have power to prohibit either generally, or by special order in any individual case, assemblages consisting of any number of persons exceeding fifty, in any place whether public or private, or in any circumstances, or for any purpose, if in his opinion such assemblages in such place, in such circumstances, or for such purpose, would be likely to become a means of spreading the disease or of rendering it more virulent.

Power of Government to confer special powers on officers to control notified diseases.

76. (1) In the event of the prevalence or threatened outbreak of a notified disease in any local area, the Government may, by notification—

(*a*) declare that such local area is visited or threatened with an outbreak of notified disease, and

(*b*) confer on the Health Officer or any other officer of the local authority concerned, or on any officer of the Government, all or any of the powers specified in sub-section (2).

(2) The powers which may be conferred under sub-section (1) are—

(*a*) power to order the evacuation of infected houses and houses adjoining them or in their neighbourhood, or generally of all houses in an infected locality;

(*b*) power to make vaccination and preventive inoculations compulsory subject to the provisions of sub-section (3);

(*c*) power to direct—

(i) that persons arriving from places outside the local area, or residing in any building adjacent to, or in the neighbourhood of, an infected building, shall be examined by any specified medical officer or by any one of a speeified class of medical officers;

(ii) that the clothing, bedding or other articles belonging to such persons shall be disinfected, if there is reason to suspect that they have been exposed to infection; and

(iii) that any such person shall give his address and present himself daily for medical examination at a specified time and place, for a period not exceeding ten days;

(*d*) power to take such measures as may be necessary—

(i) in respect of, or in relation to, persons exposed to infection from any notified disease, or likely to infect other persons with any such disease, and

(ii) in respect of, or in relation to, articles exposed to infection from any notified disease, or likely to infect persons with any such disease,

including, in case (i) the placing of restrictions on the movements of such persons, and in case (ii), the destruction of such articles and the placing of restrictions on their export from, import into, or transport within, the local area;

(*e*) power to direct that at any place within or outside the local area, any consignment of grain exported from, or imported into, such area by rail, road or otherwise, shall be examined and, if necessary, unloaded and disinfected in any specified manner; and

(*f*) power to close all or any existing markets and to appoint special places where markets may be held.

(3) (*a*) If any person who, or a child in whose care, is sought to be vaccinated or inoculated in pursuance of the power referred to in clause (*b*) of sub-section (2), declares before a Magistrate specially empowered by the Government in this behalf that as a result of a careful inquiry into the subject, he believes that such vaccination or inoculation will be injurious to his health or the health of the child, as the case may be, the Magistrate may, after giving notice to the Health Officer and hearing any representations made by him or on his behalf, exempt such person or child from vaccination or inoculation, on condition of the person aforesaid undertaking to subject himself and the members of his family to isolation of such description and for such period and to such further restrictions, if any, as may be directed by the Magistrate:

Provided that any exemption granted under this clause shall cease to have effect after a conviction under clause (*b*) and no exemption shall be granted to any person who has been so convicted.

(*b*) Any person who commits a breach of any undertaking giv n by him under clause (*a*) shall be punished with imprisonment which may extend to three months, or with fine, or with both.

(4) Any officer on whom powers are conferred by a notification nnder sub-section (1) shall, subject to such limitations, restrictions and conditions, if any, as the Government may in the same or in any subsequent notification impose, exercise every power so conferred on him until it is withdrawn by notification.

(5) The local authority may, in its diseretion, give compensation to any person who in its opinion has sustained substantial loss by the destruction of any property under the powers conferred by this section; but save as provided in this sub-section, no claim for compensation shall lie for any loss or damage caused by any exercise of the powers aforesaid.

Destruction of rats, mice, etc.

77. (1) The occupier of every premises, or if the premises are unoccupied, the owner thereof, shall take such steps as may be reasonably practicable for the destruction of rats, mite and other animals susceptible to plague infesting such premises.

(2) Where the Health Officer is of opinion that the occupier or owner of any premises has failed to fulfil the obligation laid on him by sub-section (1), he may either—

(*a*) serve a notice on such occupier or owner, requiring him to take such steps and within such time as may be specified in the notice, or

(*b*) enter upon such premises and take such steps as may be necessary for the purpose of destroying the rats, mice and other animals susceptible to plague infesting the same, after giving not less than twenty-four hours previous notice to such occupier or owner:

(3) Any expenses incurred under clause (*b*) of sub-section (2) may be recovered by the local authority concerned from the occupier or owner, as the case may be, as if it were a tax due from him to the local authority.

Part III.

Venereal diseases.

Provision for treatment of venereal disease by local authorities.

78. (1) A local authority may, and if so required by the Government shall, make such arrangements in its local area as may be directed by the Government for—

(*a*) the free diagnosis and treatment of persons suffering, or suspected to suffer, from venereal diseases; and

(*b*) the prevention of infection from such diseases.

(2) The local authority may, for the purpose mentioned in sub-section (1), enter into a contract—

(*a*) with any other local authority, or

(*b*) with a hospital or medical institution recognized by the Government in this behalf, or

(*c*) with the sanction of the Government, with any medical practitioner registered under the Madras Medical Registration Act, 1914.

Patient to be instructed in methods of prevention of the spread of venereal disease.

79. Every physician or other person treating, or examining with a view to treatment, a person having a venereal disease shall, at the first visit—

(*a*) impress upon such person the necessity for treatment until the cure is effected;

(*b*) instruct him in regard to the measures necessary for preventing the spread of the disease; and

(*c*) furnish him with such other information relating to the disease as may be provided by the Director of Public Health.

Certain medical practitioners to certify as to freedom from venereal disease.

80. Every medical practitioner registered under the Madras Medical Registration Act, 1914, and included in a panel published by the Government for the purposes of this section shall be bound, at the instance of a person desirous of obtaining a certificate under this section and on payment of a fee of five rupees, to examine such person, and if he finds that that such person is not suffering from a venereal disease, or has been cured thereof, to furnish to such person a certificate to that effect in the prescribed form.

Part IV.

Power to make rules.

Rules for the prevention, treatment and control of certain diseases.

81 The Government shall have power to make such rules as they deem fit for the treatment of persons affected with any epidemic, endemic or infectious disease and for preventing the spread of such diseases and the rules may declare by what authority or authorities such rules shall be enforced and executed.

CHAPTER VIII.

MATERNITY AND CHILD-WELFARE.

Local authority to carry out maternity and child-welfare measures.

82. Every Local authority shall be bound to carry out such measures pertaining to maternity and child-welfare as may be prescribed.

CHAPTER IX.

MOSQUITO CONTROL.

Prohibition of mosquito breeding in collections of water.

83. (1) If the provisions of this section have been extended to any local area, no person or local authority shall, after such extension—

(a) have, keep, or maintain within such area any collection of standing or flowing water in which mosquitoes breed or are likely to breed, or

(b) cause, permit, or suffer any water within such area to form a collection in which mosquitoes breed or are likely to breed,

unless such collection has been so treated as effectively to prevent such breeding

Explanation.—Troughs used for cattle and in frequent use shall not, until the contrary is proved, be deemed to be collections of water in which mosquitoes breed or are likely to breed.

(2) The natural presence of mosquito larvæ in any standing or flowing water shall be evidence that mosquitoes are breeding in such water.

Treatment of mosquito breeding places.

84. (1) The Health Officer may, by notice in writing, require the owner or the occupier of any place containing any collection of standing or flowing water in which mosquitoes breed or are likely to breed, within such time as may be specified in the notice, not being less than twenty-four hours, to take such measures with respect to the same, or to treat the same by such physical, chemical or biological method, being measures or a method, approved by the Director of Public Health, as the Health Officer may consider suitable in the circumstances.

(2) If a notice under sub-section (1) is served on the occupier, he shall, in the absence of a contract, expressed or implied, to the contrary, be entitled to recover from the owner the reasonable expenses incurred by him in taking the measures or adopting the method of treatment, specified in the notice, and may deduct the amount of such expenses from the rent which is then, or which may thereafter be, due from him to the owner.

Health Officer's powers in case of default.

85. If the person on whom a notice is served under section 84 fails or refuses to take the measures, or adopt the method of treatment, specified in such notice within the time specified therein, the Health Officer may himself take such measures or adopt such treatment and recover the cost of doing so from the owner or occupier of the property, as the case may be, in the same manner as if it were a property tax.

Protection of anti-mosquito works.

86. Where, with the object of preventing the breeding of mosquitoes in any land or building, the Government or any local authority, or the owner or occupier at the instance of the Government or any local authority, has constructed any works in such land or building, the owner for the time being as well as the occupier for the time being of such land or building shall prevent its being used in any manner which causes, or is likely to cause, the deterioration of such works, or which impairs, or is likely to impair, their efficiency.

Prohibition of interference with such works.

87. (1) No person shall, without the consent of the Health Officer, interfere with, injure, destroy or render useless, any work executed or any material or thing placed in, under, or upon any land or building, by or under the

orders of the Health Officer with the object of preventing the breeding of mosquitoes therein.

(2) If the provisions of sub-section (1) are contravened by any person, the Health Officer may re-execute the work or replace the materials or things, as the case may be, and the cost of doing so shall be recovered from such person in the same manner as if it were a property tax.

Power of Healh staff to enter and inspect premises.

88. For the purpose of enforcing the provisions contained in this Chapter, the Health Officer or any of his subordinates not below the rank of Health or Sanitary Inspector may, at all reasonable times, after giving such notice in writing as may appear to him reasonable, enter and inspect any land or building within his jurisdiction; and the occupier or the owner, as the case may be, of such land or building, shall give all facilities necessary for such entry and inspection, and supply all such information as may be required of him for the purpose aforesaid.

CHAPTER X.

SANITATION AND BUILDINGS.

Part I.

Residential Areas.

Notification of residential areas.

89. (1) Every urban local authority shall, within one year from the commencement of this Act or within such further time as the Government may allow in the case of any such authority, notify in the prescribed manner the localities, divisions, wards, streets or portions of streets in its local area which shall be reserved for residential purposes.

(2) An urban local authority may, at any time subsequent to the issue of a notification under sub-section (1), notify additional localities, divisions, wards, streets or portions of streets, as areas which shall be reserved for residential purposes.

(3) A notification issued under sub-section (1) or sub-section (2) may declare that operations in any factory, workshop or workplace in existence at the time when it comes into force, or that the continuance of any offensive trade carried on by any person at such time, shall be subject to such restrictions, limitations and conditions as may be specified in the notification.

Approval of Director of Public Health and of Director of Town-Planning to be obtained for notification.

90. (1) Before issuing a notification under section 89, the local authority shall—

(*a*) obtain the approval both of the Director of Public Health and of the Director of Town-Planning, in regard to—

(i) the suitability of the areas proposed to be reserved for residential purposes; and

(ii) the restrictions, limitations and conditions, if any, proposed to be imposed under sub-section (3) of section 89; and

(*b*) publish in the prescribed manner for general information the situation and limits of the areas proposed to be reserved for residential purposes and the restrictions limitations and conditions, if any, proposed to be imposed under sub-section (3) of section 89, and consider all objections received by it within six weeks of such publication.

(2) In the event of a difference of opinion between the local authority and the Director of Public Health or the Director of Town-Planning the matter shall be referred to the Government whose decision shall be final.

Appeal against notification.

91. Any person aggrieved by the issue of a notification under section 89, may appeal to the Government whose decision shall be final.

Consequences of notification.

92. Upon the issue of a notification under section 89, the following consequences shall ensue, namely:—

(*a*) The construction or establishment of any new factory, workshop or workplace, or the carrying on of any new offensive trade in the areas specified in the notification shall be absolutely prohibited.

(*b*) In the case of any factory, workshop or workplace in existence at the time when the notification comes into force or of any offensive trade in existence at such time, the restrictions, limitations and conditions, if any, specified in the notification, shall be observed in the areas aforesaid.

Explanation (1).—If work in any factory, workshop, or workplace existing at the time when the notification under section 89 comes into force or any offensive trade carried on by any person at such time ceases to be carried on for a continuous period of not less than one year, the resumption of work in such factory, workshop, or workplace or of such offensive trade, as the case may be, shall, unless the Government otherwise order, be deemed to be absolutely prohibited under clause (*a*).

Explanation (2).—In the case referred to in Explanation (1), where the period exceeds six months but does not extend to one year, work in the factory, workshop or workplace or the offensive trade, as the case may be, shall not be resumed without the written permission of the Health Officer unless the Government otherwise order.

Extension of sections 89 to 92 to non-urban local authorities.

93. The Government may, by notification, direct that the provisions of sections 89 to 92 shall apply to any non-urban local authority specified in such notification; and thereupon, the provisions of those sections shall apply to such authority as if it were an urban local authority and as if the reference to the commencement of this Act in sub-section (1) of section 89 were a reference to the date of publication of the notification under this section.

Part II.

Control over Insanitary Buildings.

New building not to be erected on certain sites.

94. (1) No person shall erect a new building on any ground which has been filled up with fæcal or offensive vegetable or offensive animal matter or upon which any such matter has been deposited, unless and until the Health Officer certifies that such matter has been properly removed by excavation or otherwise, or has become or been rendered innocuous.

(2) Against the refusal of the Health Officer to issue a certificate under sub-section (1), an appeal shall lie to the Government whose decision shall be final.

Cleansing of court, yard or passage used in common.

95. (1) If any court, yard or passage which is used in common by the occupants of two or more buildings, but is not a public street, is not regularly swept and kept clean and free from rubbish or other accumulation to the satisfaction of the Health Officer, he may cause such court, yard or passage to be swept and cleansed.

(2) The local authority may recover any expenses reasonably incurred by the Health Officer under sub-section 1 from the occupants of the buildings which front or abut on the court or yard, or to which the passage affords access, in such proportions as may be determined by the Health Officer.

Dwelling house unfit for human habitation to be vacated.

96. (1) If any dwelling house or portion thereof appears to the Health Officer to be unfit for the purpose of human habitation, he may in cases not falling under section 46, apply to the local authority to prohibit the use thereof for such purpose, and such authority shall make

an order prohibiting the use of such dwelling house or portion for human habitation until in the opinion of the Health Officer it is rendered fit therefor:

Provided that before making an order under this sub-section, the loca authority shall give the owner and the occupier or occupiers, if any, concerned a reasonable opportunity of showing cause why it should not be made.

(2) When any order has been made under sub-section (1), the executive authority shall cause a copy of the order to be communicated to the owner as well as to every occupier concerned; and every such occupier shall be bound to cease to inhabit the dwelling house or portion thereof, as the case may be, within thirty days after the communication of the order to him.

(3) The owner of any dwelling house or portion of a dwelling house in respect of which an order under sub-section (1) is in force, shall not let or occupy, or permit to be let or occupied, such dwelling house or portion, or any part thereof, as a human habitation.

Back-to-back houses not to be erected without permission.

97. Notwithstanding anything contained in any other law or provision having the force of law, for the time being in force, no person shall, without the previous permission of the Health Officer, erect any back-to-back houses intended to be used as dwelling houses and any such house the erection of which is begun after the commencement of this Act without such permission shall be deemed to be unfit for human habitation within the meaning of section 96.

Part III.

Abatement of Overcrowding.

Definitions.

98. In this Part—

(1) "tenement" means a dwelling house and includes—

(*a*) any part of a dwelling house which is capable of separate occupation; and

(*b*) a students' hostel under public or recognized control,

but does not include a dwelling house or part of a dwelling house occupied by the owner thereof; and

(2) "landlord" means the immediate landlord of the occupier or occupiers of a tenement.

Duties of landlord.

99. A landlord of a tenement—

(*a*) shall maintain it in a habitable condition; and

(*b*) except temporarily on occasions such as marriages and the like, shall not cause or permit the tenement to be overcrowded:

Provided that no proceedings shall be instituted against the landlord in respect of any infringement by him of the provisions of this section, unless a notice in writing that the tenement is not in a habitable condition or that it is overcrowded, has been served upon the landlord or his agent by the Health Officer, and the landlord fails within such time as may be specified in such notice to take such steps as may be reasonably open to him for putting the tenement in a habitable condition or for securing the abatement of the overcrowding therein, as the case may be, including, if necessary, the taking of legal proceedings for possession of the tenement.

Power to make rules.

100. The Government shall have power to make rules for determining—

(*a*) whether a tenement or any class of tenements is or is not maintained in a habitable condition within the meaning of section 99; and

(*b*) whether a tenement or any class of tenements is or is not overcrowded within the meaning of that section.

CHAPTER XI.

LODGING HOUSES.

Lodging houses to be registered.

101. No person shall keep a lodging house or receive a lodger therein unless he is registered as the keeper thereof under this Act:

Provided that a person who immediately before the commencement of this Act was keeping a lodging house shall, for a period of three months after such commencement, be deemed to have been registered as the keeper thereof.

Register of lodging houses.

102. Every executive authority shall keep a register in which shall be entered—

(a) the full name and the place of residence of every person registered as the keeper of a lodging house;

(b) the situation of every such lodging house;

(c) the number of persons authorized to be received in the lodging house; and

(d) the full names and the places of residence of any persons who are to act as deputies of the keeper of the lodging house.

Conditions of registration and of renewal of registration.

103. (1) An executive authority on receiving from any person an application for registration, or for the renewal of his registration, as a keeper of a lodging house, and on payment by him of such fee, if any, as may be prescribed for the purpose, shall register the applicant in respect of the lodging house named in the application or renew his registration in respect thereof and issue to him a certificate of registration or of renewal of registration:

Provided that the executive authority—

(a) shall not register an applicant until the Health Officer has inspected the premises named in the application and has recommended such registration; and

(b) may refuse to register, or to renew the registration of, an applicant if he is satisfied that—

(i) the applicant or any person employed or proposed to be employed by the applicant at the lodging house as a deputy or otherwise is not a fit person, whether by reason of age or otherwise, to keep or to be employed at a lodging house; or

(ii) the premises are not suitable for use as a lodging house or are not as regards sanitation and water-supply and in other respects including means of escape in case of fire, suitably equipped for use as such; or

(iii) the use of the premises as a lodging house is likely to occasion inconvenience or annoyance to persons residing in the neighbourhood.

(2) The registration, or the renewal of the registration, of a person as a keeper of a lodging house shall expire at the end of the year for which it is granted unless, for special reasons, the executive authority considers that it should expire at an earlier date, when it shall expire at such earlier date which shall be specified in the certificate of registration or of renewal of registration.

(3) If an executive authority refuses to grant or renew registration under this section, he shall deliver to the applicant a statement in writing of the grounds on which his application is refused.

(4) If at any time, a person registered as the keeper of a lodging house applies for the removal from the register of the name of any person entered therein as a deputy of the keeper, or for the insertion therein of the name of any other person, being a person approved by the executive authority, whom the keeper proposes to employ as a deputy, the executive authority shall alter the register accordingly and make any consequential alterations in the certificate of registration.

Appeal to local authority.

104. A person aggrieved by the refusal of an executive authority to grant or renew registration under section 103 may appeal to the local authority.

Rules for the upkeep and maintenance of lodging houses.

105. The Government shall have power to make rules—

(a) for fixing the number of persons who may be received into a lodging house and for the separate accommodation of the sexes therein;

(b) for promoting cleanliness and ventilation in lodging houses and requiring the walls and ceilings thereof to be lime-washed or treated with some other suitable preparation, at specified intervals;

(c) with respect to the taking of precautions when any case of infectious disease occurs in a lodging house; and

(d) generally for the well-ordering of lodging houses.

Notice to be affixed outside the lodging house.

106. (1) The keeper of a lodging house shall, if so required by the executive authority, affix, and keep affixed and undefaced and legible, a notice with the words "Registered lodging house" in some conspicuous place on the outside of the house.

(2) The keeper of a lodging house and every other person having the care or taking part in the management thereof shall at all times allow the executive authority, the Health Officer or any other person authorized by the executive authority or Health Officer in this behalf, to have free access to all parts of the house.

Cancellation of registration by Court.

107. When the registered keeper of a lodging house is convicted of any offence under this Chapter or under section 64 or a rule or by-law applicable to him made under this Act, the Court by which he is convicted may cancel his registration as a lodging house-keeper and may order that he be disqualified for such period as the Court thinks fit for being again registered as such keeper.

CHAPTER XII.

FOOD CONTROL.

Prohibition of sale of unsound food.

108. (1) No person shall—

(a) sell, expose or hawk about for sale, or keep, store or prepare for sale, any animal intended for human consumption which is diseased, or the flesh of any animal which has died on account of natural causes; or

(b) sell, expose or hawk about for sale, or keep, store, manufacture or prepare for sale, any food or drug intended for human consumption which is unfit for such purpose or is unwholesome.

(2) In any prosecution under sub-section (1), the Court shall, unless and until the contrary is proved, presume—

(a) that any animal found in the possession of a person who is in the habit of keeping animals of that class for sale for human consumption, has been kept by such person for sale, and

(b) that any food or drug found in the possession of a person who is in the habit of keeping, storing, manufacturing or preparing such food or drug for sale for human consumption, has been kept, stored, manufactured or prepared by such person for sale.

Punishment for contravening provisions of section 108, through others.

109. (1) Any person who does any of the acts mentioned in sub-section (1) of section 108 or in clauses *(a)* to *(d)* of sub-section (1) of section 5 of the Madras Prevention of Adulteration Act, 1918, through others employed by him, whether the latter be adults or children, shall be liable to punishment for such act as if he had himself done the same.

(2) If a child under seven years of age does any of the acts aforesaid, the employer of the child, or the parent or other person having the care and custody of the child, as the case may be, shall be liable to punishment for such act as if he had himself done the same.

Flesh of dead animal not to be consumed.

110. No person shall knowingly consume the flesh of any animal which has died on account of natural causes.

Explanation.—It shall be no defence to a prosecution under this section that the flesh was consumed as a matter of custom, or as a matter of right on account of services rendered in removing dead cattle, or on any other ground.

Importing meat into local area.

111. (1) No person shall bring into any local area, without the permission in writing of the Health Officer thereof, the flesh of any animal slaughtered outside the local area otherwise than in a slaughter-house maintained or licensed by the Government or by a local authority.

(2) Any flesh brought into the local area in contravention of sub-section (1) may be seized by the Health Officer or any officer or servant of the local authority authorized by him in that behalf, and sold or otherwise disposed of as the Health Officer may direct; and in case of sale, the sale-proceeds shall be credited to the funds of the local authority.

(3) Nothing in this section shall be deemed to apply to—

(*a*) cured or preserved meat, or

(*b*) flesh or meat carried through any local area for consumption outside the limits thereof and not stored anywhere within such limits in the course of transit, or

(*c*) flesh or meat brought into the local area by any person for immediate domestic consumption and not for sale:

Provided that the local authority may, by public notice, direct that the provisions of this section shall apply to cured or preserved meat of any specified description or brought from any specified place.

Power of Health Officer to enter premises used for food trade.

112. The Health Officer may, without notice, enter any place at any time, by day or by night, where any article of food is being manufactured, prepared, exposed or stored for sale, and inspect such article and any utensil or vessel used for manufacturing, preparing or containing the same.

Powers of Health Officer to deal with carriers of disease handling food.

113. (1) The Health Officer may, at any time, examine any person engaged in selling, or in manufacturing or preparing for sale, or in any manner whatsoever handling any article of food intended for sale.

(2) If on such examination the Health Officer finds that such person is suffering from, or harbouring the germs of, any infectious disease, such person shall not take part in selling any article of food or in manufacturing, preparing or in any manner handling any article of food intended for sale, until the Health Officer certifies in writing that he is free from infection from such disease.

Investigation of diseases caused by milk or dairy produce.

114. (1) If the Health Officer has reason to believe—

(a) that any person within the local area over which he has jurisdiction is suffering from an infectious disease attributable to milk or dairy produce supplied within such area, or

(b) that the consumption of any milk or dairy produce supplied within such local area is likely to cause any person therein to suffer from an infectious disease,

the Health Officer may require the person supplying the milk or dairy produce to furnish within such time as may be fixed by the Health Officer, a complete list of all dairies (whether situated within or outside the limits of the local area) from which that person's supply of milk or dairy produce is derived or has been derived during the six weeks immediately preceding.

(2) If such supply or any part of such supply is obtained, not directly from a dairy but through some other person, the Health Officer may make a similar requisition upon such other person.

(3) Every person on whom any requisition is made under sub-section (1) or sub-section (2) shall be bound to comply therewith.

Inspection of dairy by Health Officer.

115. (1) The Health Officer may inspect any dairy referred to in section 114 and the milch-cattle and the employees therein, and if, on such inspection, the Health Officer is of opinion that any infectious disease is caused, or is likely to be caused, by the consumption of the milk or dairy produce supplied from such dairy, he may make an order prohibiting the supply of any milk or dairy produce for human consumption from such dairy.

(2) An order made under sub-section (1) shall be forthwith cancelled by the Health Officer on his being satisfied that the milk supply has been changed, or that the employees objected to by him have ceased to work at the dairy, or that the cause of infection has been removed.

(3) If an order made under sub-section (1) or cancelled under sub-section (2) relates to a dairy situated outside the limits of the local area, the Health Officer shall also inform the local authority within whose jurisdiction the dairy is situated.

(4) When an order is made under sub-section (1), the Health Officer may either—

(a) permit the milk or other produce of the dairy, after being boiled or treated in such other manner as he may direct, to be sold or used as animal food, subject to any reasonable restrictions he may impose, or

(b) cause such milk or dairy produce to be destroyed.

(5) No person shall sell or supply any milk or dairy produce in contravention of the provisions of this section.

CHAPTER XIII.

Fairs and Festivals.

Notification of fairs and festivals by Government.

116. (1) The Government may, by notification—

(a) declare that any local area or part of a local area in which a fair or festival is to be held shall, for the purposes of this Chapter, be a notified fair or festival centre, for such period as may be specified in the notification; and

(b) define the limits of the area which shall, for the purposes aforesaid, be the site for the fair or festival.

(2) The provisions of this Chapter shall apply only to fairs and festivals in connexion with which a notification under sub-section (1) has been issued.

Levy of pilgrim tax on travellers by inland water ways.

117. (1) The Government, or the local authority with the approval of the Government, may by notification impose, during a period to be specified in the notification, a tax on persons leaving by inland waterways a notified fair or festival centre or any place within such distance therefrom as may be specified in the notification.

(2) Every such notification shall specify the rates at which the tax shall be levied:

Provided that the tax shall not exceed four annas in the case of passengers leaving by steam vessels, and two annas in the case of passengers leaving by other vessels including ferry boats.

(3) The Government shall have power to make rules regarding—

(a) the collection of the tax;

(b) the ascertainment of the expenses incurred in collecting the tax;

(c) in case the tax is collected by any authority (other than the local authority concerned) or any person, the payment of the proceeds of the tax after deducting the expenses of collecting the same, to the local authority;

(d) in the case referred to in clause (c), the returns and the information to be furnished by the authority or person collecting the tax to the local authority concerned, and the decision of disputes between the authority or person aforesaid and such local authority; and

(e) the decision of disputes between two or more local authorities.

Levy of tolls on vehicles.

118. (1) The Government, or the local authority with the approval of the Government, may, by notification, levy tolls on any vehicle (other than a motor vehicle) or any animal entering a notified fair or festival centre, for such period, at such rates, and subject to such exemptions, as may be specified in the notification.

(2) The Government shall have power to make rules regarding—

(a) the collection of tolls;

(b) the composition of the tolls payable by any person;

(c) the seizure, detention, and disposal of any vehicle or animal in respect of which toll is not paid;

(d) the duty of the police to assist persons authorized to collect tolls, and the powers of the police in that behalf; and

(e) the penalties to be imposed in case of evasion of tolls or of resistance to the seizure and detention of any vehicle or animal in respect of which toll is not paid.

Notice to be given of fair or festival.

119. (1) The person or authority in charge of any fair or festival shall, not less than sixty days before its commencement, intimate to the executive authority or Health Officer of the local authority concerned, or in case the fair or festival is to be held within the jurisdiction of more than one local authority, to the executive authority or Health Officer of each of the local authorities concerned, the date of the commencement of such fair or festival, and the period for which it will last.

(2) The person or authority in charge of the fair or festival shall also furnish such other particulars relating to the fair or festival as may be called for by the executive authority or Health Officer of the local authority or any of the local authorities concerned.

Sanitary arrangements, etc.

120. The local authority within whose jurisdiction a fair or festival is held, or if it is held within the jurisdiction of two or more local authorities, any person or committee appointed by such local authorities jointly, shall make provision for—

(1) the demarcation and preparation of the site of the fair or festival;

(2) the clearing and draining of the site;

(3) the disposition of the several parts of the fair or festival, including the alignment of roads within the site;

(4) the supply in sufficient quantities of water fit for drinking and cooking purposes for the use of persons resorting to the fair or festival and the proper preservation of such water;

(5) the accommodation of pilgrims and visitors, to such extent as may be practicable;

(6) the lighting of the fair or festival site;

(7) the supply by suitable persons of wholesome food, at reasonable rates, and in sufficient quantities, to persons resorting to the fair or festival and the proper supervision and inspection of all food prepared or offered for sale or stored or in course of transit within the fair or festival site;

(8) the collection, removal and disposal of refuse, rubbish and sewage;

(9) the supply and maintenance of suitable latrines for the use of persons resorting to the fair or festival;

(10) the detection and segregation of cases of infectious disease and the prevention of the introduction and spread of such diseases;

(11) the employment of adequate medical staff, the provision of medical relief, and the furnishing of hospital accommodation both for general and isolation purposes; and

(12) such other purposes as may be prescribed.

Health Officer to supervise the arrangements.

121. The arrangements mentioned in section 120 shall be executed under the supervision and control of the Health Officer concerned, or if the fair or festival is held within the jurisdiction of more than one local authority, under the supervision and control of the Health Officer of one of such local authorities designated by the person or committee referred to in section 120, or in case no Health Officer is so designated, under the supervision and control of the Health Officers concerned within their respective local areas.

Power to enter and seize unwholesome food.

122. (1) The Health Officer, or a Health or Sanitary Inspector of the local authority or of any of the local authorities concerned, or any officer of the Government or of any such local authority appointed by the Government in this behalf, may—

(*a*) enter and inspect any building or shop in the fair or festival site, which is a source of food-supply;

(*b*) for the purpose of inspection, have access to any source of water-supply on such site or within such distance therefrom as the Government may, by general or special order, determine; and

(*c*) seize any food prepared or offered for sale or stored or in course of transit within the fair or festival site which, he has reason to believe, is unwholesome or unfit for human consumption, and destroy the same forthwith, if, in his opinion, such food is of a perishable nature or the value thereof does not exceed three rupees.

(2) (*a*) Any officer seizing any food under clause (*c*) of sub-section (1) shall, if it is not destroyed under that clause, report the seizure to such authority or person as may be prescribed in that behalf.

(*b*) If the authority or person aforesaid is of opinion that the food is unwholesome or unfit for human consumption, such authority or person may, by order in writing, direct the food to be destroyed; and any expenses incurred in this behalf (including the cost, if any, of analysing the food or a sample

thereof) shall be recoverable from the person from whom the food was seized, as it it were a tax due from him to the local authority or any of the local authorities concerned.

(c) If the authority or person aforesaid is of opinion that such food is wholesome and fit for human consumption, the food shall be returned to the person from whom it was seized; and the cost, if any, of analysing the food or a sample thereof shall be borne by the local authority or local authorities concerned.

Occupation of building, etc., required in connexion with fair or festival.

123. (1) The local authority may, in cases of emergency, with the sanction of the District Collector, depute any person to enter upon, occupy and use, without having recourse to the provisions of the Land Acquisition Act, 1894, any land or any building not being a dwelling-house in the notified fair or festival centre which in the opinion of the Health Officer, is required and is suitable for any purposes connected with the fair or festival, such as the construction of pilgrim-sheds, water-sheds, hospitals, segregation-sheds, latrines, and the like:

Provided that if the land or building is occupied, notice shall be given in writing to the occupant or be conspicuously affixed on such land or building, not less than twenty-four hours before it is entered upon.

(2) The owner or lessee of such land or building shall be entitled to compensation for any damage or expenses incurred, and to a reasonable rent for the period during which it had been occupied or used for any of the purposes referred to in sub-section (1). Such compensation and rent shall be fixed by the District Collector.

(3) The local authority shall, when any such land or building ceases to be occupied or used for any of the purposes aforesaid, cause it to be thoroughly disinfected and cleansed.

Control over private sources of water-supply.

124. (1) The Health Officer may, by notice in writing, require the owner of, or other person having control over, any source of water-supply situated on the fair or festival site, or within such distance therefrom as the Government may by general or special order determine, to close or distinfect such source within a specified time if, in the opinion of the Health Officer, it is likely to engender or cause the spread of disease amongst persons resorting to the fair or festival.

(2) If the owner or person aforesaid fails or neglects to comply with any notice issued under sub-section (1) within the time specified therein, the Health Officer may himself take the necessary action; and the whole of the expenses incurred in doing so or such part thereof as the Health Officer may determine to be reasonable, shall be recovered from such owner or person as if it were a tax due from him to the local authority or any of the local authorities concerned.

Licensing of houses to accommodate visitors to fair or festival.

125. (1) The owner or occupier of a house, not being a lodging house registered under Chapter XI, situated in any notified fair or festival site shall not, for purposes of gain, accommodate in the house visitors to the fair or festival, without obtaining a licence in that behalf from the executive authority or the Health Officer of the local authority or any of the local authorities concerned.

This provision shall not apply to tenancies from month to month or for a period exceeding one month.

(2) Every application for a licence under sub-section (1) shall be in writing, shall contain such information as may be required by the authority to

whom it is addressed, and shall be accompanied by such fee as may be prescribed for the grant of the licence.

(3) (a) If it appears to the executive authority or the Health Officer, as the case may be, that the house is suitable for accommodating visitors to the fair or festival, he may issue a licence, in the prescribed form and subject to the prescribed conditions, for the accommodation in the house of such number of visitors as may, in his opinion, be conveniently received therein, having regard to the number of persons resident in the house, whether as members of the family or as servants of the owner or occupier.

(b) The licence shall also specify—

(i) the maximum number of persons (residents and visitors) who may be accommodated in the house at any one time; and

(ii) the date until which it shall remain in force.

(4) If the authority granting the licence is satisfied that the licensed house has, subsequent to the grant of the licence, become unfit for the accommodation of visitors, or if the licensee is convicted of any offence punishable under this Chapter, such authority may revoke the licence or, at his discretion, may suspend the licence for such period or until the fulfilment of such condition, as he may specify.

CHAPTER XIV.

FINANCE.

Manner of spending proceeds of taxes and tolls levied in respect of fairs and festivals.

126. If in respect of any fair or festival, any tax or toll is levied under section 117 or section 118 of this Act, or under section 116 of the Madras District Municipalities Act, 1920, or section 110 of the Madras Local Boards Act, 1920, the local authority shall have power to spend the proceeds thereof in connexion with the fair or festival or for the benefit generally of the local area concerned, in such manner as the Government may, by general or special order, authorize.

Earmarking of revenue by local authorities for expenditure on public health.

127. (1) Every municipality shall earmark not less than 30 per cent. of its income from all sources other than Government grants, for expenditure on the advancement of public health in its local area, including expenditure on medicial relief, and every district board or panchayat shall similarly earmark not less than 12½ per cent. of its income from such sources:

Provided that the Government may, for financial or other reasons, vary the provisions of this sub-section to such extent as they may think fit in the case of any municipality or district board or any panchayat or class of panchayats.

(2) (a) The Government may, by notification, authorize any local authority or class of local authorities to incur expenditure on any public health purpose specified in the notification, notwithstanding anything contained in the Act under which such local authority or authorities have been constituted.

(b) Any expenditure incurred by a local authority, which is authorized by clause (a) shall be taken into account for the purposes of sub-section (1).

CHAPTER XV.

RULES, BY-LAWS, PENALTIES, ETC.

Power of Government to make rules.

128. (1) The Government shall, in addition to the rule-making powers conferred on them by any other provision contained in this Act, have power to make rules generally to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the power conferred by sub-section (1), the Government may make rules—

(a) with reference to all matters expressly required, or allowed, by this Act to be prescribed; and

(b) regulating the situations in which sanitary conveniences for the use of the public shall be constructed by a local authority, and the number of such sanitary conveniences.

Penalty for breach of rules.

129. (1) In making a rule under section 81, the Government may provide that a breach of such rule shall be punishable with imprisonment which may extend to three months or with fine or with both.

(2) In making a rule under any other provision contained in this Act, the Government may provide that a breach of such rule shall be punishable—

(i) with fine which may extend to one hundred rupees, and in case of a continuing breach, with fine which may extend to thirty rupees for every day during which the breach continues after conviction for the first breach; or

(ii) with fine which may extend to twenty rupees for every day during which the breach continues after receipt of notice from the executive authority or the Health Officer to discontinue such breach.

Procedure for making and the effect of rules.

130. (1) The power to make rules under this Act shall be subject to the following conditions:—

(a) A draft of the rules shall be published in the Official Gazette.

(b) Such draft shall not be further proceeded with until six weeks after such publication or until such later date as the Government may appoint.

(2) All rules made under this Act shall be published in the Official Gazette and upon such publication shall have effect as if enacted in this Act.

By-laws by local authorities.

131. Any local authority may make by-laws, not inconsistent with this Act or the rules made thereunder or with any other law, for carrying out all or any of the purposes of this Act.

Breach of by-laws.

132. In making a by-law, the local authority may provide that a breach thereof shall be punishable—

(a) with fine which may extend to fifty rupees, and in case of a continuing breach with fine which may extend to fifteen rupees for every day during which the breach continues after conviction for the first breach, or

(b) with fine which may extend to ten rupees for every day during which the breach continues after receipt of notice from the executive authority or the Health Officer to discontinue such breach.

Procedure for making or altering by-laws.

133. In regard to by-laws made by a local authority under sections 131 and 132, the following provisions shall apply, namely:—

(a) in case the local authority is the Corporation of Madras, sections 352, 353, 354 and 356 of the Madras City Municipal Act, 1919;

(b) in case the local authority is a municipality constituted under the Madras District Municipalities Act, 1920, sections 309, 310 and 311 of that Act; and

(c) in case the local authority is a local board constituted under the Madras Local Boards Act, 1920, sections 204, 205 and 205-A of that Act.

Penalties for offences against Act, etc.

134. (1) Whoever—

(a) contravenes any of the provisions of this Act specified in the first and second columns of Schedule I; or

(*b*) contravenes any rule or order made under any of the provisions so specified; or

(*c*) fails to comply with any direction lawfully given to him, or any requisition lawfully made upon him, under or in pursuance of any of the said provisions

shall be punished with fine which may extend to the amount mentioned in that behalf in the fourth column of the said Schedule.

(2) Whoever after having been convicted of—

(*a*) contravening any of the provisions of this Act specified in the first and second columns of Schedule II; or

(*b*) contravening any rule or order made under any of the provisions so specified; or

(*c*) failing to comply with any direction lawfully given to him, or any requisition lawfully made upon him, under or in pursuance of any of the said provisions

continues to contravene the said provision or the said rule or order, or continues to fail to comply with the said direction or requisition, shall be punished for each day after the previous date of conviction during which he continues so to offend, with fine which may extend to the amount mentioned in that behalf in the fourth column of the said Schedule.

Explanation.—The entries in the third column of Schedules I and II headed 'Subject' are not intended as definitions of the offences described in the provisions specified in the first and second columns thereof, or even as abstracts of those provisions, but are inserted merely as references to the subject dealt with therein.

Penalty for preventing entry of executive authority or Health Officer.

135. Every person who prevents the executive authority or the Health Officer or any person to whom the executive authority or the Health Officer has lawfully delegated his powers of entering on or into any land or building, from exercising his lawful power of entering thereon or thereinto, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Miscellaneous.

Appeal against decisions of Health Officer.

136. Any decision of the Health Officer against which an appeal is not otherwise provided for in this Act shall be subject to such appeal as may be prescribed.

Method of serving notices.

137. (1) When any notice is required to be given by this Act, or by any rule, by-law, regulation or order made under it, such notice shall be given—

(*a*) by giving or tendering the notice to such person; or

(*b*) if such person is not found, by leaving such notice at his last known place of abode or business or by giving or tendering the same to some adult member or servant of his family; or

(*c*) if such person does not reside in the local area and his address elsewhere is known to the executive authority, by sending the same to him by post, registered; or

(*d*) if none of the means aforesaid be available, by affixing the same in some conspicuous part of such place of abode or business.

(2) When the person is an owner or occupier of any building or land, it shall not be necessary to name the owner or occupier in the notice, and in the case of joint owners and occupiers it shall be sufficient to serve it on, or send it to, one of such owners or occupiers.

Cognizance of offences against the Act.

138. No person shall be tried for any offence against the provisions of this Act, or of any rule, or by-law made under it, unless complaint is made within three months of the commission of the offence by the police, or the executive authority or the Health Officer, or by a person expressly authorized in this behalf by the local authority, the executive authority or the Health Officer:

Provided that nothing contained in this section shall affect the provisions of the Code of Criminal Procedure, 1898, in regard to the power of certain Magistrates to take cognizance of offences upon information received or upon their own knowledge or suspicion.

Powers of police officers to arrest offenders against Act, etc.

139. Any police officer who sees a person committing an offence against any of the provisions of this Act or of any rule or by-law made thereunder, may arrest such person, if his name and address are unknown to the officer and such person on demand declines to give his name and address or gives a name and address which the officer has reason to believe to be false.

Powers of executive officer and public health staff to arrest offenders against Act, etc.

140. (1) The executive officer of a local authority or any member of the public health establishment of a local authority not below the rank of Health or Sanitary Inspector, who sees a person committing any of the offences specified in sub-section (2) in the area over which the local authority has jurisdiction, may arrest such person, if his name and address are unknown to the executive officer or member aforesaid and such person on demand declines to give his name and address or gives a name and address which such officer or member has reason to believe to be false. Any person so arrested shall be handed over to the officer in charge of the nearest police station as expeditiously as possible.

(2) The offences referred to in sub-section (1) are—

(*a*) offences against any of the provisions of this Act or of any rule or by-law made thereunder; and

(*b*) offences falling under any of the provisions of the Acts mentioned below, if such provisions are in force in the area over which the local authority has jurisdiction—

(i) Chapters VII to XIII, both inclusive, of the Madras City Municipal Act, 1919, read with section 357 of that Act and Schedules VII and VIII thereto;

(ii) Chapters VII to XIII, both inclusive, of the Madras District Municipalities Act, 1920, read with section 313 of that Act and Schedules VII and VIII thereto;

(iii) Chapters VIII to XI, both inclusive, of the Madras Local Boards Act, 1920, read with section 207 of that Act and Schedules VIII and IX thereto;

(iv) sections 53 and 73 of the Madras City Police Act, 1888;

(v) clauses (9) and (11) of section 3 and sections 4 and 10 of the Towns Nuisances Act, 1889; and

(vi) section 5 of the Madras Prevention of Adulteration Act, 1918.

Persons arrested not to be detained unnecessarily.

141. No person arrested under section 139 or section 140 shall be detained in custody—

(*a*) after his true name and address have been ascertained, or

(*b*) for a longer period than under all the circumstances of the case is reasonable; and such period shall not, in the absence of the special order of a Magistrate, whether having jurisdiction to try the case or not, exceed twenty-four hours, exclusive of the time necessary for the journey of such person to the Court having jurisdiction to try the case.

Bar of suits and prosecutions in certain cases.

142. (1) No suit, prosecution or other proceeding shall lie, against any local authority or any executive authority of a local authority, or against the Government or any officer or servant of a local authority or of the Government, or against any person appointed under section 12 of this Act, for any act done or purporting to be done under this Act without the previous sanction of the Government.

(2) No local authority or executive authority of a local authority, no officer or servant of any local authority or of the Government and no person appointed under section 12 of this Act, shall be liable in respect of any such act in any civil or criminal proceeding if the act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under this Act.

Punishment for malicious abuse of powers.

143. Any executive authority of a local authority or any officer or servant of a local authority or of the Government, or any person appointed under section 12 of this Act, who maliciously abuses any powers conferred on him by or under this Act, shall be punished with imprisonment which may extend to one year or with fine which may extend to one thousand rupees or with both.

Explanation.—No prosecution shall be instituted under this section without the previous sanction of the Government.

Act to override other enactment.

144. If any provision relating to public health contained in any other enactment in force in the Province of Madras is repugnant to any provision contained in this Act, the latter provision shall prevail and the former provision shall, to the extent of the repugnancy, be void.

Power to remove difficulties.

145. If any difficulty arises in giving effect to the provisions of this Act, the Government, as occasion may require, may, by order, do anything which appears to them necessary for the purpose of removing the difficulty.

SCHEDULE I.

Ordinary Penalties.

[*See* section 134 (1).]

Section (1)	Sub-section or clause. (2)	Subject. (3)	Fine which may be imposed. (4)
24	(1)	Failure of the owner or other person having control to obey or comply with the directions contained in a notice requiring to keep any well, etc, in good repair, to cleanse it, or protect, etc.	Fifty rupees.
26	..	Owner of new dwelling house occupying or permitting its occupation without a supply of wholesome water.	Fifty rupees.
28	(1)	Failure to comply with notice to provide efficient drainage.	Fifty rupees.
29	..	Failure to comply with notice requiring to connect a house drain with an outside drain.	Fifty rupees.
30	..	Failure on the part of the owner of land to comply with notice requiring a drain for a hut on the land	One hundred rupees.
31	..	Failure to comply with notice for paving or raising the level of any court, yard, etc.	Fifty rupees.

Section. (1)	Sub-section or clause. (2)	Subject. (3)	Fine which may be imposed. (4)
32	(1)	Unlawful construction of cess-pool or construction of cess-pool on unapproved site	Fifty rupees.
	(2)	Failure to comply with notice requiring removal or closure of cess-pool.	Fifty rupees.
33	..	Occupying or permitting occupation of new building without drain.	One hundred rupees.
34	..	Letting out sullage or sewage into a street, etc.	Fifty rupees.
35	..	Discharging injurious refuse, etc, into a drain.	One hundred rupees
36	..	Polluting water-course ..	One hundred rupees
38	..	Constructing or reconstructing a building intended for human habitation without a sanitary convenience.	Fifty rupees.
39	..	Failure to comply with notice regarding provision of sanitary conveniences or latrines.	Fifty rupees.
40	(1)	Failure to construct and maintain latrines in the prescribed manner.	Fifty rupees.
	(2)	Failure to comply with notice regarding removal or improvement of latrines.	Fifty rupees.
	(3)	Causing injury to latrines ..	Fifty rupees.
44	..	Failure to comply with notice to abate nuisance.	Fifty rupees.
46	..	Failure to comply with Magistrate's order prohibiting the use of a house or building.	One hundred rupees.
51	(1)	Depositing filth, rubbish, etc., in streets.	Twenty-five rupees
	(2)	Easing or permitting a member of the family to ease in a street, etc.	Twenty-five rupees.
	(3)	Failure to cover excreta with earth ..	Five rupees.
56	..	Failure to give information regarding existence of certain infectious diseases.	Five rupees.
57	(2)	Failure to comply with notice prohibiting the use of unwholesome water	One hundred rupees.
59	..	Exposing other persons to infection ..	Twenty-five rupees.
60	(*a*)	Infected persons carrying on trade in articles of food.	Fifty rupees.
	(*b*)	Infected persons engaging in other occupations without permit	Fifty rupees.
64	..	Failure to give information of notified diseases.	Ten rupees.
67	..	Failure to close lodging houses, etc. ..	One hundred rupees.
68	..	Sending infected clothes to a laundry or depositing infected articles in a receptacle for refuse matter	Fifty rupees.
69	(1), (2), (3) and (5).	Using or permitting use of public conveyance by an infected person.	Fifty rupees.
70	..	Letting or sub-letting of infected building without a permit	Fifty rupees.
71	..	Exposing other persons to infection ..	Fifty rupees.
72	(1)	Failure to comply with notice forbidding work in infected premises.	Fifty rupees.
73	..	Use of books from public libraries by infected persons, etc	Fifty rupees.
74	(1), (2), (4) and (5).	Delay in disposing of dead body of an infected person or allowing others unne	Fifty rupees.

Section. (1)	Sub-section or clause. (2)	Subject. (3)	Fine which may be imposed. (4)
74—*contd.*		cessarily to come into contact with it, etc. etc.	
75	..	Failure to comply with order prohibiting assemblages of 50 or more persons.	One hundred rupees.
77	(1)	Failure to take steps for the destruction of rats, mice, etc.	Twenty rupees.
	(2)	Failure to comply with the notice for the destruction of rats, mice, etc.	Fifty rupees.
79	..	Failure to give instructions to the person having venereal disease and failure to furnish the required information.	Twenty rupees.
84	(1)	Failure to comply with notice requiring steps to be taken against breeding of mosquitoes.	Fifty rupees.
86	..	Permitting the deterioration of works relating to prevention of the breeding of mosquitoes.	Two hundred rupees.
87	(1)	Injuring or destroying anti-mosquito works.	Five hundred rupees.
92	(*a*)	Construction of factories, workshops, etc., in residential areas.	One thousand rupees.
	(*b*)	Failure of factories, workshops, etc., to comply with restrictions imposed.	Five hundred rupees.
94	..	Illegal erection of building on insanitary ground.	Two hundred rupees.
96	(2) and (3)	Failure to cease to inhabit a dwelling house declared unfit for human habitation or permitting it to be let or occupied as a dwelling house.	Two hundred rupees.
97	..	Constructing back-to-back houses without permission.	One hundred rupees.
99	(*a*)	Failure to maintain a tenement in a habitable condition.	Fifty rupees.
	(*b*)	Causing or permitting a tenement to be overcrowded.	Fifty rupees.
101	..	Keeping a lodging house or receiving a lodger without registration.	One hundred rupees.
106	(1)	Failure to affix notice ..	Ten rupees.
	(2)	Refusal to allow free access to the executive authority, etc., to all parts of the lodging house.	One hundred rupees.
108	(1)	Selling, etc., unsound meat or food ..	One hundred rupees.
109	..	Selling, etc., unsound meat or food through others.	One hundred rupees.
110	..	Consuming the flesh of any animal which has died of natural causes.	One hundred rupees.
111	(1)	Unlawfully importing meat from outside the local area.	One hundred rupees.
113	(2)	Infected person carrying on trade, etc., in articles of food.	One hundred rupees.
114	..	Failure to furnish information regarding the sources of supply of milk or dairy produce.	Fity rupees.
115	(5)	Failure to comply with the order prohibiting the supply of milk or dairy produce.	Two hundred rupees.
119	..	Failure to inform the proper authority about the date and other particulars regarding fair or festival.	Fifty rupees.
124	..	Failure to comply with notice to close or disinfect source of water-supply.	One hundred rupees.
125	(1) and (3)	Accommodating visitors without licence, or infringing conditions of licence.	Fifty rupees.

SCHEDULE II.

Penalties for continuing breaches.

[*See* section 134 (2).]

Section. (1)	Sub-section or clause. (2)	Subject. (3)	Fine which may be imposed. (4)
24	(1)	Failure of the owner or other person having control to obey or comply with the directions contained in the notice requiring to keep any well, etc., in good repair, to cleanse it or protect, etc.	Ten rupees.
26	..	Continuing to occupy a dwelling house or to permit its occupation without a supply of wholesome water.	Ten rupees.
28	(1)	Failure to comply with notice to provide efficient drainage.	Ten rupees.
29	..	Failure to comply with notice requiring to connect a house drain with an outside drain.	Ten rupees.
30	..	Failure on the part of the owner of land to comply with notice requiring a drain for a hut on the land.	Twenty rupees.
31	..	Failure to comply with notice for paving or raising the level of any court, yard, etc.	Ten rupees.
32	(2)	Failure to comply with notice requiring removal or closure of cesspool.	Ten rupees.
34	..	Letting out sullage or sewage into a street, etc.	Ten rupees.
35	..	Discharging injurious refuse, etc., into a drain.	Twenty rupees.
36	..	Polluting water-course ..	Ten rupees.
38	..	Constructing or reconstructing a building intended for human habitation without a sanitary convenience.	Ten rupees.
39	..	Failure to comply with notice regarding provision of sanitary conveniences or latrines.	Ten rupees.
40	(2)	Failure to comply with notice requiring removal or improvement of latrines.	Ten rupees.
44	..	Failure to comply with notice to abate nuisance.	Ten rupees.
46	..	Failure to comply with Magistrate's order prohibiting the use of a house or building.	Twenty rupees.
57	(2)	Failure to comply with notice prohibiting the use of unwholesome water.	Twenty rupees.
59	..	Exposing other persons to infection ..	Five rupees.
60	(a)	Infected persons carrying on trade in articles of food.	Ten rupees.
	(b)	Infected persons engaging in other occupations without permit.	Ten rupees.
67	..	Failure to close lodging houses, etc. ..	Twenty rupees.
71	..	Exposing other persons to infection ..	Ten rupees.
72	(1)	Failure to comply with notice forbidding work in infected premises.	Ten rupees.
77	(1)	Failure to take steps for the destruction of rats, mice, etc.	Five rupees.
	(2)	Failure to comply with notice for the destruction of rats, mice, etc.	Five rupees.
84	(1)	Failure to comply with notice requiring steps to be taken against the breeding of mosquitoes.	Ten rupees.

Section. (1)	Sub-section or clause. (2)	Subject. (3)	Fine which may be imposed. (4)
92	(a)	Construction of factories, workshops, etc., in residential areas.	Two hundred rupees.
	(b)	Failure of factories, workshops, etc., to comply with restrictions imposed	One hundred rupees.
96	(2) and (3)	Failure to cease to inhabit a dwelling house declared unfit for human habitation; or permitting it to be let or occupied as a dwelling house.	Fifty rupees.
97	..	Constructing back-to-back houses without permission.	Twenty-five rupees.
99	(a)	Failure to maintain a tenement in a habitable condition.	Twenty rupees.
	(b)	Causing or permitting a tenement to be overcrowded.	Twenty rupees.
101	..	Keeping a lodging house or receiving a lodger without registration.	Fifty rupees.
106	(1)	Failure to affix notice ..	Five rupees.
	(2)	Refusal to allow free access to the executive authority, etc., to all parts of the lodging house.	Fifty rupees.
108	(1)	Selling, etc., unsound meat or food ..	Twenty rupees.
109	..	Selling, etc., unsound meat or food through others.	Twenty rupees.
113	(2)	Infected person carrying on trade, etc., in articles of food.	Twenty rupees.
115	(5)	Failure to comply with the order prohibiting the supply of milk or dairy produce.	Fifty rupees.
124	..	Failure to comply with notice to close or disinfect source of water-supply.	Twenty-five rupees.
125	(1) and (3)	Accommodating visitors without licence or infringing conditions of licence.	Twenty rupees.

THE MADRAS PREVENTION OF ADULTERATION (AMENDMENT) ACT, 1939.

ACT No. IV OF 1939.

[13th March, 1939.

An Act further to amend the Madras Prevention of Adulteration Act, 1918, for a certain purpose.

WHEREAS it is expedient further to amend the Madras Prevention of Adulteration Act, 1918, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS PREVENTION OF ADULTERATION (AMENDMENT) ACT, 1939.

Amendment of section 19, Madras Act III of 1918.

2. For the proviso to section 19 of the Madras Prevention of Adulteration Act, 1918, the following proviso shall be substituted, namely: —

"Provided that a prosecution in respect of an offence under section 6-A may be commenced at any time after the vendor gives notice of his intention to plead the warranty by way of defence under the first proviso to sub-section (2) of section 6 and before the expiry of three months from the date on which the prosecution against the vendor is finally disposed of."

THE MADRAS ELECTRICITY DUTY ACT, 1939.

ACT No. V OF 1939.

[*20th March, 1939.*

An Act for the levy of a duty on certain sales of electrical energy effected by licensees in the Province of Madras.

WHEREAS it is expedient to levy a duty on certain sales of electrical energy effected by licensees in the Province of Madras; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS ELECTRICITY DUTY ACT, 1939.

(2) It extends to the whole of the Province of Madras.

(3) It shall come into force on such date as the Provincial Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

(*a*) 'energy' means electrical energy;

(*b*) 'licensee' means any person including a company or a local authority licensed under Part II of the Indian Electricity Act, 1910, to supply energy, or any person including a company or a local authority who has obtained the sanction of the Provincial Government under section 28 of that Act to supply energy; and

(*c*) 'prescribed' means prescribed by rules made under this Act.

Levy of a duty on certain sales of electrical energy.

3. (1) Save as otherwise provided in sub-section (2), every licensee in the Province of Madras shall pay every month to the Provincial Government in the prescribed manner, a duty calculated at the rate of six pies per unit of energy, on and in respect of all sales of energy effected by the licensee during the previous month, at a price of more than two annas per unit.

(2) A licensee shall be exempt from duty under sub-section (1) in any month if the total sales of energy effected by him in the previous month, at whatever price, did not exceed 16,666 units:

Provided that if at the end of any financial year, it is found that the total sales of energy effected by the licensee in such year, at whatever price, were not less than 200,000 units, the licensee shall pay the duty in respect of any month or months comprised in such year in which the sales of energy effected by him did not exceed 16,666 units.

(3) Where a licensee holds more than one licence, duty shall be calculated and levied under this section separately in respect of each licence.

Obligation of licensees to keep books of account and to submit returns.

4. Every licensee shall—

(*a*) keep books of account in the prescribed form; and

(*b*) submit returns showing the units of energy supplied and the amount of the duty payable in respect thereof, to such officer, in such form, and at such times as may be prescribed.

Inspecting Officers.

5. (1) The Provincial Government may, by notification in the Official Gazette, appoint Inspecting Officers to inspect the books of account required to be kept by licensees under clause (*a*) of section 4.

(2) Officers so appointed shall perform such duties and exercise such powers as may be prescribed, for the purpose of carrying into effect the provisions of this Act and the rules made thereunder.

(3) Every such officer shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

Recovery of duty.

6. Any duty due under this Act which remains unpaid, shall be recoverable as an arrear of land revenue, or by deduction from amounts payable by the Provincial Government to the licensee.

Licensee to reimburse himself from consumer in certain cases.

7. (1) Any licensee may, with the previous sanction of the Provincial Government and subject to such conditions as they may impose, recover from any person or class of persons to whom energy is sold at a price of more than two annas per unit, the duty which falls to be paid by the licensee in respect of the energy so sold or any part of it, as may be determined by the Provincial Government.

Explanation.—The duty recoverable from any person under this sub-section shall not be deemed to be part of the price charged for the energy by the licensee.

(2) The licensee may, for the purpose of sub-section (1), exercise the power conferred on a licensee by sub-section (1) of section 24 of the Indian Electricity Act, 1910, for the recovery of any charge or sum due in respect of energy supplied by him.

Penalties.

8. If any licensee—

(*a*) fails to keep books of account or to submit returns as required by section 4, or

(*b*) intentionally obstructs an Inspecting Officer appointed under section 5 in the performance of his duties or the exercise of his powers under this Act and the rules made thereunder,

he shall be punished with fine which may extend to fifty rupees.

Power to make rules.

9. (1) The Provincial Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the time and manner of payment of duty under section 3;

(*b*) the form of the books of account required to be kept under clause (*a*) of section 4;

(*c*) the times at which, the forms in which, and the officers to whom, the returns required by clause (*b*) of section 4 should be submitted;

(*d*) the duties and powers of Inspecting Officers appointed under section 5; and

(*e*) any other matter for which there is no provision or insufficient provision in this Act and for which provision is, in the opinion of the Provincial Government, necessary for giving effect to the purposes of this Act.

(3) In making a rule under sub-section (1) or sub-section (2), the Provincial Government may provide that a breach thereof shall be punishable with fine not exceeding fifty rupees.

(4) The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of the rules being made after previous publication for a period of not less than one month.

THE MADRAS SALES OF MOTOR SPIRIT TAXATION ACT, 1939.

ACT No. VI OF 1939.

[*20th March 1939.*

An Act to provide for the levy of a tax on retail sales of motor spirit in the Province of Madras.

WHEREAS it is expedient to provide for the levy of a tax on retail sales of motor spirit in the Province of Madras; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS SALES OF MOTOR SPIRIT TAXATION ACT, 1939.

(2) It extends to the whole of the Province of Madras.

(3) This section shall come into force at once, and the rest of this Act shall come into force on such date as the Provnicial Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

(*a*) "Government treasury" means a treasury or sub-treasury of the Provincial Government and includes any office, branch or agency of the Reserve Bank of India, transacting treasury business for the Provincial Government;

(*b*) "importer" means any person who imports motor spirit into British India;

(*c*) "motor spirit" means any substance which by itself or in admixture with other substances is ordinarily used directly or indirectly to provide reasonably efficient fuel for automotive or stationary internal combustion engines, and includes petrol, diesel oil and other internal combustion oils, but does not include kerosene, furnace oil, coal or charcoal;

(*d*) "petrol" means dangerous petroleum as defined in the Petroleum Act, 1934;

(*e*) "prescribed" means prescribed by rules made under this Act;

(*f*) "retail dealer" means any person who sells or keeps for sale motor spirit for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased;

(*g*) "retail sale" means a sale of motor spirit by a retail dealer for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased, and the expression "sell in retail" shall be construed accordingly; and

(*h*) "wholesale dealer" means any person who sells motor spirit, or keeps motor spirit for sale, to dealers in such spirit, for the purpose of trade.

Explanation.—A sale of motor spirit by a co-operative society, or a club, a firm or any association to one of its members for consumption is a retail sale within the meaning of clause (*g*).

Payment of tax.

3. (1) Subject to the provisions of this Act, there shall be levied on all retail sales of motor spirit effected after the commencement of this Act, a tax

in the case of petrol,—at the rate of one anna and six pies per gallon, and

in the case of any motor spirit other than petrol,—at the rate of six pies per gallon;

and such tax shall be payable by the person effecting the sale:

Provided that the Provincial Government may from time to time by notification fix any other rate at which the tax shall be payable:

Provided further that no such notification shall come into force until approved by a resolution of the Legislative Assembly.

(2) Where any retail dealers obtain their supplies of motor spirit from an importer or a wholesale dealer, it shall be open to the Provincial Government, by agreement with the importer or wholesale dealer, to levy from him in advance the tax which may be payable by the retail dealers under sub-section (1) on the sale by them of the motor spirit and the provisions of this Act relating to the assessment and recovery of tax shall, subject to such conditions as may be agreed upon, apply to the importer or wholesale dealer accordingly.

(3) No tax shall be levied under this Act on the sale of any motor spirit in respect of which such tax has already been paid.

Registration of importers and dealers.

4. (1) No person shall, after the commencement of this Act, carry on business in motor spirit as an importer or as a wholesale or retail dealer at any place in the Province unless he has been registered as such under this Act:

Provided that persons carrying on business at the commencement of this Act shall be allowed two months from such commencement to get themselves registered under this Act.

Explanation.—Where a person has more than one place of business, whether in the same town or village or in different towns and villages, he shall get himself registered separately in respect of each such place of business.

(2) (*a*) No importer or wholesale dealer shall, unless also registered as a retail dealer under this Act, sell motor spirit for consumption or sale in the Province to any person other than an importer or a wholesale dealer or a retail dealer, registered as such under this Act.

(*b*) No retail dealer shall use or transfer for consumption any motor spirit stocked by him without its being included in his accounts and in the next return of retail sales submitted by him under section 5 (*b*).

(3) Application for registration as an importer or a wholesale dealer or a retail dealer under this Act shall be made in such form and to such authority as may be prescribed.

(4) Registration may be made subject to such conditions, if any, as may be prescribed, including, in the case of an applicant for registration as a retail dealer, the making of such deposit or the furnishing of such security as the registering authority may consider necessary to ensure the due payment of the tax which may from time to time be payable by him.

(5) No person including a company or firm registered as an importer, a wholesale dealer or a retail dealer, shall carry on the business of public transport requiring the use of motor spirit.

(6) Any registration under sub-section (1) may be suspended or cancelled by such authority, for such reasons, and in such manner, as may be prescribed.

Obligation of retail dealers to keep books of account and submit returns.

5. Every retail dealer in motor spirit shall in respect of each place where he carries on business—

(*a*) keep books of account in the prescribed form; and

(*b*) submit every month to the District Collector and to such other officers as may be prescribed, a return in the prescribed form and before the prescribed date, showing—

(i) the quantity of motor spirit received by him during the preceding month;

(ii) the quantity sold by him during such month; and

(iii) such other particulars as may be prescribed.

Receipt for payment of tax to be furnished along with return.

6. Along with the return referred to in clause (*b*) of section 5, the retail dealer shall furnish a receipt from a Government treasury for the amount of the tax due in respect of the motor spirit sold by him in retail during the preceding month, according to the return.

Determination of tax by District Collector in certain cases and recovery thereof.

7. (1) If no return is submitted by a retail dealer under clause (*b*) of section 5 in respect of any month before the date prescribed in that behalf, or if the return is submitted without receipt for the full amount of the tax due as required by section 6, or if the return submitted appears to the District Collector to be incorrect or incomplete, the District Collector shall, after making such inquiry as he considers necessary, determine the amount of the tax due from such retail dealer in respect of such month and the amount so determined less the sum, if any, already paid by him shall be paid by the retail dealer into a Government treasury within fourteen days after demand is made therefor:

Provided that before taking action under this sub-section, the retail dealer shall be given a reasonable opportunity of proving the correctness and completeness of his return.

(2) In default of payment within the period aforesaid, the amount of tax due shall be recovered from the person from whom the tax is due as if it were an arrear of land revenue.

Obligation of importers and wholesale dealers to keep books of account and submit returns.

8. Every importer or wholesale dealer, shall—

(*a*) keep books of accounts in the prescribed form; and

(*b*) submit every month to the District Collector and to such other officers as may be prescribed, a return in the prescribed form and before the prescribed date, showing—

(*i*) the quantity of motor spirit received by him in the preceding month,

(*ii*) the quantities of motor spirit supplied by him during such month to other importers, wholesale dealers or retail dealers, specifying the name and address of each importer, wholesale dealer or retail dealer, the quantities supplied to him, and the dates on which the supplies were made, and

(*iii*) such other particulars as may be prescribed.

Powers of entry and inspection.

9. (1) All accounts and vouchers relating to stocks, purchases, sales and deliveries of motor spirit kept by importers, wholesale dealers and retail dealers and the stocks of motor-spirit with them shall be open to inspection by such officers as the Provincial Government may authorize in that behalf.

(2) Any such officer shall have power to enter and search any building, vessel, vehicle or place where any importer, wholesale dealer or retail dealer carries on business or keeps any stock of motor spirit.

Penalties.

10. Any person who—

(*a*) carries on business in motor spirit as an importer, a wholesale dealer or a retail dealer at any place without getting himself registered as required by sub-section (1) of section 4 or when his registration in respect of such place is not in force, or

(*b*) fails to keep books of account as required by clause (*a*) of section 5 or of section 8, or

(*c*) fails to submit any return as required by clause (*b*) of section 5 or of section 8 on or before the prescribed date, or submits an incorrect or incomplete return, or fails to submit a receipt for the full amount of the tax due as required by section 6, or

(*d*) fails to pay the tax due from him within the time allowed, or

(*e*) fraudulently evades the payment of any tax due under this Act, or

(*f*) acts in contravention of any of the provisions of this Act,

shall on conviction by a Presidency Magistrate or a Magistrate of the first class, be liable to a fine which may extend to one thousand rupees and where the breach is a continuing one, to a further fine which may extend to fifty rupees for every day after the first during which the breach continues.

Motor spirit liable to confiscation in certain cases.

11. The motor spirit in respect of which an offence against this Act is committed and any receptacle in which such spirit is contained shall be liable to confiscation.

Confiscation how ordered.

12. (1) When in any case tried by a Magistrate, the Magistrate decides that anything is liable to confiscation under section 11, he may, after hearing the person, if any, claiming any right thereto and the evidence, if any, which he produces in support of his claim, order confiscation or may give the owner an option to pay such fine as the Magistrate deems fit in lieu of confiscation.

(2) When an offence against this Act has been committed but the offender is not known, or cannot be found, or when anything liable to confiscation under this Act and not in the possession of any person cannot be satisfactorily accounted for, the case shall be inquired into and determined by the prescribed officer who may order such confiscation:

Provided that no such order shall be made until the expiration of one month from the date of seizure of the things intended to be confiscated or without hearing the persons, if any, claiming any right thereto, and the evidence, if any, which they produce in support of their claims.

Issue of warrants for arrest.

13. (1) Any officer of the Provincial Government specially empowered by them in this behalf may issue a warrant for the arrest of any person whom he has reason to believe to have committed an offence against this Act.

(2) All warrants issued under this section shall be executed in accordance with the provisions of the Code of Criminal Procedure, 1898, by a police officer, or if the officer issuing the warrant deems fit, by any other person.

Power of entry and search without warrant.

14. Any officer of the Provincial Government specially empowered by them in this behalf may—

(*a*) enter and search any building, vessel, vehicle or place in which he has reason to believe that any motor spirit liable to confiscation under this Act is kept or concealed;

(*b*) seize any motor spirit and any receptacle which he has reason to believe to be liable to confiscation under this Act; and

(*c*) detain, search and arrest any person whom he has reason to believe to be guilty of any offence against this Act.

Procedure for arrest without warrant.

15. The provisions of section 61 of the Code of Criminal Procedure, 1898, shall apply to all arrests without warrant made under section 14.

Offences to be reported, etc.

16. Every officer employed by the Provincial Government or by any local body shall be bound to give immediate information at the nearest police station or, if so required by any general or special order issued by the Provincial Government, to the nearest Excise officer of rank not below that of Sub-Inspector, of all breaches of any of the provisions of this Act which may come to his knowledge; and all such officers shall be bound to take all reasonable measures in their power to prevent the commission of any such breaches which they may know or have reason to believe are about or likely to be committed.

Power of investigation.

17. (1) Every officer of the Excise, Police or Land Revenue Departments not below such rank as may be prescribed, shall, within the area for which he is appointed, have power to investigate all offences against this Act.

(2) Every such officer shall, in the conduct of such investigation, exercise the powers conferred by the Code of Criminal Procedure, 1898, upon an officer in charge of a police station for the investigation of a cognizable offence:

Provided that if such officer is of opinion that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused to a Magistrate, or that the person arrested may be discharged with a warning, such officer shall release him on his executing a bond, with or without sureties, to appear if and when so required before a Magistrate and shall make a full report of the case to the District Collector.

Offences to be bailable.

18. (1) All offences against this Act shall be bailable.

(2) Any officer empowered under section 17 shall have power to grant bail in accordance with the provisions of the Code of Criminal Procedure, 1898 to any person arrested without warrant for an offence against this Act.

Procedure on seizure.

19. When anything has been seized by an officer exercising powers under section 17, such officer, after such inquiry as he considers necessary—

(*a*) if it appears that such thing is required as evidence in the case of any person arrested, shall forward the thing to the Magistrate to whom such person is forwarded or for his appearance before whom bail has been taken;

(*b*) if it appears that such thing is liable to confiscation but is not required as evidence as aforesaid, shall send the thing with a report of the particulars of the seizure to the prescribed authority; and

(*c*) if no offence appears to have been committed, shall return the thing to the person from whose possession it was taken and shall report to the prescribed authority accordingly.

Power to compound offences.

20. (1) The prescribed authority may accept from any person who has committed or is reasonably suspected of having committed an offence against this Act, by way of composition of such offence—

(*a*) where the offence consists of a sale of motor spirit in contravention of this Act or of the evasion of any tax payable under this Act, in addition to the tax payable by him under section 3, a sum of money not exceeding five hundred rupees or double the amount of the tax payable, whichever is greater and

(*b*) in other cases, a sum of money not exceeding five hundred rupees.

(2) On the payment of such sum of money and the tax, if any, payable under section 3, to the prescribed authority, the accused person shall be discharged, the property seized, if any, shall be released and no further proceedings shall be taken against such person or property in respect of such offence.

Cognizance of offences.

21. (1) No Magistrate shall take cognizance of any offence against this Act—

(*i*) except upon the complaint or report of the District Collector or other prescribed authority, or

(*ii*) except upon his own knowledge or suspicion.

(2) Except with the sanction of the Provincial Government, no Magistrate shall take cognizance of any offence against this Act, unless the prosecution is instituted within six months from the date on which the offence is alleged to have been committed:

Provided that nothing contained in this sub-section shall apply to any case governed by section 23.

Bar of certain proceedings.

22. (1) No suit, prosecution or other proceeding shall lie against any officer or servant of the Provincial Government, for any act done or purporting to be done under this Act, without the previous sanction of the Provincial Government.

(2) No officer or servant of the Provincial Government shall be liable in respect of any such act in any civil or criminal proceeding, if the act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under this Act.

Limitation for certain suits and prosecutions.

23. No suit shall be instituted against the Crown and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the Provincial Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months from the date of the act complained of.

Appeal.

24. (1) Any person aggrieved by any order passed under this Act, not being an order passed by any Court or Magistrate, may appeal—

(*a*) in case such order is passed by a District Collector, to the Board of Revenue, and

(*b*) in any other case, to the District Collector.

(2) The appellate authority may, after giving the appellant an opportunity of being heard, pass such orders on the appeal as such authority thinks fit.

(3) Every order passed in appeal under this section shall, subject to the powers of revision conferred by section 25, be final.

Revision.

25. The Board of Revenue may, at any time, call for and examine the record of any order passed by, or any proceedings recorded by, any officer or person under this Act, for the purpose of satisfying itself as to the legality or propriety of such order, or as to the regularity of such proceedings, and may pass such order in reference thereto as it thinks fit.

Nothing contained in this section shall apply to the orders or proceedings of any Court or Magistrate.

Power to make rules.

26. (1) The Provincial Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) all matters expressly required or allowed by this Act to be prescribed;

(*b*) the regulation of the sale of motor spirit for the purpose of enforcing the provisions of this Act;

(*c*) the duties and powers of inspecting and other officers appointed or authorized to exercise any powers under this Act, and the procedure to be followed by such officers;

(*d*) the form in which, and the time within which, appeals under section 24 may be preferred; and

(*e*) any other matter for which there is no provision or no sufficient provision in this Act and for which provision is, in the opinion of the Provincial Government, necessary for giving effect to the purposes of this Act.

(3) In making a rule under sub-section (1) or sub-section (2), the Provincial Government may provide that a breach thereof shall be punishable with

fine which may extend to one thousand rupees and, where the breach is a continuing one, with further fine which may extend to fifty rupees for every day after the first during which the breach continues.

(4) The power to make rules conferred by this section shall, except on the first occaion of the exercise thereof, be subject to the condition of the rules being made after previous publication for a period of not less than four weeks.

Publication of rules and notifications.

27. All rules made and notifications issued under this Act shall be published in the Official Gazette and upon such publication, shall have effect as if enacted in this Act.

Power to remove difficulties.

28. If any difficulty arises in giving effect to the provisions of this Act or the rules made thereunder, the Provincial Government may, as occasion may arise, by order, do anything which appears to them necessary for the purpose of removing the difficulty.

THE CANALS AND PUBLIC FERRIES (AMENDMENT) ACT, 1939.

ACT No. VII OF 1939.

[*20th March, 1939.*

An Act further to amend the Canals and Public Ferries Act, 1890, for certain purposes.

WHEREAS it is expedient further to amend the Canals and Public Ferries Act, 1890, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE CANALS AND PUBLIC FERRIES (AMENDMENT) ACT, 1939.

(2) It shall come into force on the 1st day of April, 1939.

Substitution of new section for section 10, Madras Act II of 1890.

2. For section 10 of the Canals and Public Ferries Act, 1890 (hereinafter referred to as the said Act), the following section shall be substituted, namely:—

Power to provide for management of ferries and fix fees and rates of tolls

"10. (1) The Provincial Government may—

(*a*) provide for the management of any public ferry, or

(*b*) authorize any person to convey passengers, animals, vehicles or goods across a channel by means of vessels at any public ferry, or

(*c*) assign the management of any public ferry to a local board or municipal council.

(2) All vessels used by a person authorized under clause (*b*) of sub-section (1) shall be licensed, and the Provincial Government may fix the fees payable for such licence.

(3) In the cases referred to in clauses (*a*) and (*b*) of sub-section (1), the Provincial Government may levy tolls at such rates as they may fix upon passengers, animals, vehicles and goods conveyed across the ferry.

(4) Where under clause (*c*) of sub-section (1), the management of a public ferry is assigned to a local board or municipal council, the local board or municipal council may levy tolls upon passengers, animals, vehicles and goods conveyed across the ferry at such rates as it may, subject to the control of the Provincial Government, fix. All moneys received by the local board or municipal council from the tolls levied by it under this sub-section shall form part of its funds.

(5) A notice in English and in the language of the district specifying the tolls leviable at a ferry under sub-section (3) or sub-section (4), as the case may be, shall be exhibited to public view on each side of the ferry."

Amendment of section 11, Madras Act II of 1890.

3. In section 11 of the said Act, the words "or public ferry" shall be omitted.

Amendment of section 14, Madras Act II of 1890.

4. To section 14 of the said Act, the following proviso shall be added, namely:—

"Provided that any ferry rent due to a local board or municipal council shall be recovered as if the same were a tax due to the local board or municipal council."

Provision for the continuance of existing tolls.

5. All tolls levied immediately before the commencement of this Act at any public ferry the management of which has been assigned to a local board or muncipal council, shall be deemed to have been levied, with effect from such commencement, by the local board or municipal council concerned under sub-section (4) of section 10 of the said Act as amended by this Act.

THE MADRAS TOBACCO (TAXATION OF SALES AND LICENSING) ACT, 1939.

ACT No. VIII OF 1939.

[4th June, 1939.

An Act for the levy of a tax on the sale of tobacco and the licensing of trade therein in the Province of Madras.

Preamble.

WHEREAS it is expedient to provide for the levy of a tax on the sale of tobacco and the licensing of trade therein in the Province of Madras; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS TOBACCO (TAXATION OF SALES AND LICENSING) ACT, 1939.

(2) It extends to the whole of the Province of Madras.

(3) This section shall come into force at once, and the Provincial Government may from time to time by notification in the Official Gazette apply all or any of the remaining provisions of this Act to the whole or any portion of the Province of Madras from such date as may be specified in the notification, and may cancel or modify any such notification.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

(1) "broker" or "commission agent" means a person who in the ordinary course of his business negotiates and makes contracts for the sale or purchase of tobacco for others;

(2) "Collector" means the Collector of the district and includes any person appointed by the Provincial Government under section 15 to exercise all or any of the powers or to perform all or any of the duties of a Collector under this Act;

(3) "Commissioner" means a member of the Board of Revenue or other officer appointed by the Provincial Government to exercise the powers and perform the duties of the Commissioner under this Act;

(4) "grower" means a person who grows tobacco in the Province of Madras, by his own labour or by that of the members of his household or of his servants, or by tenants, but does not include a firm or association registered under the Indian Companies Act, 1913, which grows tobacco, or an association of growers registered or deemed to be registered under the Madras Co-operative Societies Act, 1932;

(5) "leaf" includes the stalks and stem of the tobacco plant;

(6) "licensee" means any person to whom a licence is granted under this Act;

(7) "Magistrate" means a Presidency Magistrate, a Magistrate of the first or second class, or a Magistrate of the third class specially authorized in this behalf by the District Magistrate;

(8) "manufactured tobacco" means cigars, cheroots, cigarettes, cigarette tobacco, pipe tobacco, bidis and snuff, but does not include any preparation or mixture of tobacco intended for a further process of manufacture;

(9) "manufacturer" means a person who manufactures by machinery or manual labour "manufactured tobacco" or any preparation or mixture of tobacco intended for a further process of manufacture;

(10) "place" includes a house, building, shed, bunk, shop, tent, vehicle, and vessel;

(11) "prescribed" means prescribed by rules made under this Act;

(12) "retail dealer" means a person licensed to sell tobacco in retail under the provisions of this Act;

(13) "retail sale" means a sale of tobacco for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased and the expression "sell in retail" shall be construed accordingly:

Provided that any sale of tobacco by a retail dealer shall be presumed to be a retail sale unless the retail dealer concerned proves that the sale was not a retail sale.

(14) "sale" or "selling" includes any transfer otherwise than by way of gift;

Explanation.—A sale by a co-operative society or a club, a firm or any association to its members is a sale within the meaning of this clause.

(15) "tobacco" includes manufactured tobacco, cured and uncured tobacco, any preparation or mixture of tobacco, and the leaf of the tobacco plant;

(16) "Tobacco Officer" means any person appointed under section 16;

(17) "tobacco revenue" means revenue derived or derivable from any tax, fee, fine or confiscation levied, imposed or ordered, and all sums accruing to the Provincial Government, under the provisions of this Act;

(18) "turnover" means the aggregate amount for which tobacco is sold, whether for cash or for deferred payment or other valuable consideration;

(19) "wholesale dealer" means a person who buys or sells tobacco for the purpose of trade or manufacture;

(20) "wholesale sale" means a sale of tobacco to traders in, or manufacturers of, that commodity for the purpose of trade or manufacture, and the expression "sell wholesale" shall be construed accordingly; and

(21) "year" means the financial year.

Prohibition of sale of tobacco without licence.

3. (1) Save as provided in this Act, no person shall sell or expose for sale any manufactured tobacco in retail or sell tobacco in any form wholesale or otherwise carry on business as a wholesale dealer, manufacturer, broker or commission agent except under the authority, and in accordance with the terms and conditions, of a licence granted by the Collector under this Act:

Provided that a grower may, without licence or restriction, sell as leaf any tobacco grown by him, or grown and cured by him for the purpose of marketing it as leaf.

Explanation I.—The supply of tobacco by a club to its members or by a hotel to its guests or customers on payment of any price, fee or subscription, is a sale of tobacco within the meaning of this sub-section.

Explanation II.—The sale by a manufacturer of tobacco manufactured by him, whether by wholesale sale or by retail sale, is a sale of tobacco within the meaning of this sub-section.

(2) A licensed wholesale dealer, manufacturer, broker or commission agent shall not sell manufactured tobacco in retail, unless he has been granted a separate licence as a retail dealer.

Tax on turnover of retail and wholesale dealers.

4. (1) Every retail dealer shall pay a tax in each year on his retail sales of manufactured tobacco at the rates specified below in respect of his turnover as determined in accordance with the rules made under sub-section (3):

(*a*) If such turnover does not exceed two hundred rupees ..	Six rupees.
(*b*) If such turnover exceeds two hundred rupees but does not exceed four hundred rupees ..	Twelve rupees.
(*c*) If such turnover exceeds four hundred rupees	Three per cent. on the first four hundred rupees of the turnover and ten per cent. on the remainder of the turnover.

(2) Every wholesale dealer shall pay a tax in each year on his wholesale sales of manufactured tobacco at the rate of two per cent. calculated on his turnover as determined in accordance with the rules made under sub-section (3):

Provided that the tax under this sub-section shall not be levied on any person who prepares manufactured tobacco of value not exceeding one thousand rupees in a year for the purpose of supplying to wholesale dealers.

(3) The turnover and tax mentioned in sub-section (1) and sub-section (2) shall be determined, assessed and collected in accordance with such rules as may be made in that behalf.

Licence fees.

5. (1) No fee shall be levied for the grant of a retail dealer's licence. In respect of every licence granted to a wholesale dealer, manufacturer, broker or commission agent, there shall be levied on the licensee an annual fee as specified in the table below:—

		Fee.
(i) Any wholesale dealer who sells or buys tobacco leaf cured or uncured or any preparation or mixture of tobacco (not being manufactured tobacco) for trade therein or for conversion into manufactured tobacco ..	..	One hundred rupees.
Provided that the Collector may issue a licence to any person who deals on a small scale—		
(*a*) if his turnover is estimated at less than one thousand rupees per annum ..	on a fee of five rupees per annum.	
(*b*) if his turnover is estimated at one thousand rupees or above, but at less than three thousand rupees ..	on a fee of ten rupees per annum.	
(ii) Any other wholesale dealer, not being a manufacturer governed by item (iii) below ..	..	Fifty rupees.
(iii) (*a*) Any manufacturer to whose premises the Factories Act, 1934, applies or has been extended and in whose premises 200 or more workers are working or were working on any day of the preceding twelve months.	..	One hundred rupees.

		Fee.
(*b*) Any other manufacturer to whose premises the Factories Act, 1934, applies or has been extended	..	Fifty rupees.
(*c*) Any manufacturer to whose premises the Factories Act, 1934, does not apply, and has not been extended	..	Two rupees.
(iv) A broker or commission agent ..	..	Fifty rupees.

Provided that any wholesale dealer or manufacturer being a wholesale dealer, who pays a turnover tax under sub-section (2) of section 4 shall for each licence granted to him under item (i), (ii), (iii) (*a*) or (iii) (*b*) above be charged an annual fee of ten rupees instead of the fee specified in that item.

(2) The Provincial Government may, from time to time, by notification, alter all or any of the fees specified in sub-section (1), but no such notification shall come into force unless the same is approved by a resolution of the Legislative Assembly.

Possession of tobacco in excess of the quantity prescribed by Government prohibited.

6. No person other than a grower or a licensee under this Act, shall have in his possession any quantity of tobacco in excess of such quantity as the Provincial Government may from time to time prescribe in respect of all or any of the varieties thereof.

Form and conditions of licences, etc.

7. Every licence under this Act shall be granted—

(*a*) for such area, if any,

(*b*) for such period,

(*c*) subject to such restrictions and on such conditions, and

(*d*) in such form and containing such particulars, as the Provincial Government may, by general or special order, direct.

Separate licence for each shop or place of business.

8. Where a licensee has more than one shop or place of business, whether in the same town or village or in different towns and villages, he shall obtain a separate licence in respect of each such shop or place of business.

Counterpart agreement to be executed by licensee.

9. Every licensee shall, if so required, execute a counterpart agreement in conformity with the tenor of his licence, and give such security for the performance of his agreement as the Collector may require.

Power to recall licence, etc.

10. (1) The Collector may cancel or suspend any licence granted under this Act—

(*a*) if any tax, fee or other due payable in respect of such licence be not duly paid; or

(*b*) if the holder of such licence fails to keep the prescribed accounts or to submit the prescribed returns or if the returns submitted by him are incorrect or incomplete; or

(*c*) in the event of any breach by the holder of such licence or by his agents or servants or by any one acting with his express or implied permission on his behalf, of any of the terms or conditions of such licence; or

(*d*) if the holder of such licence is convicted of any offence against this Act or any other Revenue Law, or of any cognizable and non-bailable offence under the Indian Penal Code; or

(*e*) if the conditions of such licence provide for the cancellation or suspension thereof for any other reason.

(2) Where a licence is cancelled or suspended under sub-section (1), the holder of the licence shall not be entitled to claim from the Provincial Government any compensation for such cancellation or suspension, nor shall

such holder be entitled to claim the refund of any sum paid to, or deposit made with, the Provincial Government, in respect of the licence.

Recovery of fees, etc.

11. All taxes, fees, fines and other sums payable to the Provincial Government under any of the provisions of this Act or of any licence granted under it, may be recovered from the person primarily liable to pay the same, or from his surety (if any), as if they were arrears of land revenue.

Obligation of licensee to keep books of account and submit returns.

12. (1) Every licensee under this Act shall, in respect of each licence held by him—

(a) keep such books of account and in such form as may be prescribed; and

(b) submit to the Collector and to such other officers as may be prescribed, a return in such form, containing such particulars and at such intervals, as may be prescribed.

(2) The accounts kept by a licensee under sub-section (1) and the stocks of tobacco with him shall be open to inspection by such officers as the Provincial Government may authorize in that behalf.

(3) Any such officer shall have power to enter and search any place where any licensee carries on business or keeps any stock of tobacco.

(4) Any officer empowered by the Provincial Government in this behalf, may for the purposes of this Act, require any dealer carrying on business in tobacco to produce before him the accounts and other documents and to furnish any other information relating to such business.

Duties of commissioner.

13. Subject to the control and direction of the Provincial Government, the Commissioner shall superintend the working of this Act and the collection of tobacco revenue in all areas in the Province of Madras to which this Act is applied.

Collectors charged with the carrying out of the provisions of the Act.

14. Subject to the control and direction of the Provincial Government and of the Commissioner, Collectors of districts shall be responsible for the collection of tobacco revenue and the carrying out of the provisions of this Act in all areas in their respective districts to which this Act is applied.

Appointment of Special Collectors.

15. The Provincial Government may, by notification in the Official Gazette, appoint in any district or portion of a district any person other than the Collector of the district, to exercise all or any of the powers or to perform all or any of the duties conferred or imposed by this Act on a Collector, subject to such control and direction, if any, in addition to the control and direction of the Provincial Government and of the Commissioner, as the Provincial Government may from time to time direct.

Appointment of Tobacco Officers.

16. The Provincial Government, or subject to their general or special orders, the Commissioner, may appoint any person, by name or by virtue of his office, to be a Tobacco Officer and assign to him such powers and duties under this Act as the Provincial Government or the Commissioner may think fit.

Issue of warrants for arrest.

17. (1) A Collector, a Tobacco Officer specially empowered in this behalf, or a Magistrate, may issue a warrant for the arrest of any person whom he has reason to believe to have committed an offence against this Act.

(2) All warrants issued under sub-section (1) shall be executed in accordance with the provisions of the Code of Criminal Procedure, 1898, by a Police officer, or by a Tobacco Officer specially empowered in this behalf, or if the officer issuing the warrant deems fit, by any other person.

Power of entry and search without warrant.

18. A Collector or a Tobacco Officer specially empowered in this behalf, may—

(*a*) enter and search any place in which he has reason to believe that any tobacco liable to confiscation under this Act is kept or concealed;

(*b*) seize any tobacco or any other article which he has reason to believe is liable to confiscation under this Act; and

(*c*) detain, search and arrest any person whom he has reason to believe to be guilty of any offence against this Act.

Procedure for arrest without warrant.

19. The provisions of section 61 of the Code of Criminal Procedure, 1898, shall apply to all arrests without warrant made under section 18.

Duty of officers to report offences, etc.

20. Every officer employed by the Provincial Government or by any local body shall be bound—

(*a*) to give immediate information at the nearest police station, or if so required by any general or special order issued by the Provincial Government to the nearest Tobacco Officer empowered in this behalf, of any breach of any of the provisions of this Act, or of the intention or preparation to commit any such breach, which may come to his knowledge;

(*b*) to take all reasonable measures in his power to prevent the commission of any such breach which he may know or have reason to believe is about or likely to be committed; and

(*c*) to assist any Tobacco Officer in carrying out the provisions of this Act.

Tobacco Officers to have powers of investigation.

21. (1) Every Tobacco Officer empowered in this behalf shall, within the area for which he is appointed, have power to investigate all offences against this Act.

(2) Every such officer shall in the conduct of such investigation exercise the powers conferred by the Code of Criminal Procedure, 1898, upon an officer in charge of a police station for the investigation of cognizable offence:

Provided that—

(*a*) if such officer is of opinion that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused to a Magistrate, or that the person arrested may be discharged with a warning, such officer shall release him on his executing a bond, with or without sureties, to appear if and when so required before a Magistrate and shall make a full report of the case to the Collector; and

(*b*) the powers of such officer shall be subject to such further modifications and restrictions as the Provincial Government may determine.

Offences to be bailable.

22. (1) All offences against this Act shall be bailable.

(2) Any Tobacco Officer empowered under section 21 shall have power to grant bail in accordance with the provisions of the Code of Criminal Procedure, 1898, to any person arrested without warrant for an offence against this Act.

Procedure on seizure.

23. When anything has been seized by a Tobacco Officer exercising powers under section 21, such officer, after such inquiry as he considers necessary—

(*a*) if it appears that such thing is required as evidence in the case of any person arrested, shall forward the thing to the Magistrate to whom such person is forwarded or for his appearance before whom bail has been taken;

(*b*) if it appears that such thing is liable to confiscation but is not required as evidence as aforesaid, shall send the thing with a report of the particulars of the seizure to the Collector; and

(*c*) if no offence appears to have been committed, shall return the thing to the person from whose possession it was taken and make a report to the Collector.

Penalties.

24. Any person who—

(*a*) in contravention of this Act or of any rule or order made thereunder or of any terms or conditions of a licence, sells, exposes for sale, or keeps, any tobacco or carries on business as a wholesale dealer, manufacturer, broker or commission agent, or

(*b*) fails to keep books of account as required by clause (*a*) of sub-section (1) of section 12, or

(*c*) fails to submit any return as required by clause (*b*) of sub-section (1) of section 12, or submits an incorrect or incomplete return, or

(*d*) fails to pay within the time allowed, or fraudulently evades the payment of, any tax, fee or other sum due from him to the Provincial Government, or

(*e*) acts in contravention of any of the provisions of this Act or of any rule, notification or order or of any terms or conditions of a licence made, issued or granted thereunder,

shall, on conviction by a Magistrate, be liable to a fine which may extend to one thousand rupees and where the breach is a continuing one, to a further fine which may extend to fifty rupees for every day after the first during which the breach continues. Such person shall also be liable to pay any tax or fee which he would have had to pay if he had conformed to the provisions of this Act. The amount of such tax or fee or both, as the case may be, shall be determined by the Magistrate and shall be recoverable as if it were a fine.

Punishment for obstructing officers in the performance of duties.

25. Whoever intentionally obstructs a Tobacco Officer in the exercise of any powers conferred or the performance of any duties imposed on him by this Act shall, on conviction by a Magistrate, be liable to imprisonment which may extend to three months, or to fine which may extend to five hundred rupees or to both.

Confiscation.

26. Whenever an offence against this Act has been committed, all tobacco in respect of which such offence has been committed and every box, receptacle, package, or covering in which such tobacco is contained and all other contents of such box, receptacle, package or covering, shall be liable to confiscation.

Procedure in confiscation.

27. (1) When in any case tried by a Magistrate, the Magistrate decides that anything is liable to confiscation under section 26, he may, after hearing the person, if any, claiming right thereto and the evidence, if any, which he produces in support of his claim, order confiscation or may give the owner an option to pay such fine as the Magistrate deems fit in lieu of confiscation.

(2) When an offence against this Act has been committed but the offender is not known or cannot be found, or when anything liable to confiscation under this Act and not in the possession of any person cannot be satisfactorily accounted for, the case shall be inquired into and determined by a Tobacco Officer who may order confiscation:

Provided that no such order shall be made until the expiration of one month from the date of seizure of the things intended to be confiscated or with-

out hearing the persons, if any, claiming any right thereto and the evidence, if any, which they produce in support of their claims.

Power to compound offences, etc.

28. (1) (a) A Collector, or a Tobacco Officer specially empowered in this behalf, may accept from any person who has committed or is reasonably suspected of having committed an offence against this Act, by way of composition of such offence—

(i) where the offence consists of a sale of tobacco in contravention of this Act or of the failure to pay or the evasion of any tax, fee or sum payable under this Act, in addition to the tax, fee or sum recoverable from him, a sum of money not exceeding five hundred rupees or double the amount of the tax, fee or sum recoverable from him whichever is greater, and

(ii) in other cases, a sum of money not exceeding five hundred rupees.

(b) On the payment of such sum of money and the tax, fee or sum, if any, recoverable under this Act, to the officer mentioned in clause (a), the accused person shall be discharged, the property seized, if any, shall be released and no further proceedings shall be taken against such person or property in respect of such offence.

(2) A Collector, or a Tobacco Officer specially empowered in this behalf, may accept by way of composition, from any person whose licence is liable to be cancelled or suspended under this Act, a sum of money not exceeding five hundred rupees in lieu of such cancellation or suspension.

Cognizance of offences.

29. (1) No Magistrate shall take cognizance of any offence against this Act—

(i) except upon the complaint or report of a Collector, or a Tobacco Officer or of an Excise, Prohibition, or Police Officer, or

(ii) except upon his own knowledge or suspicion.

(2) Except with the sanction of the Provincial Government, no Magistrate shall take cognizance of any offence against this Act, unless the prosecution is instituted within six months from the date on which the offence is alleged to have been committed:

Provided that nothing contained in this sub-section shall apply to any case governed by section 31.

Bar of certain proceedings.

30. (1) No suit, prosecution or other proceeding shall lie against any officer or servant of the Provincial Government, for any act done or purporting to be done under this Act, without the previous sanction of the Provincial Government.

(2) No officer or servant of the Provincial Government shall be liable in respect of any such act in any civil or criminal proceeding, if the act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under this Act.

Limitation for certain suits and prosecutions.

31. No suit shall be instituted against the Crown and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the Provincial Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months from the date of the act complained of.

Power to make rules.

32. (1) The Provincial Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) all matters expressly required or allowed by this Act to be prescribed;

(b) the regulation of the sale, custody and transport of tobacco, or of any form of tobacco, for the purpose of enforcing the provisions of this Act;

(c) the cases or classes of cases in which and the authorities to whom appeals shall lie from orders (not being orders passed by any Court or Magistrate) whether original or appellate, passed under this Act or under any rule made thereunder, the authorities by whom such orders may be revised, the time within which and the manner in which appeals may be presented and the procedure for dealing with such appeals;

(d) the disposal of articles confiscated and of the proceeds thereof;

(e) the powers and duties which may be exercised and performed by Tobacco Officers and the procedure to be followed by them;

(f) the delegation of powers conferred by this Act; and

(g) any other matter for which there is no provision or no sufficient provision in this Act and for which provision is, in the opinion of the Provincial Government, necessary for giving effect to the purposes of this Act.

(3) The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of the rules being made after previous publication for a period of not less than one month.

Power to remove difficulties.

33. If any difficulty arises in giving effect to the provisions of this Act or the rules made thereunder, the Provincial Government may, as occasion may arise, by order, do anything which appears to them necessary for the purpose of removing the difficulty.

THE MADRAS GENERAL SALES TAX ACT, 1939.

ACT No. IX OF 1939.

[4th June, 1939.

An Act to provide for the levy of a general tax on the sale of goods in the Province of Madras.

WHEREAS it is expedient to provide for the levy of a general tax on the sale of goods in the Province of Madras; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS GENERAL SALES TAX ACT, 1939.

(2) It extends to the whole of the Province of Madras.

(3) This section shall come into force at once, and the rest of this Act shall come into force on such date as the Provincial Government may, by notification in the *Fort St. George Gazette*, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

(a) "assessing authority" means any person authorized by the Provincial Government to make any assessment under this Act;

(b) "dealer" means any person who carries on the business of buying or selling goods;

Explanation (1).—A co-operative society, a club, a firm, or any association which sells goods to its members is a dealer within the meaning of this clause.

Explanation (2).—The agent of a person resident outside the Province who carries on the business of buying or selling goods in the Province shall be deemed to be the dealer in respect of such business for the purposes of this Act.

(c) "goods" means all kinds of movable property other than actionable claims, stocks and shares and securities and includes all materials, commodities, and articles;

(*d*) "licence" means a licence granted or renewed under this Act;

(*e*) "notification" means a notification published in the *Fort St. George Gazette;*

(*f*) "prescribed" means prescribed by rules made under this Act;

(*g*) "Province" means the Province of Madras;

(*h*) "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge;

Explanation.—A transfer of goods on the hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale.

(*i*) "turnover" means the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover;

Explanation.—Subject to such conditions and restrictions, if any, as may be prescribed in this behalf—

(i) the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of or before the delivery thereof;

(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover; and

(iii) where for accommodating a particular customer, a dealer obtains goods from another dealer and immediately disposes of the same to the said customer, the sale in respect of such goods shall be included in the turnover of the latter dealer but not in that of the former; and

(*j*) "year" means the financial year.

Liability to tax under the Act.

3. (1) Subject to the provisions of this Act, every dealer shall pay in each year a tax in accordance with the scale specified below:—

(*a*) If his turnover does not exceed twenty thousand rupees.	Five rupees per month.
(*b*) If his turnover exceeds twenty thousand rupees.	One-half of one per cent. of such turnover.

Provided that any dealer whose turnover in any year is less than ten thousand rupees shall not be liable to pay the tax under this sub-section for that year:

Provided further (1) that in respect of the same transaction of sale, the buyer and the seller shall not both be taxed, but only one of them, as shall be determined by the rules made in this behalf under sub-section (2), shall be taxed thereon, and (2) that, when the amount for which any goods were bought by a dealer has been included in his turnover, the amount for which the same goods were sold by him shall not be included in his turnover, for the purposes of this Act.

(2) The turnover for all the purposes of this Act shall be determined in accordance with, and the tax shall be assessed, levied and collected in such manner and in such instalment as may be prescribed by, the rules made by the Provincial Government in this behalf:

Provided that no rule for the determination of the turnover shall come into force unless approved by a resolution of the Legislative Assembly.

(3) Subject to any rules made under sub-section (2), the assessing authority may fix the turnover of any dealer in any year at the amount of his turnover in the previous year.

Application of the Act.

4. The provisions of section 3 of this Act shall not apply to the sale of electrical energy, motor spirit as defined in the Madras Sales of Motor Spirit Taxation Act, 1939, manufactured tobacco as defined in the Madras Tobacco (Taxation of Sales and Licensing) Act, 1939, and any goods on which duty is or may be levied under the Madras Abkari Act, 1886, or the Opium Act, 1878.

Exemptions from taxation.

5. Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees, the sale of bullion and specie, of cotton, of cotton yarn, and of any cloth woven on handlooms and sold by persons dealing exclusively in such cloth shall be exempt from taxation under section 3.

Sale of hides and skins.

6. Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees, the sale of hides and skins whether tanned or untanned, shall be taxed under section 3 only at such single point in the series of sales by successive dealers, as may be prescribed.

Sales of certain goods for delivery outside the Province.

7. In respect of such finished articles of industrial manufacture as may be notified by the Provincial Government and subject to such restrictions and conditions as may be prescribed, a rebate shall be allowed of one-half of the tax levied on sales of such articles for delivery outside the Province if such articles are actually so delivered.

Licensing and exemption of agents.

8. The Provincial Government may, on application and on payment of such fee as may be prescribed in that behalf, license any person under this section who for an agreed commission or brokerage buys or sells on behalf of known principals specified in his accounts in respect of each transaction and may exempt from the tax under section 3 such of his transactions as are carried out in accordance with the terms and conditions of his licence:

Provided always that, save where the transaction consists of a sale by a grower of produce grown by him or on his land, no such exemption shall be given unless the amounts for which the goods concerned in such transactions are sold, are included in the turnover of the principals or of the dealers from whom purchases were made, or would have been so included but for an exemption provided under this Act.

Procedure to be followed by assessing authority.

9. (1) Every dealer whose turnover is ten thousand rupees or more in a year shall submit such return or returns of his turnover, in such manner, and within such periods as may be specified in the rules made under sub-section (2) of section 3.

(2) (*a*) If the assessing authority is satisfied that any return submitted under sub-section (1) is correct and complete, he shall assess the dealer on the basis thereof.

(*b*) If no return is submitted by the dealer under sub-section (1) before the date prescribed or specified in that behalf or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall proceed to determine the turnover in accordance with the rules made under sub-section (2) of section 3:

Provided that before taking action under this clause, the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted by him.

Payment and recovery of tax.

10. The tax assessed under this Act shall be paid in such manner and in such instalments, if any, and within such time, as may be specified in the notice of assessment, not being less than fifteen days from the date of service of the notice. In

default of such payment, the whole of the amount then remaining due may be recovered as if it were an arrear of land revenue.

Appeals.

11. (1) Any assessee objecting to an assessment made on him may, within thirty days from the date on which he was served with notice of the assessment, appeal to such authority as may be prescribed:

Provided that no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable, as the case may be.

(2) The appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) The appellate authority may, after giving the appellant an opportunity of being heard, pass such orders on the appeal as such authority may think fit.

(4) Every order passed in appeal under this section shall, subject to the powers of revision conferred by section 12, be final.

Revision.

12. The Board of Revenue may in its discretion at any time either *suo motu* or on application, call for and examine the record of any order passed by, or any proceedings recorded by, any officer or person under this Act for the purpose of satisfying itself as to the legality or propriety of such order, or as to the regularity of such proceedings, and may pass such order in reference thereto as it thinks fit.

Nothing contained in this section shall apply to the orders or proceedings of any Court or Magistrate.

Accounts to be maintained by dealers.

13. Every dealer and every person licensed under section 8 shall keep and maintain a true and correct account showing the value of the goods sold and bought by him; and in case the accounts maintained in the ordinary course, do not show the same in an intelligible form, he shall maintain a true and correct account in such form as may be prescribed in this behalf:

Provided that this section shall not apply to petty dealers whose business is such as is not likely to make them liable to taxation under this Act.

Powers to order production of accounts and powers of entry and inspection.

14. (1) Any officer empowered by the Provincial Government in this behalf, may, for the purposes of this Act, require any dealer carrying on business in any kind of goods to produce before him the accounts and other documents, and to furnish any other information relating to such business.

(2) All accounts and registers maintained by dealers in the ordinary course of their business, the goods in their possession and their offices, shops, godowns, vessels or vehicles shall be open to inspection at all reasonable times by such officers as may be authorized in this behalf.

(3) Any such officer shall have power to enter, for the purpose referred to in sub-section (2), any office, shop, godown, vessel, vehicle or any other place in which business is done.

Offences and penalties.

15. Any person who—

(*a*) wilfully submits an untrue return or fails to submit a return as required by the provisions of this Act or the rules made thereunder, or

(*b*) fails to pay the tax due from him within the time allowed, or

(*c*) prevents or obstructs inspection or entry by any officer authorized under section 14, in contravention of the terms thereof, or

(*d*) fraudulently evades the payment of any tax due under this Act, or

(*e*) wilfully acts in contravention of any of the provisions of this Act, shall, on conviction by a Presidency Magistrate or a Magistrate of the first class, be liable to a fine which may extend to one thousand rupees, and where the breach is a continuing breach, to a further fine which may extend to fifty rupees for every day after the first during which the breach continues.

Composition of offences.

16. The prescribed authority may accept from any person who has committed or is reasonably suspected of having committed an offence against this Act, by way of composition of such offence—

(*a*) where the offence consists of the failure to pay, or the evasion of, any tax recoverable under this Act, in addition to the tax so recoverable, a sum of money not exceeding one thousand rupees or double the amount of the tax recoverable, whichever is greater, and

(*b*) in other cases, a sum of money not exceeding one thousand rupees.

Bar of certain proceedings.

17. (1) No suit, prosecution or other proceeding shall lie against any officer or servant of the Provincial Government, for any act done or purporting to be done under this Act, without the previous sanction of the Provincial Government.

(2) No officer or servant of the Provincial Government shall be liable in respect of any such act in any civil or criminal proceeding, if the act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under this Act.

Limitation for certain suits and prosecutions.

18. No suit shall be instituted against the Crown and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the Provincial Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months from the date of the act complained of.

Power to make rules.

19. (1) The Provincial Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) all matters expressly required or allowed by this Act to be prescribed;

(*b*) the licensing of persons engaged in the sale of goods and the imposing of conditions in respect of the same for the purpose of enforcing the provisions of this Act and fees for licences;

(*c*) the assessment to tax under this Act of businesses which are discontinued or the ownership of which has changed;

(*d*) the assessment to tax under this Act of businesses owned by minors and other incapacitated persons or by persons residing outside the Province of Madras;

(*e*) the assessment of a business owned by any person whose estate or any portion of whose estate is under the control of the Court of Wards, the Administrator-General, the Official Trustee, or any receiver or manager appointed by or under any order of a Court;

(*f*) the assessment to tax under this Act of any turnover which has escaped assessment, and the period within which such assessment may be made, not exceeding three years;

(*g*) the rectification of mistakes apparent from the record of any assessment, appeal or revision and the period within which such rectification may be made;

(*h*) compelling the submission of returns and the production of documents and enforcing the attendance of persons and examining them on oath or affirmation;

(*i*) securing that returns furnished or accounts or documents produced or evidence of any kind given under this Act before any assessing authority or on appeal or revision from any decision of such authority are kept confidential;

(*j*) the duties and powers of officers appointed for the purpose of enforcing the provisions of this Act;

(*k*) generally regulating the procedure to be followed and the forms to be adopted in proceedings under this Act; and

(*l*) any other matter for which there is no provision or no sufficient provision in this Act and for which provision is, in the opinion of the Provincial Government, necessary for giving effect to the purposes of this Act.

(3) In making a rule under sub-section (1) or sub-section (2), the Provincial Government may provide that a person guilty of a breach thereof shall, on conviction by a Presidency Magistrate or a Magistrate of the first class, be punishable with fine which may extend to one thousand rupees and, where the breach is a continuing one, with further fine which may extend to fifty rupees for every day after the first during which the breach continues.

(4) The power to make rules conferred by this section shall be subject to the condition of the rules being made after previous publication for a period of not less than four weeks.

(5) All rules made under this section shall be published in the *Fort St. George Gazette*, and upon such publication shall have effect as if enacted in this Act.

Transitional provision for levy of tax.

20. If, when this Act comes into force, the tax is leviable for the second half of any year, it shall be levied in accordance with the scale specified in section 3 and on the basis of the turnover as determined in accordance with the rules made under this Act.

Power to remove difficulties.

21. If any difficulty arises in giving effect to the provisions of this Act, the Provincial Government may, as occasion may require, by order, do anything which appears to them necessary for the purpose of removing the difficulty.

THE MADRAS ENTERTAINMENTS TAX ACT, 1939.

ACT No. X OF 1939.

[*10th June, 1939.*

An Act to impose a tax on amusements and other entertainments in the Province of Madras.

WHEREAS it is expedient to provide for the levy by the Provincial Government of a tax on amusements and other entertainments, to repeal the Madras Local Authorities Entertainments Tax Act, 1926, and to provide for the payment of compensation to local authorities now levying a tax under the Act aforesaid; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS ENTERTAINMENTS TAX ACT, 1939.

(2) It extends to the whole of the Province of Madras.

(3) This section shall come into force at once, and the rest of this Act shall come into force on such date as the Provincial Government may, by notification in the Official Gazette, appoint.

Repeal of Madras Act V of 1927.

2. The Madras Local Authorities Entertainments Tax Act, 1926, is hereby repealed.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context—

(1) "admission" includes admission as a spectator or as one of an audience, and admission for the purpose of amusement by taking part in an entertainment;

(2) "admission to an entertainment" includes admission to any place in which an entertainment is held;

(3) "agriculture" includes horticulture and the breeding of animals of every description;

(4) "entertainment" includes any exhibition, performance, amusement, game, sport or race to which persons are admitted for payment;

(5) "institution" includes a company, society, club or other association of persons by whatever name called;

(6) "local authority" means the Corporation of Madras, or a municipal council or a local board constituted under any enactment for the time being in force;

(7) "payment for admission" includes—

(a) any payment made by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof, for admission to which a payment involving a tax or a higher tax is required;

(b) any payment for seats or other accommodation in a place of entertainment; and

(c) any payment for any purpose whatsoever connected with an entertainment which a person is required to make as a condition of attending or continuing to attend the entertainment in addition to the payment, if any, for admission to the entertainment;

(8) "prescribed" means prescribed by rules made under this Act; and

(9) "proprietor" in relation to any entertainment includes any person responsible for the management thereof.

Tax on payments for admission to entertainments.

4. Except as otherwise expressly provided in this Act, there shall be levied, and paid to the Provincial Government, on all payments for admission to any entertainment, a tax (hereinafter referred to as the entertainments tax) at the following rates, namely:—

Where the payment, excluding the amount of the tax—

	Amount of tax.
(i) is not more than two annas ..	Three pies.
(ii) is more than two annas but less than six annas ..	Six pies.
(iii) is six annas or more but is less than twelve annas ..	One anna.
(iv) is twelve annas or more but is less than one rupee eight annas ..	Two annas.
(v) is one rupee eight annas or more but is less than two rupees eight annas ..	Four annas.
(vi) is two rupees eight annas or more but is less than three rupees eight annas ..	Eight annas.
(vii) is three rupees eight annas or more but is less than four rupees eight annas ..	Twelve annas.
(viii) is four rupees eight annas or more but is less than six rupees eight annas ..	One rupee.
(ix) is six rupees eight annas or more but is less than nine rupees eight annas ..	One rupee eight annas.
(x) is nine rupees eight annas or more but is less than ten rupees ..	Two rupees.
(xi) is ten rupees or more ..	Two rupees in respect of the first ten rupees and two rupees for every ten rupees or portion thereof in excess of the first ten rupees.

Composition and consolidated payment of tax.

5. The Provincial Government may, on the application of the proprietor of any entertainment in respect of which the entertainments tax is payable under section 4, allow the proprietor on such conditions as they may lay down—

(*a*) to compound the tax payable in respect of such entertainment for a fixed sum; or

(*b*) to pay the amount of the tax due by means of a consolidated payment at such percentage of the gross proceeds received by the proprietor on account of payments for admission to such entertainment and on account of the tax, as the Provincial Government may fix.

Admission to entertainments.

6. (1) Save in the cases referred to in section 5, no person shall be admitted for payment to any entertainment where the payment is subject to the entertainments tax except—

(*a*) with a ticket stamped with an impressed, embossed, engraved or adhesive stamp (not previously used) issued by the Provincial Government and indicating the proper tax for such ticket, or

(*b*) in special cases, with the approval of the Provincial Government, through a barrier which, or by means of a mechanical contrivance which automatically registers the number of persons admitted,

unless the proprietor of the entertainment has made arrangements approved by the Provincial Government for furnishing returns of the payments for admission to the entertainment and has given security up to an amount and in a manner approved by the Provincial Government for the payment of the entertainments tax.

(2) Nothing in sub-section (1) shall be deemed to preclude the Provincial Government from requiring security from the proprietor of an entertainment for the payment of the entertainments tax in any other case.

Manner of payment of tax.

7. (1) The entertainments tax shall be levied in respect of each person admitted for payment, and in the case of admission by stamped ticket, shall be paid by means of the stamp on the ticket, and, in the case of admission otherwise than by stamped ticket, shall be calculated and paid on the number of admissions.

(2) The entertainments tax in the case of admission otherwise than by stamped ticket, shall be recoverable from the proprietor.

(3) Where the payment for admission to an entertainment is made wholly or partly by means of a lump sum paid as a subscription or contribution to any institution, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, the entertainments tax shall be paid on the amount of the lump sum, but where the Provincial Government are of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the admission in an entertainment, or covers admission to an entertainment during any period during which the tax has not been in operation, the tax shall be levied on such an amount as appears to the Provincial Government to represent the right of admission to entertainments in respect of which the entertainments tax is payable.

Entertainments exempted from payment of tax.

8. (1) The entertainments tax shall not be levied on payment for admission to any entertainment where the Provincial Government are satisfied—

(*a*) that the entire gross proceeds of the entertainment are devoted to philanthropic, religious or charitable purposes without any charge on such proceeds for any expenses of the entertainment; or

(*b*) that the entertainment is of a wholly educational character; or

(c) that the entertainment is provided for purposes which are partly educational, cultural or scientific by an institution not conducted or established for profit; or

(d) that the entertainment is provided by an institution not conducted for profit and established solely for the purpose of promoting the public health or the interests of agriculture or of a manufacturing industry, and consists solely of an exhibition of articles which are of material interest in connection with questions relating to public health or agriculture, or of the products of the industry for promoting the interests of which the institution exists or of the materials, machinery, appliances or foodstuffs used in the production of those products.

(2) The Provincial Government may, by general or special order, exempt any entertainment or class of entertainments from liability to the entertainments tax.

Refunds in certain cases.

9. Where the Provincial Government are satisfied that the whole of the net proceeds of an entertainment are devoted to philanthropic, religious or charitable purposes, and that in calculating the net proceeds, not more than twenty-five per cent. of the gross proceeds have been deducted on account of the expenses of the entertainment, they shall repay to the proprietor the amount of the entertainments tax paid in respect of the entertainment.

Manner of recovery of tax.

10. Any amount due on account of the entertainments tax may be recovered by the Provincial Government as if it were an arrear of land revenue.

Inspection.

11. (1) (a) Any officer authorized by the Provincial Government in this behalf may enter any place of entertainment while the entertainment is proceeding, and any place ordinarily used as a place of entertainment at any reasonable time, for the purpose of seeing whether the provisions of this Act or any rules made thereunder are being complied with.

(b) Every officer so authorized shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

(2) The proprietor of every entertainment or the owner or person in charge of any place ordinarily used as a place of entertainment shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1).

(3) If any person prevents or obstructs the entry of the inspecting officer, he shall, in addition to any other punishment to which he is liable under any law for the time being in force, be punished with fine which may extend to five hundred rupees.

Exemption from payment for admission.

12. The officer referred to in section 11 or any other officer who has to enter any place of entertainment in pursuance of a duty imposed upon him by or under this Act or any other law shall not be required to pay for his admission to the entertainment.

Payment of compensation to local authorities.

13. (1) From the proceeds of the tax collected under this Act every year, there shall be paid to each of the local authorities which were in receipt of an income from the tax levied under the Madras Local Authorities Entertainments Tax Act, 1926, during any part of the three years preceding the 1st April, 1939, a sum equivalent to the average net annual income derived by such local authority during those three years from the tax so levied:

Provided that from the amount payable under this sub-section to any local authority for the first year after the commencement of this Act, the net income derived by that authority from any tax levied on and after the 1st April of that year under the Madras Local Authorities Entertainments Tax Act, 1926, shall be deducted.

Explanation.—In this sub-section, "year" shall mean the financial year.

(2) The Provincial Government shall determine the sums which should be paid to local authorities under sub-section (1) and their determination shall be final.

Penalties.

14. The proprietor of any entertainment who—

(*a*) admits any person for payment to any place of entertainment in contravention of the provisions of section 6, or

(*b*) fails to pay the tax due from him within the time prescribed, or

(*c*) fraudulently evades the payment of any tax due under this Act, or

(*d*) contravenes any of the provisions of this Act,

shall, on conviction by a Magistrate, be liable in respect of each such offence to a fine which may extend to five hundred rupees, and shall in addition, be liable to pay any tax which should have been paid.

Power to compound offences.

15. The prescribed authority may accept from any person who has committed or is reasonably suspected of having committed an offence against this Act, by way of composition of such offence—

(*a*) where the offence consists of the failure to pay, or the evasion of, any tax payable under this Act, in addition to the tax so payable, a sum of money not exceeding five hundred rupees or double the amount of the tax payable, whichever is greater, and

(*b*) in other cases, a sum of money not exceeding five hundred rupees.

Power to make rules.

16. (1) The Provincial Government may make rules for securing the payment of the entertainments tax and generally for carrying into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, they may make rules—

(*a*) for the supply and use of stamps or stamped or embossed tickets, or for the stamping or embossing of tickets sent to be stamped or embossed, and for securing the defacement of stamps when used;

(*b*) for the use of tickets covering the admission of more than one person and the calculation of the tax thereon; and for the payment of the tax on the transfer from one part of a place of entertainment to another, and on payments for seats or other accommodation;

(*c*) for controlling the use of barriers or mechanical contrivances (including the prevention of the use of the same barrier or mechanical contrivance for payments of a different amount) and for securing proper records of admission by means of barriers or mechanical contrivances;

(*d*) for the checking of admissions, the keeping of accounts and the furnishing of returns by the proprietors of entertainments to which the provisions of section 5 are applied or in respect of which the arrangements approved by the Provincial Government for furnishing returns are made under section 6;

(*e*) for the renewal of damaged or spoiled stamps and for the procedure to be followed on applications for refund under this Act or under the rules made thereunder;

(*f*) for the keeping of accounts of all stamps used under this Act;

(*g*) for the presentation and disposal of applications for exemption from payment of the entertainments tax, or for the refund thereof, made under the provisions of this Act;

(*h*) for the collection of the entertainments tax under this Act and the powers to be exercised by the officers of the Provincial Government in that behalf;

(*i*) for authorizing any local authority to collect the entertainments tax on behalf of the Provincial Government in the area within the jurisdiction of the local authority or any part of such area, for the payment of a commission to the local authority for making the collection, and for the powers to be exercised by the officers of the local authority in connexion with such collection;

(*j*) for the issue of passes by proprietors of entertainments for the admission of officers who have to perform any duty in connexion therewith or any other duty imposed upon them by law; and

(*k*) for any other matter for which there is no provision or no sufficient provision in this Act and for which provision is, in the opinion of the Provincial Government, necessary for giving effect to the purposes of this Act.

(3) In making a rule under sub-section (1) or sub-section (2), the Provincial Government may provide that a breach thereof shall be punishable with fine which may extend to five hundred rupees.

(4) The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of the rules being made after previous publication for a period of not less than one month.

(5) All rules made under this section shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

Bar of certain proceedings.

17. (1) No suit, prosecution or other proceeding shall lie against any officer or servant of the Provincial Government, for any act done or purporting to be done under this Act, without the previous sanction of the Provincial Government.

(2) No officer or servant of the Provincial Government shall be liable in respect of any such act in any civil or criminal proceeding, if the act was done in good faith in the course of the execution of duties or the discharge of the functions imposed by or under this Act.

Limitation for certain suits and prosecutions.

18. No suit shall be instituted against the Crown and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the Provincial Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months from the date of the act complained of.

Proceedings, etc., against officers and servants of a local authority collecting the tax.

19. If any local authority has been authorized under this Act to collect the entertainments tax on behalf of the Provincial Government, the provisions of sections 17 and 18 shall apply in regard to the officers and servants of such authority in the same manner as they apply in regard to the officers and servants of the Provincial Government.

Delegation of certain powers of the Provincial Government.

20. (1) The Provincial Government may, by notification in the Official Gazette, delegate all or any of their powers under this Act except those conferred upon them by sub-section (3) of section 1, section 16 and this section, to any person or authority subordinate to the Provincial Government, and may in like manner withdraw any powers so delegated.

(2) The exercise of any powers delegated under sub-section (1) shall be subject to such restrictions, limitations and conditions, if any, as may be laid down by the Provincial Government, and shall also be subject to control and revision by them.

THE MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS AMENDMENT ACT, 1939.

ACT No. XI OF 1939.

[*11th June, 1939.*

An Act further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for certain purposes.

WHEREAS it is expedient further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1939.

Amendment of sections 40 and 83, Madras Act V of 1920.

2. In the Madras District Municipalities Act, 1920—

(i) after sub-section (2) of section 40, the following sub-section shall be added, namely:—

"(3) Any person removed under sub-section (1) from the office of chairman or from the office of vice-chairman shall not be eligible for election to either of the said offices until the date on which notice of the next ordinary elections to the municipal council is published in the prescribed manner, or the expiry of six months from the date of the removal, whichever is earlier."; and

(ii) in sub-section (1) of section 83, for clause (*e*), the following clause shall be substituted, namely:—

"(*e*) any irrigation work vesting in the Crown including the bed of a water-course, or any building or land adjacent and appertaining to such irrigation work; Crown lands set apart free for recreation purposes; and all such other Crown property (being neither buildings nor land from which in the opinion of the Provincial Government any income could be derived) as may from time to time be notified by the Provincial Government."

Amendment of section 43, Madras Act XIV of 1920.

3. In section 43 of the Madras Local Boards Act, 1920, after sub-section (2) the following sub-section shall be added, namely:—

"(3) Any person removed under sub-section (1) from the office of president or from the office of vice-president shall not be eligible for election to either of the said offices until the date on which notice of the next ordinary elections to the local board is published in the prescribed manner, or the expiry of six months from the date of the removal, whichever is earlier."

THE TIRUMALAI-TIRUPATI DEVASTHANAMS AMENDMENT ACT, 1939.

ACT No. XII OF 1939.

[*11th June, 1939.*

An Act to amend the Tirumalai-Tirupati Devasthanams Act, 1932, for certain purposes.

WHEREAS it is expedient to amend the Tirumalai-Tirupati Devasthanams Act, 1932, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE TIRUMALAI-TIRUPATI DEVASTHANAMS (AMENDMENT) ACT, 1939.

Amendment of section 1, Madras Act XIX of 1933.

2. In sub-section (2) of section 1 of the Tirumalai-Tirupati Devasthanams Act, 1932 (hereinafter referred to as the said Act), after the words "applies to" the words "the Tirumalai Hills area as notified by the Provincial Government in the Official Gazette from time to time," shall be inserted.

Amendment of section 4, Madras Act XIX of 1933.

3. In section 4 of the said Act—

(i) the word "and" at the end of clause (xi) shall be omitted; and

(ii) after clause (xii), the following shall be added, namely:—

"and

(xiii) 'Tirumalai Hills area' means the area notified as such under sub-section (2) of section 1."

Insertion of new Chapter V-A in Madras Act XIX of 1933.

4. After Chapter V of the said Act, the following Chapter shall be inserted, namely:—

"CHAPTER V-A.

SANITARY CONTROL, ETC., OF THE TIRUMALAI HILLS AREA.

Madras Act XIV of 1920 and other enactments relating to public health to apply to Tirumalai Hills area subject to specified modifications and restrictions.

35-A. The Provincial Government may, by notification in the Official Gazette, direct that the provisions of the Madras Local Boards Act, 1920, or of any other enactment for the time being in force in the Province of Madras and relating to public health, shall apply to the Tirumalai Hills area only to such extent and subject to such modifications and restrictions as may be specified in the notification. In particular, the notification may authorize the Commissioner, in the Tirumalai Hills area, to perform the duties and exercise the powers assigned to a panchayat and its president or to any other authority or officer under the provisions so applied, subject to such control as may be specified in the notification."

Amendment of section 36, Madras Act XIX of 1933.

5. In section 36 of the said Act, clauses (v) and (vi) shall be re-numbered as clauses (vii) and (viii) respectively, and after clause (iv), the following clauses shall be inserted, namely:—

"(v) the establishment and maintenance of a veterinary hospital for the animals of the devasthanams;

(vi) the acquisition of any lands or other immovable property, which is authorized by the Provincial Government;".

Amendment of section 37, Madras Act XIX of 1933.

6. In sub-section (1) of section 37 of the said Act—

(i) the word "and" at the end of clause (ii) shall be omitted;

(ii) clause (iii) shall be re-numbered as clause (vi); and

(iii) after clause (ii), the following shall be inserted, namely:—

"(iii) the establishment and maintenance of a hospital for the benefit of Hindus generally;

(iv) the establishment and maintenance of an asylum for Hindu lepers;

(v) the construction and maintenance of a poor home for destitute persons professing the Hindu religion who are physically disabled and helpless; and".

THE MADRAS BORSTAL SCHOOLS (AMENDMENT) ACT, 1939.

ACT No. XIII OF 1939.

[*11th June, 1939.*

An Act further to amend the Madras Borstal Schools Act, 1925, for a certain purpose.

WHEREAS it is expedient further to amend the Madras Borstal Schools Act, 1925, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS BORSTAL SCHOOLS (AMENDMENT) ACT, 1939.

Insertion of new section 10-A in Madras Act V of 1926.

2. After section 10 of the Madras Borstal Schools Act, 1925, the following section shall be inserted, namely:—

Power of Provincial Government to transfer offenders sentenced to transportation to Borstal schools.

"10-A. The Provincial Government may, if satisfied that any offender who has been sentenced to transportation either before or after the passing of the Madras Borstal Schools (Amendment) Act, 1939, and who at the time of conviction was not less than 16 nor more than 21 years of age, might with advantage be detained in a Borstal school, direct that such offender shall be transferred to a Borstal school, there to serve the whole or any part of the unexpired residue of his sentence. The provisions of this Act shall apply to such offender as if he had been originally sentenced to detention in a Borstal school.

An order may be made under this section notwithstanding that the sentence of transportation has been subsequently commuted into a sentence of imprisonment."

THE MADRAS CHILDREN (AMENDMENT) ACT, 1939.

ACT No. XIV OF 1939.

[11th June, 1939

An Act further to amend the Madras Children Act, 1920, for certain purposes.

WHEREAS it is expedient further to amend the Madras Children Act, 1920, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS CHILDREN (AMENDMENT) ACT, 1939.

Amendment of section 33, Madras Act IV of 1920.

2. To sub-section (1) of section 33 of the Madras Children Act, 1920 (hereinafter referred to as the said Act), the following proviso shall be added, namely:—

"Provided that the chief inspector may exercise the powers conferred on the managers of the school by this sub-section if, in his opinion, there will be delay in obtaining the orders of the managers and such delay will be prejudicial to the interests of the youthful offender or child concerned. A copy of every order made under this proviso shall be communicated forthwith to the Provincial Government and another copy shall be communicated as soon as may be to the managers of the school."

Amendment of section 35, Madras Act IV of 1920.

3. In section 35 of the said Act, after sub-section (2), the following sub-section shall be inserted, namely:—

"(2-A) The powers conferred on the Provincial Government by clauses (*a*), (*b*), (*c*) and (*d*) of sub-section (2) may also be exercised by the Chief Inspector. A copy of every order passed by the chief inspector under this sub-section shall be communicated forthwith to the Provincial Government with full information regarding the age of the youthful offender or child, the language spoken by him, and such other particulars relating to him as may be prescribed."

Insertion of new section 35-A in Madras Act IV of 1920.

4. After section 35 of the said Act, the following section shall be inserted, namely:—

Transfers between certified schools and schools of like nature in different parts of British India.

"35-A. (1) The Provincial Government may, generally or specially, notify in the Official Gazette that any specified certified school situated in the Province of Madras shall be available for the reception of children, young persons and youthful offenders directed to be sent to a certified school, reformatory school, or other school of a like nature, by any Court or Magistrate in any other part of British India; and thereupon provision may be made for the removal of the children, young persons and youthful offenders concerned accordingly:

Provided that no notification shall be published under this sub-section without the consent of the Provincial Government of the part of British India concerned.

(2) The Provincial Government may direct any child, young person or youthful offender to be transferred from any certified school in the Province of Madras to any certified school, reformatory school, or other school of a like nature in any other part of British India:.

Provided that no one shall be transferred under this sub-section without the consent of the Provincial Government of the part of British India concerned.

(3) The Provincial Government may consent to the transfer to a certified school under this Act, of a child, young person or youthful offender detained in any certified school, reformatory school, or other school of a like nature in any other part of British India and upon such transfer the provisions of this Act shall apply to such child, young person or youthful offender as if he had been originally ordered to be sent to a certified school under this Act."

(*f*) in sub-section (3-B), as re-numbered by this Act, for the words "total income", in both places where they occur, the words "total world income" shall be substituted; after the words "Interest on Securities" the words "or any other sum chargeable under this Act" shall be inserted; for the words "paying such interest" the words "making such payments" shall be substituted; and the words "income-tax and" shall be omitted;

(*g*) in sub-section (3-C), as re-numbered by this Act, after the words "Interest on Securities" the words "or any other sum chargeable under this Act" shall be inserted; for the words "pays to that person in any year an amount of such interest" the words "makes to that person in any year payments" shall be substituted; for the words "paying such interest" the words "making such payments" shall be substituted; for the word, brackets, figure and letter "sub-section (3-A)" the word, brackets, figure and letter "sub-section (3-B)" shall be substituted; the words "income-tax on the total amount of such interest at the rate appropriate to such total, and" shall be omitted; and for the words "such total" the words "the total amount of such payments" shall be substituted;

(*h*) in sub-section (3-D), as re-numbered by this Act, for the words "total income" the words "total world income" shall be substituted;

(*i*) in sub-section (3-E), as re-numbered by this Act, for the word, brackets, figure and letter "sub-section (3-C)" the word, brackets, figure and letter "sub-section (3-D)" shall be substituted;

(*j*) in sub-section (5), after the word "section" the words, brackets and figures "and any sum by which a dividend has been increased under sub-section (2) of section 16" shall be inserted, after the word "security" the words "or of the shareholder" shall be inserted, and in the second proviso to the said sub-section,—

(i) for the words, figures and brackets "sub-section (3) of section 16" the words, letters, figures and brackets "clause (*c*) of sub-section (1) or sub-section (3) of section 16, section 44-D or section 44-E" shall be substituted; and

(ii) for the words "that person" the words "such other person" shall be substituted;

(*k*) in sub-section (7), for the words "and pay" the words "or after deducting fails to pay" shall be substituted; and for the word "he", where it first occurs, the words, brackets, figures and letters "he, and in the cases specified in sub-sections (3-D) and (3-E) the company of which he is the principal officer" shall be substituted, and for the word "he", where it occurs for the second time, the words "he or it" shall be substituted;

(*l*) in sub-section (9), for the words "at the time of payment of interest or dividends" the words "at the time of payment of the sum from which tax has been deducted" shall be substituted, and for the word, brackets, figure and letter "or (3-D)" the word, brackets, figures and letters "(3-D) or (3-E)" shall be substituted.

Substitution of new section for section 19, Act XI of 1922.

21. For section 19 of the said Act the following section shall be substituted, namely:—

Payment in other cases.

"19. In the case of income in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment, and in any case where income-tax has not been deducted in accordance with the provisions of section 18, income-tax shall be payable by the assessee direct."

Amendment of section 20-A, Act XI of 1922.

22. In section 20-A of the said Act, for the words "one thousand" the words "four hundred" shall be substituted.

Amendment of section 21, Act XI of 1922.

23. In section 21 of the said Act,—

(a) after the words "in the prescribed form" the words "and verified in the prescribed manner" shall be inserted;

(b) in clause (a), after the word "received" the words "or to whom was due" shall be inserted;

(c) in clause (b), after the word "received" the words "or so due" shall be inserted, and after the word "paid" the words "or due, as the case may be" shall be added;

(d) in clause (c), after the word "income-tax" the words "and super-tax" shall be inserted.

Amendment of section 22, Act XI of 1922.

24. In section 22 of the said Act,—

(a) for sub-section (1) the following sub-section shall be substituted, namely:—

"(1) The Income-tax Officer shall, on or before the 1st day of May in each year, give notice, by publication in the press and by publication in the prescribed manner, requiring every person whose total income during the previous year exceeded the maximum amount which is not chargeable to income-tax to furnish, within such period not being less than sixty days as may be specified in the notice, a return, in the prescribed form and verified in the prescribed manner, setting forth (along with such other particulars as may be required by the notice) his total income and total world income during that year:

Provided that the Income-tax Officer may in his discretion extend the date for the delivery of the return in the case of any person or class of persons.";

(b) in sub-section (2), the words "other than company" shall be omitted, and for the word "shall serve" the words "may serve" shall be substituted, and after the words "his total income" the words "and total world income" shall be inserted; and to the said sub-section the following proviso shall be added; namely:—

"Provided that the Income-tax Officer may in his discretion extend the date for the delivery of the return.";

(c) in sub-section (3), the words "and any return so made shall be deemed to be a return made in due time under this section" shall be omitted;

(d) in sub-section (4), the words "on the principal officer of any company or" shall be omitted; and after the words "on any person" the words "who has made a return under sub-section (1) or" shall be inserted; and

after sub-section (4) the following sub-section shall be added, namely:—

"(5) The prescribed form of the returns referred to in sub-sections (1) and (2) shall, in the case of an assessee engaged in any business, profession or vocation, require him to furnish particulars of the location and style of the principal place wherein he carries on the business, profession or vocation and of any branches thereof, the names and addresses of his partners, if any, in such business, profession or vocation and the extent of the share of the assessee and the shares of all such partners in the profits of the business, profession or vocation and any branches thereof."

Amendment of section 23, Act XI of 1922

25. In section 23 of the said Act,—

(a) in sub-section (1), after the word "satisfied" the words "without requiring the presence of the assessee or the production by him of any evidence" shall be inserted;

(b) in sub-section (2), for the words and figure "has reason to believe that a return made under section 22 is incorrect or incomplete, he shall serve on the person who made the return" the words and figure "is not satisfied without requiring the presence of the person who made the return or the production of evidence that a return made under section 22 is correct and complete, he shall serve on such person" shall be substituted;

(*c*) in sub-section (4),—

(i) for the words beginning "If the principal officer" and ending "as the case may be" the words, brackets and figures "If any person fails to make the return required by any notice given under sub-section (2) of section 22 and has not made a return or a revised return under sub-section (3) of the same section" shall be substituted;

(ii) after the word "judgment" the words "and determine the sum payable by the assessee on the basis of such assessment" shall be inserted;

(iii) for the words "in the case of a registered firm, may cancel its registration" the words "in the case of a firm, may refuse to register it or may cancel its registration if it is already registered" shall be substituted;

(*d*) after sub-section (4) the following sub-section shall be added, namely:—

"(5) Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4), as the case may be,—

(*a*) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined:

Provided that if such share of any partner is a loss it shall be set off against his other income or carried forward and set-off in accordance with the provisions of section 24:

Provided further that when any of such partner, is a person not resident in British India his share of the income, profits and gains of the firm shall be assessed on the firm at the rates which would be applicable if it were assessed on him personally, and the sum so determined as payable shall be paid by the firm; and

(*b*) in the case of an unregistered firm, the Income-tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (*a*) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm."

Amendment of section 23-A, Act XI of 1922.

26. In section 23-A of the said Act,—

(*a*) sub-section (1) shall be omitted;

(*b*) sub-section (2) shall be re-numbered sub-section (1), and—

(i) for the portion of the said sub-section preceding the proviso the following shall be substituted, namely:—

Power to assess individual members of certain companies.

"(1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting increased by any income-tax payable thereon are less than sixty per cent. of the assessable income of the company of that previous year, he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes shall be deemed to have been distributed as dividends amongst the shareholders

as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income:

Provided that when the reserves representing accumulations of past profits which have not been the subject of an order under this sub-section exceed the paid up capital of the company, together with any loan capital which is the property of the shareholders, or the actual cost of the fixed assets of the company whichever of these is greater, this section shall apply as if instead of the words 'sixty per cent. of the assessable income' the words 'one hundred per cent. of the assessable income' were substituted:

Provided further that no order under this sub-section shall be made where the company has distributed not less than fifty-five per cent. of the assessable income of the company, unless the company, on receipt of a notice from the Income-tax Officer that he proposes to make such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent. of the assessable income of the company of the previous year concerned:";

(ii) for the proviso the following shall be substituted, namely:—

"Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.";

(iii) in the *Explanation*, the whole of clause (*a*), the brackets and letter "(*b*)" and the whole of clauses (*c*) and (*d*) shall be omitted;

(*c*) sub-section (3) shall be re-numbered as sub-section (2) and in the sub-section, as so re-numbered, before the words "Assistant Commissioner" the word "Inspecting" shall be inserted and the words "firm, association or" shall be omitted;

(*d*) sub-sections (4) and (5) shall be re-numbered, respectively, sub-sections (3) and (4), and in sub-section (3), as so re-numbered,—

(i) paragraph (i) shall be omitted;

(ii) in paragraph (ii), for the word, brackets and figure "sub-section (2)" the word, brackets and figure "sub-section (1)" shall be substituted; for the words "and may be recovered from such member" the words "if it cannot be recovered from such member" shall be substituted and the words following those words shall be omitted;

(iii) in paragraph (iii), the words ", firm or other association" and the words ", firm or association" shall be omitted;

(*e*) after sub-section (4), as re-numbered by the foregoing clause, the following sub-section shall be added, namely:—

"(5) When a company is a shareholder deemed under sub-section (1) to have received a dividend, the amount of the dividend thus deemed to have been paid to it shall be deemed to be part of its total income for the purpose also of the application of that sub-section to distributions of profits by that company."

Amendment of section 24, Act XI of 1922.

27. In section 24 of the said Act,—

(*a*) to sub-section (1) the following proviso shall be added, namely:—

"Provided that where the assessee is an unregistered firm which has not been assessed under the provisions of clause (*b*) of sub-section (5) of section 23 in the manner applicable to a registered firm, any such loss shall be set-off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm; and where the assessee is a registered firm, any loss which cannot be set-off against other income, profits and gains of

the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set-off under this section.";

(*b*) for sub-section (2) the following sub-sections shall be substituted, namely:—

"(2) Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, under the head 'Profits and gains of business, profession or vocation', and the loss cannot be wholly set-off under sub-section (1), the portion not so set-off shall be caried forward to the following year and set-off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year; and if it cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following year, and so on; but no loss shall be so carried forward for more than six years, and a loss arising in the previous years for the assessment for the years ending on the 31st day of March, 1940, the 31st day of March, 1941, the 31st day of March, 1942, the 31st day of March, 1943, and the 31st day of March, 1944, respectively, shall be carried forward only for one, two, three, four and five years, respectively:

Provided that nothing herein contained shall entitle any assessee, being a registered firm, to have carried forward and set off any loss which has been apportioned between the partners, under the proviso to sub-section (1), or entitle any assessee, being a partner in an unregistered firm which has not been assessed under the provisions of clause (*b*) of sub-section (5) of section 23 in the manner applicable to a registered firm, to have carried forward and set off against his own income any loss sustained by the firm:

Provided further that where an unregistered firm is assessed as a registered firm under clause (*b*) of sub-section (5) of section 23, during any year, its losses shall also be carried forward and set off under this section as if it were a registered firm:

Provided further that where a change has occurred in the constitution of a firm or where any person carrying on any business, profession or vocation has been succeeded in such capacity by another person, otherwise than by inheritance, nothing in this section shall be deemed to entitle any person other than the person incurring the loss to have it set off against his income, profits or gains.

(3) When, in the course of the assessment of the total income of any assessee, it is established that a loss of profits or gains has taken place which he is entitled to have set off under the provisions of this section, the Income-tax Officer shall notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of this section."

Amendment of section 24-A, Act XI of 1922.

28. In section 24-A of the said Act,—

(*a*) in sub-section (1), for the words beginning "for the period from the expiry of the last previous year" and ending "for the financial year in which such assessment is made" the following words shall be substituted, namely:—

"of the period from the expiry of the last previous year of which the income has been assessed in his hands to the probable date of his departure from British India, or where he has not been previously assessed, on his total income of the period up to the probable date of his departure from British India. The assessment shall be made on the total income of each completed previous year included in such period at the rate at which such income would have been charged had it been fully assessed, and as respects the period from the expiry of the last of such completed previous years to the probable date of departure the Income-tax Officer shall estimate the total income of such person during such period and assess it at the rate in force for the financial year in which such assessment is made";

and in the proviso, for the words "or have been assessed at too low a rate" the words "or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act but" shall be substituted;

(*b*) in sub-section (2), for the words "comprised in the period first referred to in" the words "comprised in the relevant period referred to in the first sentence of" shall be substituted.

Amendment of section 24-B, Act XI of 1922.

29. In section 24-B of the said Act,—

(*a*) for sub-section (2) the following sub-section shall be substituted, namely:—

"(2) Where a person dies before the publication of the notice referred to in sub-section (1) of section 22 or before he is served with a notice under sub-section (2) of section 22 or section 34, as the case may be, his executor, administrator or other legal representative shall, on the serving of the notice under sub-section (2) of section 22 or under section 34, as the case may be, comply therewith, and the Income-tax Officer may proceed to assess the total income of the deceased person as if such executor, administrator or other legal representative were the assessee.";

(*b*) in sub-section (3), the words, brackets and figure "of sub-section (2)" shall be omitted and after the words "and for this purpose may" the following words shall be inserted, namely:—

",by the issue of the appropriate notice which would have had to be served upon the deceased person had he survived,".

Amendment of section 25, Act XI of 1922.

30. In section 25 of the said Act,—

(*a*) in sub-section (3), after the words "is discontinued" the words "then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable," shall be inserted:

(*b*) after sub-section (3) the following sub-sections shall be inserted, namely:—

"(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(5) No claim to the relief afforded under sub-section (3) or sub-section (4) shall be entertained unless it is made before the expiry of one year from the date on which the business, profession or vocation was discontinued or the succession took place, as the case may be."; and

(*c*) existing sub-section (4) shall be re-numbered sub-section (6), and in that sub-section, so re-numbered, for the words, brackets and figures "sub-section (1) or sub-section (3)" the words, brackets and figures "sub-section (1) sub-section (3) or sub-section (4)" shall be substituted.

Amendment of section 25-A, Act XI of 1922.

31. (*a*) In sub-section (1) of section 25-A of the said Act, the words "that a separation of the members of the family has taken place and" shall be omitted;

(*b*) in sub-section (2) of section 25-A of the said Act, after the words "Where such an order has been passed" the words "or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation" shall be inserted, the words "separation or" shall be omitted, and, in the proviso, for the words "separated members and groups of members" the words "members and groups of members whose joint family property has been partitioned" shall be substituted.

Amendment of section 26, Act XI of 1922.

32. In section 26 of the said Act,—

(*a*) in sub-section (1), for the words beginning "the assessments on the firm" and ending "proportionate to his interest in the firm" the words "the assessment shall be made on the firm as constituted" shall be substituted, and to the said sub-section the following provisos shall be added, namely:—

"Provided that the income, profits and gains of the previous year shall, for the purpose of inclusion in the total incomes of the partners, be apportioned between the partners who in such previous year were entitled to receive the same:

Provided further that when the tax assessed upon a partner cannot be recovered from him it shall be recovered from the firm as constituted at the time of making the assessment.";

(*b*) for sub-section (2), the following sub-section shall be substituted, namely:—

"(2) Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year:

Provided that, when the person succeeded in the business, profession or, vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid."

Amendment of section 27, Act XI of 1922.

33. In section 27 of the said Act, the words "or in the case of a company, the principal officer thereof" shall be omitted.

Amendment of section 28, Act XI of 1922

34. In section 28 of the said Act,—

(*a*) for sub section (1) the following sub-section shall be substituted, namely:—

"(1) If the Income-tax Officer, the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person—

(*a*) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-

section (1) or sub-section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

(*b*) has without reasonable cause failed to comply with a notice under sub-section (4) of section 22 or sub section (2) of section 23, or

(*c*) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty, in the case referred to in clause (*a*), in addition to the amount of the income-tax and super-tax, if any, payable by him, a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (*b*) and (*c*), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income:

Provided that—

(*a*) no penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under sub-section (2) of section 22;

(*b*) where a person has failed to comply with a notice under sub-section (2) of section 22 or section 34 and proves that he has no income liable to tax, the penalty imposable under this sub-section shall be a penalty not exceeding twenty-five rupees;

(*c*) no penalty shall be imposed under this sub-section upon any person assessable under section 42 as the agent of a person not resident in British India for failure to furnish the return required under section 22 unless a notice under sub-section (2) of that section or under section 34 has been served on him.";

(*b*) in sub-section (2), for the words "Assistant Commissioner" the words "Appellate Assistant Commissioner" shall be substituted; for the words "in addition to the income-tax payable by him" the words "in addition to the income-tax and super-tax, if any, payable by him" shall be substituted; and for the words "not exceeding the amount of income-tax" the words "not exceeding one and a half times the amount of income-tax and super-tax" shall be substituted;

(*c*) in sub-section (5), for the words "Assistant Commissioner" the words "Appellate Assistant Commissioner" shall be substituted;

(*d*) after sub-section (5) the following sub-section shall be added, namely:—

"(6) The Income-tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner."

Substitution of new section for section 29, Act XI of 1922.

35. For section 29 of the said Act the following section shall be substituted, namely:—

Notice of demand.

"29. When any tax or penalty is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax or penalty a notice of demand in the prescribed form specifying the sum so payable."

Amendment of section 30, Act XI of 1922.

36. In section 30 of the said Act,—

(*a*) in sub-section (1),—

(*i*) for the words and figures "or rate at which he is assessed under section 23 or section 27" the words and figures "of income assessed under

section 23 or section 27, or the amount of loss computed under section 24 or the amount of tax determined under section 23 or section 27" shall be substituted;

(*ii*) after the words and figure "assessment under section 27, or", the word "objecting" shall be inserted, and the words "against him" shall be omitted;

(*iii*) after the word, letter and figure "section 25-A" the words, figures and brackets "or sub-section (2) of section 26" shall be inserted, and after the words "made by an Income-tax Officer" the words, letters, figures and brackets "or objecting to any penalty imposed by an Income-tax Officer under sub-section (6) of section 44E or sub-section (5) of section 44F or sub-section (1) of section 46" shall be inserted;

(*iv*) after the words "made by an Income-tax Officer" the following words, figures and letters shall be inserted, namely:—

"or objecting to a refusal of an Income-tax Officer to allow a claim to a refund under section 48, 49 or 49-F, or to the amount of the refund allowed by the Income-tax Officer under any of those sections, and any assessee, being a company, objecting to an order made by an Income-tax Officer under sub-section (1) of section 23-A";

(*v*) for the words "Assistant Commissioner" the words "Appellate Assistant Commissioner" shall be substituted;

(*vi*) for the proviso the following provisos shall be substituted, namely:—

"Provided that no appeal shall lie against an order under sub-section (1) of section 46 unless the tax has been paid:

Provided further that where the partners of a firm are individually assessable on their shares in the total income of the firm, any such partner may appeal to the Appellate Assistant Commissioner against any order of an Income-tax Officer determining the amount of the total income or the loss of the firm or the apportionment thereof between the several partners, but in respect of matters which are determined by such order may not appeal against the assessment of his own total income:

Provided further that a shareholder in a company in respect of which an order under section 23-A has been passed by an Income-tax Officer, may not in respect of matters determined by such order appeal against the assessment of his own total income.";

(*b*) in sub-section (2), after the word and figure "section 27" the words, letters and figures "or of the intimation of an order under sub-section (1) of section 23-A or under section 48, 49 or 49-F" shall be inserted, and for the words "Assistant Commissioner" the words "Appellate Assistant Commissioner" shall be substituted.

Amendment of section 31, Act XI of 1922.

37. In section 31 of the said Act,—

(*a*) for the words "Assistant Commissioner", wherever they occur in the section, the words "Appellate Assistant Commissioner" shall be substituted;

(*b*) after sub-section (2) the following sub-section shall be inserted, namely:—

" (2-A) The Appellate Assistant Commissioner may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Appellate Assistant Commissioner is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable.";

(*c*) in sub-section (3),—

(*i*) in clause (*a*), after the word "assessment" the words "and, in the case of an assessment on a firm or association of persons, authorise the Income-

tax-Officer to amend accordingly any assessment made on any partner of the firm or any member of the association," shall be inserted;

(*ii*) in clause (*b*), after the words "fresh assessment", where they occur for the second time, the words "and determine where necessary the amount of tax payable on the basis of such fresh assessment" shall be added;

(*iii*) for the words and figures "section 25 or section 28" the words, figures and letter "section 25, or sub-section (1) of section 23-A or sub-section (2) of section 26 or section 48, 49 or 49-F" shall be substituted;

(*iv*) after clause (*d*) and before the proviso the following shall be inserted, namely:—

"or, in the case of an order under sub-section (1) of section 25-A.

(*e*) confirm such order or cancel it and either direct the Income-tax Officer to make further inquiry and pass a fresh order or to make an assessment in the manner laid down in sub-section (2) of section 25-A,

or, in the case of an order under section 28 or sub-section (6) of section 44-E or sub-section (5) of section 44-F or sub-section (1) of section 46,

(*f*) confirm or cancel such order or vary it so as either to enhance or reduce the penalty;

or, in the case of an appeal against a computation of loss under section 24,

(*g*) confirm or vary such computation";

(*v*) in the proviso, after the word "assessment" the words "or a penalty" shall be inserted;

(*vi*) after the proviso the following proviso shall be added, namely:—

"Provided further that at the hearing of any appeal against an order of an Income-tax Officer, the Income-tax Officer shall have the right to be heard either in person or by a representative."

Amendment of section 32, Act XI of 1922.

38. In sub-section (1) of section 32 of the said Act for the words "Assistant Commissioner" the words "Appellate Assistant Commissioner" shall be substituted, and for the words, brackets and figures "enhancing his assessment under sub-section (3) of section 31" the words, brackets and figures "under sub-section (3) of section 31 enhancing his assessment or a penalty imposed under section 28 or sub-section (6) of section 44-E or sub-section (5) of section 44-F" shall be substituted.

Amendment of section 33, Act XI of 1922.

39. In sub-section (1) of section 33 of the said Act, for the words "Assistant Commissioner" the words "Appellate Assistant Commissioner" shall be substituted, and for the word, brackets and figure "sub-section (4)" the word, brackets and figure "sub-section (5)" shall be substituted.

Omission of section 33-A Act XI of 1922.

40. Section 33-A of the said Act shall be omitted.

Amendment of section 34, Act XI of 1922.

41. (1) Section 34 of the said Act shall be re-numbered as sub-section (1) of that section, and in the section, as so re-numbered,—

(*a*) for the words "for any reason" the words "in consequence of definite information which has come into his possession the Income-tax Officer discovers that" shall be substituted;

(*b*) for the words "has escaped assessment in any year, or has been assessed at too low a rate" the words "have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act" shall be substituted;

(*c*) for the words "at any time within one year" the following shall be substituted, namely:—

"in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years";

(*d*) after the proviso the following proviso shall be added, namely:—

"Provided further that when the income, profits or gains concerned are income, profits or gains liable to assessment for a year ending prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, or where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year were substituted."

(2) To the said section, as so re-numbered, the following sub-section shall be added, namely:—

"(2) No order of assessment under section 23 or of assessment or re-assessment under sub-section (1) of this section shall be made after the expiry, in any case to which clause (*c*) of sub-section (1) of section 28 applies, of eight years, and in any other case, of four years from the end of the year in which the income, profits or gains were first assessable."

Amendment of section 35, Act XI of 1922.

42. In sub-section (1) of section 35 of the said Act,—

(*a*) for the words "Assistant Commissioner", in both places where they occur, the words "Appellate Assistant Commissioner" shall be substituted;

(*b*) for the words "within one year", in both places where they occur, the words "within four years" shall be substituted;

(*c*) for the words "demand made upon an assessee" the words "assessment order passed by him" shall be substituted;

(*d*) for the words "brought to his notice by the assessee" the words "brought to his notice by an assessee" shall be substituted;

(*e*) after the proviso the following proviso shall be added, namely:—

"Provided further that no such rectification shall be made of any mistake in any order passed more than one year before the commencement of the Indian Income-tax (Amendment) Act, 1939."

Amendment of section 37, Act XI of 1922.

43. In section 37 of the said Act, for the words "Assistant Commissioner", in both places where they occur, the words "Appellate Assistant Commissioner," shall be substituted.

Amendment of section 38, Act XI of 1922.

44. (1) For clause (3) of section 38 of the said Act the following clause shall be substituted, namely:—

"(3) require any assessee to furnish a statement of the names and addresses of all persons to whom he has paid in any year rent, interest, commission, royalty or brokerage, or any annuity not being an annuity taxable under the head 'Salaries', amounting to more than four hundred rupees, together with particulars of all such payments made."

Amendment of section 40, Act XI of 1922.

45. In section 40 of the said Act, for the words "being in receipt on behalf of such beneficiary of any income" the words "being entitled to receive on behalf of such beneficiary any income" shall be substituted and to the said section the following proviso shall be added, namely:—

"Provided that in the case of a beneficiary being a person residing out of British India the tax may be levied upon and recovered from him direct."

Amendment of section 41, Act XI of 1922.

46. (1) Section 41 of the said Act shall be re-numbered sub-section (1) of that section, and in the section, so re-numbered,—

(*a*) the words "are received by" shall be omitted;

(*b*) after the words "the Official Trustees or" the word "by" shall be omitted;

(*c*) after the words "appointed by or under any order of a Court" the words "or any trustee or trustees appointed under a duly executed trust deed, (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913), are entitled to receive on behalf of any person" shall be inserted;

(*d*) after the words "receiver or manager", where they occur for the second time, the words "or trustee or trustees" shall be inserted;

(*e*) for the words "any person on whose behalf such income, profits or gains are received" the words "the person on whose behalf such income, profits or gains are receivable" shall be substituted;

(*f*) the following provisos shall be added, namely:—

"Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate:

Provided further that when part only of the income, profits and gains of a trust is chargeable under this Act, that proportion only of the income, profits and gains receivable by a beneficiary from the trust which the part so chargeable bears to the whole income, profits and gains of the trust shall be deemed to have been derived from that part."

(2) To sub-section (1) of section 41, as so re-numbered, the following sub-section shall be added, namely:—

"(2) Nothing contained in sub-section (1) shall prevent either the direct assessment of the person on whose behalf income, profits or gains therein referred to are receivable, or the rocovery from such person of the tax payable in respect of such income, profits or gains."

Amendment of section 42, Act XI of 1922.

47. In section 42 of the said Act,—

(*a*) in sub-section (1),—

(*i*) for the words "In the case of any person residing out of British India, all profits or gains accruing or arising to such person," the words "All income, profits or gains accruing or arising," shall be substituted;

(*ii*) for the words "or property in British India" the following words shall be substituted, namely:—

"in British India, or through or from any property in British India or through or from any asset or source of income in British India, or through or from any money lent at interest and brought into British India in cash or in kind";

(*iii*) for the words "shall be chargeable to income-tax in the name of the agent of any such person, and" the words "where the person entitled to the income, profits or gains is not resident in British India, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case" shall be substituted;

(*iv*) in the proviso, for the words "Provided that" the following shall be substituted, namely:—

"Provided that where the person entitled to the income, profits or gains is not resident in British India, the income-tax so chargeable may be recovered by deduction under any of the provisions of section 18 and that";

(*v*) after the proviso the following provisos shall be added, namely:—

"Provided further that any such agent, or any person who apprehends that he may be assessed as such an agent, may retain out of any money payable by him to such non-resident person a sum equal to his estimated liability under this sub-section, and in the event of any disagreement between the non-resident person and such agent or person as to the amount to be so retained, such agent or person may secure from the Income-tax Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining that amount:

Provided further that the amount recoverable from such agent or person at the time of final settlement shall not exceed the amount specified in such certificate except to the extent to which such agent or person may at such time have in his hands additional assets of such non-resident person.";

(*b*) in sub-section (2), after the words "Where a person not resident" the words "or not ordinarily resident" shall be inserted; the words ",and not being a British subject or a firm or company constituted within His Majesty's Dominions or a branch thereof" shall be omitted; the words "or the Assistant Commissioner, as the case may be," shall be omitted and for the words commencing "between the resident and the non-resident" and ending "connection with the non-resident" the words "between such persons, the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident" shall be substituted;

(*c*) for sub-section (3) the following sub-section shall be substituted, namely:—

"(3) In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India."

Amendment section of 43, Act XI of 1922.

48. In section 43 of the said Act,—

(*a*) before the proviso the following proviso shall be inserted, namely:—

"Provided that where transactions are carried on in the ordinary course of business through a broker in British India in such circumstances that the broker does not in respect of such transactions deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker who is carrying on such transactions in the ordinary course of his business and not as a principal such first mentioned broker shall not be deemed to be an agent under this section in respect of such transactions:";

(*b*) in the existing proviso after the word "Provided" the word "further" shall be inserted.

Substitution of new section for section 44, Act XI of 1922.

49. For section 44 of the said Act the following section shall be substituted, namely:—

Liability in case of a discontinued firm or association

'44. Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

Amendment of section 44-C, Act XI of 1922.

50. In section 44-C of the said Act, for the words "in any year" the words "in the year" shall be substituted.

Insertion of new Chapter VB in Act XI of 1922.

51. After Chapter VA of the said Act the following Chapter shall be inserted, namely:—

"CHAPTER VB.

SPECIAL PROVISIONS RELATING TO AVOIDANCE OF LIABILITY TO INCOME-TAX AND SUPER-TAX.

Avoidance of income-tax by transactions resulting in the transfer of income to persons resident or ordinarily resident abroad.

44-D. (1) Where any person has, by means of a transfer of assets, by virtue or in consequence whereof, either alone or in conjunction with associated operations, any income which if it were the income of such person would be chargeable to income-tax becomes payable to a person not resident or to a person resident but not ordinarily resident in British India, acquired any rights by virtue or in consequence of which he has within the meaning of this section power to enjoy such income, whether forthwith or in the future, that income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this section, be deemed to be income of such first mentioned person for all the purposes of this Act.

(2) Where any person receives or is entitled to receive, whether before or after any transfer of assets by virtue or in consequence whereof either alone or in conjunction with associated operations any income becomes payable to a person not resident or resident but not ordinarily resident in British India, any sum paid or payable by way of a loan or repayment of a loan or any other sum, being a sum which is not paid or payable for full consideration in money or money's worth, paid or payable otherwise than as income, such income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this section, be deemed to be the income of the first-mentioned person for all the purposes of this Act.

(3) Sub-sections (1) and (2) shall not apply if such first-mentioned person shows to the satisfaction of the Income-tax Officer either—

(*a*) that neither the transfer nor any associated operation had for its purpose or for one of its purposes the avoidance of liability to taxation; or

(*b*) that the transfer and all associated operations were *bona fide* commercial transactions and were not designed for the purpose of avoiding liability to taxation.

(4) For the purposes of this section, an 'associated operation' means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing whether directly or indirectly any of the assets transferred, or to the income arising from any such assets, or to any assets representing whether directly or indirectly the accumulations of income arising from any such assets.

(5) A person shall, for the purposes of this section, be deemed to have power to enjoy income of a person not resident, or resident but not ordinarily resident, in British India, if—

(*a*) the income is in fact so dealt with by any person as to be calculated at some point of time and, whether in the form of income or not, to enure for the benefit of the first mentioned person, or

(*b*) the receipt or accrual of the income operates to increase the value to such first mentioned person of any assets held by him or for his benefit, or

(c) such first mentioned person receives or is entitled to receive at any time any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which represent that income, or

(d) such first mentioned person has power by means of the exercise of any power of appointment or power of revocation or otherwise to obtain for himself, whether with or without the consent of any other person, the beneficial enjoyment of the income, or

(e) such first mentioned person is able, in any manner whatsoever and whether directly or indirectly, to control the application of the income.

(6) In determining whether a person has power to enjoy income within the meaning of this section, regard shall be had to the substantial result and effect of the transfer and any associated operations, and all benefits which may at any time accrue to such person as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits.

(7) For the purposes of this section—

(a) the expression 'assets' includes property or rights of any kind, and the expression 'transfer' in relation to rights includes the creation of those rights;

(b) the expression 'benefit' includes a payment of any kind;

(c) references to income of a person not resident or of a person not ordinarily resident in British India shall, where the amount of the income of a company for any year or period has been deemed to have been distributed under sub-section (1) of section 23-A, include references to so much of the income of the company for that year or period as is equal to the amount deemed to have been distributed to that person;

(d) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligation of any other person to whom, those assets, that income or those accumulations are or have been transferred;

(e) any body corporate incorporated outside British India shall be treated as if it were resident out of British India whether it is so resident or not.

(8) The provisions of this section shall apply for the purposes of assessment to income-tax and super-tax for the year ending on the 31st day of March, 1940, and subsequent years, and shall apply, in relation to transfers of assets and associated operations whether carried out before or after the commencement of the Indian Income-tax (Amendment) Act, 1939.

(9) Where any person has been charged to tax on any income deemed to be his under the provisions of this section, and that income is subsequently received by him, whether as income or in any other form, it shall not again be deemed to form part of his income for the purposes of this Act.

Avoidance of tax by certain transactions in securities.

44-E. (1) Where the owner of any securities (in this sub-section and in sub-section (2) referred to as 'the owner') agrees to sell or transfer those securities, and by the same or any collateral agreement—

(a) agrees to buy back or re-acquire the securities, or

(b) acquires an option, which he subsequently exercises, to buy back or re-acquire the securities,

then, if the result of the transaction is that any interest becoming payable in respect of the securities is receivable otherwise than by the owner, the inte-

rest payable as aforesaid shall, whether it would or would not have been chargeable to tax apart from the provisions of this section, be deemed for all the purposes of this Act to be the income of the owner and not to be the income of any other person.

(2) The references in sub-section (1) to buying back or re-acquiring the securities shall be deemed to include references to buying or acquiring similar securities, so, however, that where similar securities are brought or acquired, the owner shall be under no greater liability to tax than he would have been under if the original securities had been bought back or re-acquired.

(3) Where any person carrying on a business which consists wholly or partly in dealing in securities agrees to buy or acquire any securities and by the same or any collateral agreement—

(*a*) agrees to sell back or re-transfer the securities, or

(*b*) acquires an option, which he subsequently exercises, to sell back or re-transfer the securities,

then, if the result of the transaction is that any interest becoming payable in respect of the securities is receivable by him, no account shall be taken of the transaction in computing for any of the purposes of this Act the profits arising from or loss sustained in the business.

(4) Sub-section (3) shall have effect, subject to any necessary modifications, as if references to selling back or re-transferring the securities included references to selling or transferring similar securities.

(5) For the purpose of this section—

(*a*) the expression 'interest' includes a dividend;

(*b*) the expression 'securities' includes stocks and shares;

(*c*) securities shall be deemed to be similar if they entitle their holders to the same rights against the same persons as to capital and interest and the same remedies for the enforcement of those rights, notwithstanding any difference in the total nominal amounts of the respective securities or in the form in which they are held or the manner in which they can be transferred.

(6) The Income-tax Officer may by notice in writing require any person to furnish him within such time as he may direct (not being less than twenty-eight days), in respect of all securities of which such person was the owner at any time during the period specified in the notice, such particulars as he considers necessary for the purposes of this section and for the purpose of discovering whether tax has been borne in respect of the interest on all those securities; and, if that person without reasonable excuse fails to comply with the notice, he shall be liable to a penalty not exceeding five hundred rupees and to a further penalty of the like amount for every day after the infliction of such penalty during which the failure continues.

Avoidance of tax by sales *cum* dividend.

44-F. (1) Any person upon whom notice is served by the Income-tax Officer requiring him to furnish a statement of particulars relating to any securities in which, at any time during the period specified in the notice he has had any beneficial interest, and in respect of which, within such period, either no income was received by him, or the income received by him was less than the sum to which the income would have amounted if the income from such securities had accrued from day to day and been apportioned accordingly, shall, whether an assessment to income-tax or super-tax in respect of his total income has or has not been made for the relevant year or years of assessment, furnish such a statement and such particulars in the form and within the time (not being less than twenty-eight days) required by the notice.

(2) If it appears to the Income-tax Officer by reference to all the circumstances in relation to the securities of any such person (including circum-

stances with respect to sales, purchases, dealings, contracts, arrangements, transfers, or any other transactions relating to such securities) that such person has thereby avoided or would avoid more than ten per cent. of the amount of the income tax or super-tax for any year which would have been payable in his case in respect of the income from those securities if the income had been deemed to accrue from day to day and had been apportioned accordingly, and the income so deemed to have been apportioned to him had been treated as part of his total income from all sources for the purposes of income-tax or super-tax then those securities shall be deemed to be securities to which sub-section (3) applies.

(3) For the purposes of assessment to income-tax or super-tax in the case of any such person, the income from any securities to which this sub-section applies shall be deemed to accrue from day to day, and in the case of the sale or transfer of any such securities by or to him shall be deemed to have been received as and when it is deemed to have accrued:

Provided that this section shall not apply if such person proves to the satisfaction of the Income-tax Officer that the avoidance of income-tax or super-tax was exceptional and not systematic and that there was not in his case in any of the three preceding years any such avoidance of income-tax or super-tax, or that the provisions of section 44-E have been applied in his case in respect of such income.

(4) If any person fails to furnish any statement or particulars required under this section, or if the Income-tax Officer is not satisfied with any statement or particulars furnished under this section, the Income-tax Officer may make an estimate of the amount of the income which, under the foregoing provisions of this section, is to be deemed to form part of the person's total income for the purposes of income-tax or super-tax.

(5) If any person without reasonable excuse fails to furnish any statement or particulars required under this section, he shall be liable to a penalty not exceeding five hundred rupees, and to a further penalty of the like amount for every day after the infliction of such penalty during which the failure continues.

(6) For the purpose of this section the expression 'securities' includes stocks and shares."

Amendment of section 45, Act XI of 1922.

52. In section 45 of the said Act, for the words, brackets and figure "under sub-section (4)" the words, brackets and figure "under sub-section (3)" shall be substituted, and the words, figures and letter "or under section 33-A" shall be omitted and to the section the following shall be added, namely:—

"provided further that where an assessee has been assessed in respect of income arising outside British India in a country the laws of which prohibit or restrict the remittance of money to British India, the Income-tax Officer shall not treat the assessee as in default in respect of that part of the tax which is due in respect of that amount of his income which by reason of such prohibition or restriction cannot be brought into British India, and shall continue to treat the assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed.

Explanation.—For the purposes of this section income shall be deemed to have been brought into British India if it has been utilized or could have been utilized for the purposes of any expenditure actually incurred by the assessee without British India or if the income whether capitalized or not has been brought into British India in any form."

Amendment of section 46, Act XI of 1922.

53. In sub-section (7) of section 46 of the said Act, after the word and figure "section 42" the words and figure "or of the proviso to section 45" shall be inserted, and for the words "the year" the words "the financial year" shall be substituted.

Amendment of section 47, Act XI of 1922.

54. In section 47 of the said Act, after the word and figure "section 28", the words, letters, figures and brackets "sub-section (6) of section 44-E, sub-section (5) of section 44-F" shall be inserted.

Substitution of new section for section 48, Act XI of 1922.

55. For section 48 of the said Act the following section shall be substituted, namely:—

Refunds.

"48. (1) If any individual, Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or member of an association individually satisfies the Income-tax Officer or other authority appointed by the Central Government in this behalf that the amount of tax paid by him or on his behalf or treated as paid on his behalf for any year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of any such excess.

(2) The Appellate Assistant Commissioner in the exercise of his appellate powers, or the Commissioner in the exercise of his appellate powers or powers of revision if satisfied to the like effect shall cause a refund to be made by the Income-tax Officer of any amount found to have been wrongly paid or paid in excess.

(3) Where income of one person is included under any provision of this Act, in the total income of any other person such other person only shall be entitled to a refund under this section in respect of such income.

(4) Nothing in this section shall operate to validate any objection or appeal which is otherwise invalid or to authorise the revision of any assessment or other matter which has become final and conclusive, or the review by any officer of a decision of his own which is subject to appeal or revision, or, where any relief is specifically provided elscwhere in this Act, to entitle any person to any relief other or greater than that relief or to entitle any person to claim a refund of tax payable before the commencement of the Indian Income-tax (Amendment) Act, 1939, which he would not be entitled to claim but for the passing of that Act."

Omission of section 48-A, Act XI of 1922.

56. Section 48-A of the said Act shall be omitted.

Amendment of section 49, Act XI of 1922.

57. In section 49 of the said Act,—

(*a*) in sub-section (1),—

(*i*) after the word "paid" where it occurs for the first time, the words and figures "by deduction under section 18 or otherwise," shall be inserted; after the word "paid", where it occurs for the second time, the words "by deduction or otherwise" shall be inserted, and for the words "for that year" the words "for the corresponding year" shall be substituted;

(*ii*) the following proviso shall be added, namely:—

"Provided that in no case shall the rate at which such refund is calculated exceed half the Indian rate of tax appropriate to the income of the person entitled to relief.";

(*b*) in sub-section (2), for clause (*b*) the following clause shall be substituted, namely:—

"(*b*) the expression 'Indian rate of tax' means the amount of Indian income-tax exclusive of super-tax after deduction of any relief due to a claimant under the other provisions of this Act but before deduction of any relief due to him under this section, divided by his total income after deducting therefrom any income (including income from a share in an unregistered firm) exempted from tax by or under the provisions of this Act, added to the amount of Indian

super-tax before deduction of any relief due to the claimant under this section divided by his total income?".

Insertion of new sections 49-A, 49-B and 49C in Act XI of 1922.

58. After section 49 of the said Act the following sections shall be inserted, namely:—

Relief in respect of Indian State and Dominion Income-tax.

"49-A. (1) The Central Government may, by notification in the official Gazette, make provision for the granting of relief in respect of income on which has been paid both income-tax (including super-tax) under this Act and Dominion income-tax.

(2) For the purposes of this section 'Dominion income-tax' means any income-tax or super-tax charged under any law in force in any Indian State or in any part of His Majesty's Dominions (other than the United Kingdom) where the laws of that State or part provide for relief in respect of tax charged on income both in that State or part and in British India which appears to the Central Board of Revenue to correspond to the relief which may be granted by this section.

Payment of income-tax by company to be deemed payment by shareholder.

49-B. Where a share-holder has received a dividend from a company which has paid income-tax imposed in British India or elsewhere, he shall be deemed, in respect of such dividend himself to have paid the income tax (exclusive of super-tax) paid by the company on so much of the dividend as bears to the whole the same proportion as the amount of income on which the company has paid such income-tax bears to the whole income of the company.

Relief granted to a company to be deemed relief granted to shareholder.

49-C. (1) Where a share-holder has received a dividend from a company which has obtained the relief referred to in section 49 or granted under section 49-A or under the India and Burma (Income-tax Relief) Order, 1936, he shall be deemed in respect of such dividend himself to have obtained such relief at the rate at which such relief has been granted, in respect of income-tax only, to the company for the financial year preceding the year in which the dividend was paid.

(2) If the rate at which a shareholder is deemed under sub-section (1) to have obtained relief exceeds the rate at which he would have been entitled to relief had such relief been given direct to him by or under the said sections or Order, any excess shall be recovered from him either as an addition to the tax payable by him on any assessment made on him under section 23 or section 34 or by setting it off against any relief due to him under section 48.

Relief in respect of tax charged in country not providing for relief in respect of British Indian income-tax.

49-D. If any person who has paid by deduction or otherwise Indian income-tax for any year in respect of any income arising without British India in a country the laws of which do not provide for any relief in respect of income-tax charged in British India proves that he has paid income-tax by deduction or otherwise under the laws of the said country in respect of the same income, he shall be entitled to the deduction from the Indian income-tax payable of, a sum equal to one-half of such Indian income-tax or to one-half of such tax payable in the said country, whichever is the less."

Amendment of section 49-A, Act XI of 1922.

59. Section 49-A of the said Act shall be renumbered 49-E, and in that section so re-numbered, for the words "Assistant Commissioner" the words "Appellate Assistant Commissioner" shall be substituted.

Amendment of section 49-B, Act XI of 1922.

60. Section 49-B of the said Act shall be renumbered 49-F, and in that section so re-numbered, the word, figures and letter "or 48-A" shall be omitted.

Amendment of section 50, Act XI of 1922.

61. In section 50 of the said Act,—

(a) after the word "income-tax" the words "or super-tax" shall be inserted;

(b) for the words beginning "one year from the last day" and ending "whichever period may expire later" the following shall be substituted, namely:—

"four years from the last day of the financial year commencing next after the expiry of the previous year in which the income arose, accrued or was received or was deemed to have arisen, accrued or been received or was brought into British India:

Provided that where the claim is to a refund of income-tax or super-tax paid prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, the claim shall not be allowed unless it is made within one year from the last day of the year in which the tax was recovered or before the last day of the financial year commencing after the expiry of the previous year as defined in clause (11) of section 2 in which the income arose on which the tax was recovered, whichever period may expire later:";

(c) in the existing proviso, after the word "Provided" the word "further" shall be inserted; after the word and figures "section 49" the words, brackets and figures "of tax paid prior to the commencement of the Indian Income-tax (Amendment) Act, 1939" shall be inserted.

Omission of section 50-A, Act XI of 1922.

62. Section 50-A of the said Act shall be omitted.

Amendment of section 51, Act XI of 1922.

63. In clause (c) of section 51 of the said Act, before the word and figures "section 22" the words, brackets and figure "sub-section (2) of" shall be inserted.

Amendment of section 52, Act XI of 1922.

64. In section 52 of the said Act,—

(a) after the words, figures and letter "or section 20-A" the words and figures "or section 21" shall be inserted, and the words, brackets, figures and letters "or sub-section (2) of section 33-A or sub-section (3) of section 50-A" shall be omitted;

(b) for the words "be deemed to have committed the offence described in section 177 of the Indian Penal Code" the words "be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both" shall be substituted.

Amendment of section 53, Act XI of 1922.

65. In section 53 of the said Act,—

(a) in sub-section (1), for the words "Assistant Commissioner", the words "Inspecting Assistant Commissioner" shall be substituted;

(b) for sub-section (2) the following sub-section shall be substituted, namely:—

"(2) The Inspecting Assistant Commissioner may either before or after the institution of proceedings compound any such offence."

Amendment of section 54, Act XI of 1922.

66. In section 54 of the said Act,—

(a) in the first proviso to sub-section (2) the words "Provided that" shall be omitted and the proviso shall be numbered as sub-section (3);

(b) in sub-section (3) so re-numbered,—

(*i*) after clause (*c*) the following clauses shall be inserted, namely:—

"(*d*) of any such particulars to a Civil Court in any suit to which Government is a party, which relates to any matter arising out of any proceeding under this Act, or

(*e*) of any such particulars to the Auditor General of India for the purpose of enabling him to discharge his functions under section 144 of the Government of India Act, 1935, or

(*f*) of any such particulars to any officer appointed by the Auditor General of India or the Central Board of Revenue to audit income-tax receipts or refunds, or

(*g*) of any such particulars, relevant to any inquiry into the conduct of an official of the Income-tax Department, to any persons appointed Commissioners under the Public Servants (Inquiries) Act, 1850, or to an officer otherwise appointed to hold such inquiry, or to a Public Service Commission established under the Government of India Act, 1935, when exercising its functions in relation to any matter arising out of any such inquiry, or";

(*ii*) existing clause (*cc*) shall be re-lettered clause (*h*) and for existing clause (*d*) the following clauses shall be substituted, namely:—

"(*i*) of such facts, to an authorised officer of the United Kingdom, or of any Indian State or of any part of His Majesty's Dominions which has entered into an agreement with British India for the granting of double taxation relief, as may be necessary for the purpose of enabling such relief or a refund under section 49 of this Act to be given, or

(*j*) of such facts, to an officer of a Provincial Government, as may be necessary for the purpose of enabling that Government to levy or realise any tax imposed by it on agricultural income, or

(*k*) of such facts, to any authority exercising powers under the Sea Customs Act, 1878, or any Act of the Central Legislature imposing a duty of excise as may be necessary for enabling it duly to exercise such powers, or

(*l*) of such facts, to a Returning Officer, as may be necessary to establish whether a person is or is not entitled to be entered on an electoral roll, or

(*m*) so much of such particulars, to the appropriate authority, as may be necessary to establish whether a person has or has not been assessed to income-tax in any particular year or years, where under the provisions of any law for time being in force such fact is required to be established.";

(*c*) in the second and third provisos to sub-section (2) the words "Provided further that" shall be omitted and these provisos shall be numbered, respectively, as sub-section (4) and sub-section (5);

(*d*) in sub-section (4) so be-numbered, after the words "proceeding under" the words, letter and figure "section 25-A or" shall be inserted.

Amendment of section 55, Act XI of 1922.

67. In section 55 of the said Act,—

(*a*) for the words "company, unregistered firm or other association of individuals" the words "company, local authority, unregistered firm or other association of persons" shall be substituted, and after the words "not being a registered firm", the words "or the partners of the firm or members of the association individually," shall be inserted;

(*b*) before the existing proviso the following proviso shall be inserted, namely:—

"Provided that where under the provisions of clause (*b*) of sub-section (5) of section 23 an unregistered firm has been assessed in the manner applicable to a registered firm, super-tax shall be payable by each partner of the firm individually on his share in the income, profits and gains of the firm and not by the firm itself;";

and

(*c*) in the existing proviso,—

(*i*) after the word "Provided" the word "further" shall be inserted;

(*ii*) after the words "unregistered firm" the words "or other association of persons not being a company" shall be inserted;

(*iii*) for the words "an individual having a share in the firm" the words "a partner of the firm or a member of the association, as the case may be" shall be substituted.

Amendment of section 56, Act XI of 1922.

68. In section 56 of the said Act, after the word "company" the words "local authority" shall be inserted, and for the words "association of individuals" the words "association of persons" shall be substituted.

Omission of section 57, Act XI of 1922.

69. Section 57 of the said Act shall be omitted.

Amendment of section 58, Act XI of 1922.

70. In section 58 of the said Act,—

(*a*) in sub-section (1), for the words "the proviso" the words "the second proviso" shall be substituted, and the figures "17", "21" and "48" shall be omitted and for the words, brackets and figures "sub-sections (2) and (3)" the word, brackets and figure "sub-section (2)" shall be substituted, and for the figures "20", the words, figures and brackete "and 20 and the first proviso to sub-section (1) of section 41 and section" shall be substituted;

(*b*) in sub-section (2), for the words, brackets, figures and letters "sub-sections (3A), (3B), (3C) and (3D)" the words, brackets, figures and letters "sub-sections (2), (2A), (2B), (3B), (3C), (3D) and (3E)" shall be substituted and the word and figures "section 57" shall be omitted.

Amendment of section 58-A, Act XI of 1922.

71. In clause (*b*) of section 58-A of the said Act,—

(*a*) in sub-clause (*i*) the words "individuals or" shall be omitted;

(*b*) in sub-clause (*ii*) the words and figures "or section 11" shall be omitted.

Amendment of section 58-B, Act XI of 1922.

72. In section 58-B of the said Act, sub-section (2) shall be omitted, and sub-sections (3), (4) and (5) shall be re-numbered (2), (3) and (4), respectively, and in sub-section (4) as so re-numbered after the mord "recognise" the words "or an order withdrawing recognition from" shall be inserted.

Amendment of section 58-F, Act XI of 1922.

73. In section 58-F of the said Act,—

(*a*) to sub-section (1) the words "or six thousand rupees, whichever is less" shall be added;

(*b*) in sub-section (2), for the words beginning "In the accounts of a recognised provident fund" and ending "Such interest shall be exempt from payment of income-tax," the following shall be substituted, namely:—

"Interest credited on the accumulated balance of any employee in a recognised provident fund shall be exempt from payment of income-tax, if and in so far as it does not exceed one-third of the salary of the employee for the year cencerned and".

Amendment of section 58-G, Act XI of 1922.

74. In sub-section (3) of section 58-G of the said Act, for the words beginning "from the payment of which" and ending "in addition to any other income-tax" the following shall be substituted, namely:—

"and super-tax which would have been payable by the employee in respect of his total income for each of the years concerned if the fund had not been a

recognised provident fund, and the amount by which such total exceeds the total of all sums paid by or on behalf of such employee by way of tax for such years shall be payable by the employee in addition to any other income-tax and super-tax".

Amendment of section 58-K, Act XI of 1922.

75. In sub-section (2) of section 58-K of the said Act,—

(a) after the word "shall" the following words shall be inserted, namely:—

" , if the employer has made effective arrangements to secure that tax shall be deducted at source from the amount of such share when paid to the employee,";

(b) for the word, brackets and figures "clause (ix)" the word, brackets and figures "clause (xii)" shall be substituted.

Insertion of new Chapter in Act XI of 1922.

76. After Chapter IXA of the said Act the following Chapter shall be inserted, namely:—

"CHAPTER IXB.

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF SUPERANNUATION FUNDS.

Definitions.

58-N. In this Chapter, unless there is anything repugnant in the subject or context,—

(a) 'approved superannuation fund' means a superannuation fund or any part of a superannuation fund which has been and continues to be approved by the Central Board of Revenue in accordance with the provisions of this Chapter;

(b) 'employer', 'employee' and 'contribution' have, in relation to superannuation funds, the meanings assigned to those expressions in section 58-A in relation to provident funds;

(c) 'ordinary annual contribution' means an annual contribution of a fixed amount or an annual contribution computed on some definite basis by reference to the earnings, the contributions or the number of members of the fund.

Approval and withdrawal of approval.

58-O. (1) The Central Board of Revenue may accord approval to any superannuation fund or any part of a superannuation fund which in its opinion complies with the requirements of section 58-P, and may at any time withdraw such approval, if in its opinion the circumstances of the fund or part cease to warrant the continuance of the approval.

(2) The Central Board of Revenue shall communicate in writing to the trustees of the fund the grant of approval with the date on which the approval is to take effect, and, where the approval is granted subject to conditions, those conditions.

(3) The Central Board of Revenue shall communicate in writing to the trustees of the fund any withdrawal of approval with the reasons for such withdrawal and the date on which the withdrawal is to take effect.

(4) The Central Board of Revenue shall neither refuse nor withdraw approval to any superannuation fund or any part of a superannuation fund unless it has given the trustees of that fund a reasonable opportunity of being heard in the matter.

Conditions for approval.

58-P. In order that a superannuation fund may receive and retain approval the following conditions shall be satisfied, namely:—

(a) the fund shall be a fund established under an irrevocable trust in connection with a trade or undertaking carried on in British India;

(*b*) the fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement at or after a specified age or on their becoming incapacitated prior to such retirement, or for the widows, children or dependants of persons who are or have been such employees on the death of those persons; and

(*c*) the employer in the trade or undertaking shall be a contributor to the fund:

Provided that the Central Board of Revenue may, if it thinks fit and subject to such conditions, if any, as it thinks proper to attach to the approval, approve a fund or any part of a fund—

(*i*) notwithstanding that the rules of the fund provide for the return in certain contingencies of contributions paid to the fund, or

(*ii*) if the main purpose of the fund is the provision of such annuities as aforesaid, notwithstanding that such provision is not its sole purpose, or

(*iii*) notwithstanding that the trade or undertaking in connection with which the fund is established is carried on only partly in British India.

Application for approval

58-Q. (1) An application for approval of a superannuation fund or part of a superannuation fund for any year of assessment shall be made in writing before the end of that year by the trustees of the fund to the Income-tax Officer, and shall be accompanied by a copy of the instrument under which the fund is established and by two copies of the rules and of the accounts of the fund for the last year for which such accounts have been made up. The Central Board of Revenue may require such further information to be supplied as it thinks proper,

(2) If any alteration in the rules, constitution, objects or conditions of the fund is made at any time after the date of the application for approval, the trustees of the fund shall forthwith communicate such alteration to the Income-tax Officer, and in default of such communication any approval given shall, unless the Central Board of Revenue otherwise orders, be deemed to have been withdrawn from the date on which the alteration took effect.

Exemption of superannuation fund from income-tax.

58-R. Income derived from investments or deposits of an approved superannuation fund shall be exempt from payment of income-tax, and any sum paid by an employer or an employee by way of contribution towards an approved superannuation fund shall, in the case of an employer, be deducted in computing his income, profits or gains for the purpose of assessment, and, in the case of an employee, be treated for all the purposes of this Act as if it were a sum to which the provisions of section 15 apply:

Provided that no such exemption shall be allowable to an employee in respect of any sum which is not an ordinary annual contribution:

Provided further that where a contribution by an employer is not an ordinary annual contribution it shall, for the purposes of this section, be treated, as the Central Board of Revenue may direct, either as an an expense incurred in the year in which the sum is paid, or as an expense to be spread over such period of years as the Central Board of Revenue thinks proper.

Treatment of repaid contributions.

58-S. (1) Where any contributions (including interest on contributions, if any) are repaid to an employee, the amount so repaid shall be deemed for the purposes of income-tax and super-tax to be income of the employee for that year.

(2) Where any contributions (including interest on contributions, if any) are repaid to an employee during his lifetime but not at or in connection with the termination of his employment, income-tax on the amount so repaid or

paid shall, except in the case of an employee whose employment was carried on abroad, be deducted by the trustees of the fund at the average rate of tax at which the employee was liable to income-tax and super-tax during the preceding three years or during such period, if less than three years, as he was a member of the fund, and shall be paid by the trustees to the credit of the Central Government within the prescribed time and in such manner as the Central Board of Revenue may direct.

Deduction from pay of, and contributions on behalf of, employee to be included in return under section 21.

58-T. Where an employer deducts from the emoluments paid to an employee or pays on his behalf any contributions of that employee to an approved superannuation fund, he shall include all such deductions or payments in the return which he is required to furnish under section 21.

Liabilities of trustees on cessation of approval of fund.

58-U. If a fund or a part of a fund for any reason ceases to be an approved superannuation fund, the trustees of the fund shall nevertheless remain liable to account for tax on any sum paid—

(*a*) on account of returned contributions (including interest on contributions, if any), and

(*b*) in commutation or in lieu of annuities,

in so far as the sum so paid is in respect of contributions made before the fund or part of the fund ceased to be an approved fund under the provisions of this Chapter.

Particulars to be furnished in respect of superannuation funds.

58-V. The trustees of an approved superannuation fund and any employer who contributes to an approved superannuation fund shall, when required by notice from the Income-tax Officer, within twenty-one days of the date of such notice—

(*a*) furnish to the Income-tax Officer a return containing such particulars of contributions made to the fund as the notice may require;

(*b*) prepare and deliver to the Income-tax Officer a return containing—

(*i*) the name and place of residence of every person in receipt of an annuity from the fund,

(*ii*) the amount of the annuity payable to each annuitant,

(*iii*) particulars of every contribution (including interest on contributions, if any) returned to the employer or to employees; and

(*iv*) particulars of sums paid in commutation or in lieu of annuities;

(*c*) furnish to the Income-tax Officer a copy of the accounts of the fund to the last date prior to such notice to which such accounts have been made up, together with such other information and particulars as the Central Board of Revenue may reasonably require."

Amendment of section 59, Act XI of 1922.

77. In sub-section (2) of section 59 of the said Act, sub-clause (*ii*) of clause (*a*) shall be omitted, and sub-clause (*iii*) shall be re-numbered (*ii*).

Amendment of section 60, Act XI of 1922.

78. In section 60 of the said Act,—

(*a*) in sub-section (2), after the words, "twelve months" the following words, brackets and figures shall be inserted, namely:—

"or a payment which is under the provisions of sub-section (1) of section 7 a profit in lieu of salary", and

for the words "such relief as it may think fit" the words "the appropriate relief" shall be substituted;

(*b*) the following sub-section shall be added, namely:—

"(3) After the commencement of the Indian Income-tax (Amendment) Act, 1939, the power conferred by sub-section (1) shall not be exercisable except for the purpose of rescinding an exemption, reduction or modification already made."

Substitution of new section for section 61, Act XI of 1922.

79. For section 61 of the said Act the following section shall be substituted, namely:—

Appearance by authorised representative.

"61. (1) Any assessee, who is entitled or required to attend before any Income-tax authority in connection with any proceeding under this Act otherwise than when required under section 37 to attend personally for examination on oath or affirmation, may attend by a person authorised by him in writing in this behalf, being a relative of or a person regularly employed by the assessee, or a lawyer or accountant or Income-tax practitioner, and not being disqualified by or under sub-section (3).

(2) In this section,—

(*i*) a person regularly employed by the assessee shall include any officer of a scheduled Bank with which the assessee maintains a current account or has other regular dealings;

(*ii*) 'lawyer' means a Barrister-at-Law or Solicitor or any other person entitled to plead in any Court of law in British India;

(*iii*) 'accountant' means a registered accountant enrolled in the Register of Accountants maintained by the Central Government under the Auditors Certificate Rules, 1932, or a holder of a restricted certificate under the Restricted Certificate Rules, 1932, or a member of an association of accountants recognised in this behalf by the Central Board of Revenue;

(*iv*) 'Income-tax practitioners' means—

(*a*) any person who, before the 1st day of April, 1938, attended before an Income-tax authority on behalf of any assessee otherwise than in the capacity of an employee or relative of that assessee;

(*b*) any person who has passed any accountancy examination recognised in this behalf by the Central Board of Revenue; or

(*c*) any person who has acquired such educational qualifications as the Central Board of Revenue may prescribe for this purpose.

(3) No person who has been dismissed from Government service after the 1st day of April, 1938, shall be qualified to represent an assessee under sub-section (1); and if any lawyer or registered accountant is found guilty of misconduct in connection with any income-tax proceedings by the authority empowered to take disciplinary action against members of the profession to which he belongs, or if any other person is found guilty of such misconduct by the Commissioner of Income-tax, the Commissioner of Income-tax may direct that he shall be thenceforward disqualified to represent an assessee under sub-section (1):

Provided that—

(*a*) no such direction shall be made in respect of any person unless he is given a reasonable opportunity of being heard,

(*b*) any person against whom such direction is made may, within one month of the making of the direction, appeal to the Central Board of Revenue to have the direction cancelled, and

(*c*) no such direction shall take effect until one month from the making thereof or, when an appeal is preferred, until the disposal of the appeal."

Amendment of section 63, Act XI of 1922.

80. In sub-section (2) of section 63 of the said Act, for the words "association of individuals" the words "association of persons" shall be substituted.

Amendment of section 64, Act XI of 1922.

81. In section 64 of the said Act,—

(*a*) in sub-section (1) for the word "business," where it first occurs, the words "a business, profession or vocation" shall be substituted; for the word "business", where it occurs for the second time, the words "business, profession or vocation" shall be substituted; and for the words "his principal place of business" the words "the principal place of his business, profession or vocation" shall be substituted;

(*b*) to sub-section (3) the following provisos shall be added, namely:—

"Provided further that the place of assessment shall not be called in question by an assessee if he has made a return in response to the notice under sub-section (1) of section 22 and has stated therein the principal place wherein he carries on his business, profession or vocation, or if he has not made such a return shall not be called in question after the expiry of the time allowed by the notice under sub-section (2) of section 22 or under section 34 for the making of a return:

Provided further that if the place of assessment is called in question by an assessee the Income-tax Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under this sub-section before assessment is made."

Amendment of section 66, Act XI of 1922.

82. In section 66 of the said Act,—

(*a*) in sub-section (2), the words, figures and letter "or of a decision by a Board of Referees under section 33-A" and the words "or decision", in both places where they occur, shall be omitted;

(*b*) in the first proviso to sub-section (2), the words and figures "or section 32" shall be omitted;

(*c*) in the proviso to sub-section (7), the following words shall be added, namely:—

"unless the High Court, on intimation given by the Commissioner within thirty days of the receipt of the result of such reference that he intends to ask for leave to appeal to His Majesty in Council, makes an order authorising the Commissioner to postpone payment of such refund until the disposal of the appeal to His Majesty in Council";

(*d*) in clause (*a*) of sub-section (8), the words "the North-West Frontier Province and" shall be omitted.

Amendment of section 66A, Act XI of 1922.

83. To sub-section (1) of section 66-A of the said Act the following proviso shall be added, namely:—

"Provided that where in any reference heard by the Bench of the Court of the Judicial Commissioner of the North-West Frontier Province, a difference of opinion arises between the Judicial Commissioner and the Judge of the said Court, the opinion of the Judicial Commissioner shall prevail."

Addition of Schedule to Act XI of 1922.

84. The following shall be added as a Schedule to the said Act, namely:—

"THE SCHEDULE.

[*See* section 10 (7).]

RULES FOR THE COMPUTATION OF THE PROFITS AND GAINS OF INSURANCE BUSINESS.

1. In the case of any person who carries on, or at any time in the preceding year carried on, life insurance business, the profits and gains of such person

from that business shall be computed separately from his income, profits or gains from any other business.

2. The profits and gains of life insurance business shall be taken to be either—

(*a*) the gross external incomings of the preceding year from that business less the management expenses of that year, or

(*b*) the annual average of the surplus disclosed by the actuarial valuation made for the last inter-valuation period ending before the year for which the assessment is to be made, after adjusting such surplus so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business,

whichever is the greater:

Provided that the amount to be allowed as management expenses shall not exceed—

(*a*) 7½ per cent. of the premiums received during the preceding year in respect of single premium life insurance policies, *plus*

(*b*) in respect of the first year's premiums received in respect of other life insurance policies for which the number of annual premiums received is less than twelve, or for which the number of years during which premiums are payable is less than twelve, for each such premium or each such year 7½ per cent. of such first year's premiums received during the preceding year, *plus*

(*c*) 85 per cent. of the first year's premiums received during the preceding year in respect of other life insurance policies and 8½ per cent. of other premiums received during that year in respect of all life insurance policies other that single premium life insurance policies.

3. In computing the surplus for the purpose of rule 2,—

(*a*) one-half of the amounts paid to or reserved for or expended on behalf of policy-holders shall be allowed as a deduction:

Provided that in the first such computation made under this rule of any such surplus no account shall be taken of any such amounts to the extent to which they are paid out of or in respect of any surplus brought forward from a previous inter-valuation period:

Provided further that if any amount so reserved for policyholders ceases to be so reserved, and is not paid to or expended on behalf of policyholders, one-half of such amount, if it has been previously allowed as a deduction, shall be treated as part of the surplus for the period in which the said amount ceased to be so reserved;

(*b*) any amount either written off or reserved in the accounts or through the actuarial valuation balance sheet to meet depreciation of or loss on the realisation of securities or other assets, shall be allowed as a deduction, and any sums taken credit for in the accounts or actuarial valuation balance sheet on account of appreciation of or gains on the realisation of the securities or other assets shall be included in the surplus:

Provided that if upon investigation it appears to the Income-tax Officer after consultation with the Superintendent of Insurance that having due regard to the necessity for making reasonable provision for bonuses to participating policy holders and for contingencies, the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as artificially to reduce the surplus, such adjustment shall be made to the allowance for depreciation of, or to the amount to be included in the surplus in respect of appreciation of, such securities and other assets, as shall increase the surplus for the purposes of these rules to a figure which is fair and just:

(*c*) the whole amount of interest received in respect of any securities of the Central Government which have been issued or declared to be income-tax free shall be deducted.

4. Where for any year an assessment is made in accordance with the annual average of a surplus disclosed by a valuation for an inter-valuation period exceeding twelve months, then, in computing the tax payable for that year, credit shall not be given in accordance with sub-section (5) of section 18 for the tax paid in the preceding year, but credit shall be given for the annual average of the income-tax paid by deduction at source from interest on securities or otherwise during such period.

5. For the purposes of these rules—

(*i*) 'preceding year' means that year for which annual accounts are required to be prepared under the Insurance Act, 1938, immediately preceding the year for which the assessment is to be made or until the commencement of the Insurance Act, 1938, the previous year as defined in section 2 of this Act;

(*ii*) 'gross external incomings' means the full amount of incomings from interest, dividends, fines and fees and all other incomings from whatever source derived (except premiums received from policyholders and interest and dividends on any annuity fund) and includes also profits from reversions and on the sale or the granting of annuities, but excludes profits on the realisation of securities:

Provided that incomings, including the annual value of the property occupied by the assessee, which but for the provisions of sub-section (7) of section 10 would have been assessable under section 9 shall be computed upon the basis laid down in the last-named section, and that there shall be allowed from such gross incomings such deductions as are permissible under that section.

(*iii*) 'management expenses' means the full amount of expenses (including commissions) incurred exclusively in the management of the business of life insurance, and in the case of a company carrying on other classes of business as well as the business of life insurance in addition thereto a fair proportion of the expenses incurred in the general management of the whole business. Bonuses or other sums paid to or reserved on behalf of policyholders, depreciation of, and losses on the realisation of, securities and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business are not management expenses for the purposes of these rules;

(*iv*) 'life insurance business' means life insurance business as defined in clause (11) of section 2 of the Insurance Act, 1938;

(*v*) 'securities' includes stocks and shares.

6. The profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts, copies of which are required under the Insurance Act, 1938, to be furnished to the Superintendent of Insurance after adjusting such balance so as to exclude from it any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business. Profits and losses on the realisation of investments, and depreciation and appreciation of the value of investments shall be dealt with as provided in rule 3 for the business of life insurance.

7. The profits and gains of companies carrying on dividing society or assessment business shall be taken to be 15 per cent. of the premium income of the previous year, or in the case of non-resident companies 15 per cent. of the British Indian premium income of the previous year.

8. The profits and gains of the British Indian branches of an insurance company not resident in British India, in the absence of more reliable data, may

be deemed to be the proportion of the total world income of the company corresponding to the proportion which its British Indian premium income bears to its total premium income. For the purpose of this rule, the total world income of life insurance companies not resident in British India whose profits are periodically ascertained by actuarial valuation shall be computed in the manner laid down in these rules for the computation of the profits and gains of life insurance business carried on in British India.

9. These rules apply to the assessment of the profits of any business of insurance carried on by a mutual insurance company".

PART II.

Insertion of new section 5-A in Act XI of 1922.

85. After section 5 of the said Act the following section shall be inserted, namely:—

The Appellate Tribunal.

"5-A. (1) The Central Government shall appoint an Appellate Tribunal consisting of not more than ten persons to exercise the functions conferred on the Appellate Tribunal by this Act.

(2) The Appellate Tribunal shall consist of an equal number of judicial members and accountant members as hereinafter defined.

(3) A judicial member shall be a person who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge; and an accountant member shall be a person who has, for a period of not less than six years, practised professionally as a Registered Accountant enrolled on the Register of Accountants maintained by the Central Government under the Auditors Certificate Rules, 1932:

Provided that the Central Government may appoint as an accountant member of the Tribunal any person not possessing the qualifications required by this sub-section, if it is satisfied that he has qualifications and has had adequate experience of a character which render him suitable for appointment to the Tribunal.

(4) The Central Government shall appoint a judicial member of the Tribunal to be president thereof.

(5) The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted from members of the Tribunal by the president of the Tribunal.

(6) A Bench shall consist of not less than two members of the Tribunal, and shall be constituted so as to contain an equal number of judicial members and accountant members, or so that the number of members of one class does not exceed the number of members of the other class by more than one.

(7) If the members of a Bench differ in opinion on any point the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the president of the Tribunal for hearing on such point or points by one or more of the other members of the Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Tribunal who have heard the case, including those who first heard it.

(8) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure, and the procedure of Benches of the Tribunal in all matters arising out of the discharge of its functions, including the place at which the Benches shall hold their sittings".

Amendment of section 28, Act XI of 1922.

86. In section 28 of the said Act,—

(*a*) in sub-section (1) and sub-section (2), for the words "or the Commissioner" the words "or the Appellate Tribunal", and for the words "he may direct" the words "he or it may direct" shall be substituted;

(*b*) in sub-section (5) for the words "or a Commissioner who has made" the words "or the Appellate Tribunal on making" shall be substituted.

Omission of section 32, Act XI of 1922.

87. Section 32 of the said Act shall be omitted.

Substitution of new section for section 33, Act XI of 1922.

88. For section 33 of the said Act the following section shall be substituted, namely:—

Appeals against orders of Appellate Assistant Commissioner.

33. (1) Any assessee objecting to an order passed by an Appellate Assistant Commissioner under section 28 or section 31 may appeal to the Appellate Tribunal within sixty days of the date on which he is served with notice of such order.

(2) The Commissioner may, if he objects to any order passed by an Appellate Assistant Commissioner under section 31, direct the Income-tax Officer to appeal to the Appellate Tribunal against such order, and such appeal may be made at any time before the expiry of sixty days from the date of the order.

(3) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner, and shall, except in the case of an appeal referred to in sub-section (2), be accompanied by a fee of one hundred rupees.

(4) The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner.

(5) Save as provided in section 66 orders passed by the Appellate Tribunal on appeal shall be final".

Amendment of section 35, Act XI of 1922.

89. In section 35 of the said Act, sub-sections (2) and (3) shall be renumbered sub-sections (3) and (4), respectively, and the following shall be inserted as sub-section (2), namely:—

"(2) The provisions of sub-section (1) apply also in like manner to the rectification of mistakes by the Appellate Tribunal."

Amendment of section 37, Act XI of 1922

90. In section 37 of the said Act, for the words "and Commissioner" the words ",Commissioner and Appellate Tribunal" and for the words "or Commissioner" in clause (*c*) the words ",Commissioner or Appellate Tribunal" shall be substituted.

Amendment of section 48, Act XI of 1922.

91. In sub-section (2) of section 48 of the said Act, for the words "The Appellate Assistant Commissioner in the exercise of his appellate powers, or the Commissioner in the exercise of his appellate powers or powers of revision" the words "The Appellate Assistant Commissioner or the Appellate Tribunal in the exercise of their appellate powers" shall be substituted.

Amendment of section 66, Act XI of 1922

92. In section 66 of the said Act,—

(*a*) for sub-sections (1), (2), (3), (3A,) (4) and (5), the following sub-sections shall be substituted, namely:—

Statement of case by Appellate Tribunal to High Court.

"(1) Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33 the assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred

rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court:

Provided that, if, in the exercise of its powers under sub-section (2), the Appellate Tribunal refuses to state a case which it has been required by the assessee to state, the assessee may, within thirty days from the date on which he receives notice of the refusal to state the case, withdraw his application and, if he does so, the fee paid shall be refunded.

(2) If on any application being made under sub-section (1) the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner, as the case may be, may, within six months from the date on which he is served with notice of the refusal, apply to the High Court, and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition the Appellate Tribunal shall state the case and refer it accordingly.

(3) If on any application being made under sub-section (1) the Appellate Tribunal rejects it on the ground that it is time-barred, the assessee or the Commissioner, as the case may be, may, within two months from the date on which he is served with notice of the rejection, apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Appellate Tribunal's decision, may require the Appellate Tribunal to treat the application as made within the time allowed under sub-section (1).

(4) If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Appellate Tribunal to make such additions thereto or alterations therein as the Court may direct in that behalf.

(5) The High Court upon the hearing of any such case shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment."

(*b*) in sub-section (6), the words "on the application of an assessee" shall be omitted;

(*c*) in sub-section (7-A), for the words, brackets, figures and letter "under sub-section (3) or sub-section (3-A)", the words, brackets and figures "under sub-section (2) or sub-section (3)" shall be substituted.

THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939.

ACT No. VIII OF 1939.

[*17th March, 1939.*

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

WHEREAS it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under

Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim women on her marriage tie; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939.

(2) It extends to the whole of British India.

Grounds for decree for dissolution of marriage.

2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(*i*) that the whereabouts of the husband have not been known for a period of four years;

(*ii*) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(*iii*) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(*iv*) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(*v*) that the husband was impotent at the time of the marriage and continues to be so;

(*vi*) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(*vii*) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(*viii*) that the husband treats her with cruelty, that is to say,—

(*a*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(*b*) associates with women of evil repute or leads an infamous life, or

(*c*) attempts to force her to lead an immoral life, or

(*d*) disposes of her property or prevents her exercising her legal rights over it, or

(*e*) obstructs her in the observance of her religious profession or practice, or

(*f*) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;

(*ix*) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that—

(*a*) no decree shall be passed on ground (*iii*) until the sentence has become final;

(*b*) a decree passed on ground (*i*) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(*c*) before passing a decree on ground (*v*) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

Notice to be served on heirs of the husband when the husband's whereabouts not known

3. In a suit to which clause (*i*) of section 2 applies—

(*a*) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(*b*) notice of the suit shall be served on such persons, and

(*c*) such persons shall have the right to be heard in the suit:

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

Effect of conversion to another faith.

4. The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

Rights to dower to be affected.

5. Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

Repeal of section 5 of Act XXVI of 1937.

6. Section 5 of the Muslim Personal Law (*Shariat*) Application Act, 1937, is hereby repealed.

THE STANDARDS OF WEIGHT ACT, 1939.

ACT NO. IX OF 1939.

[*28th March, 1939.*

An Act to establish standards of weight throughout British India.

WHEREAS it is expedient to establish standards of weight throughout British India;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE STANDARDS OF WEIGHT ACT, 1939.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Unit for weight.

2. (1) The unit for weight shall be the standard grain, that is to say, that weight which when multiplied by 1799·84585 is the weight *in vacuo* of the iridio-platinum cylinder in the custody of the Mint Master, Bombay, certified by the Standards Department of the British Board of Trade as having a weight of 1799·84585 grains *in vacuo*.

(2) The standard grain shall be the only unit from which all other standard weights shall be ascertained.

Standard weights.

3. (1) There shall be the following standard weights, namely:—

(*a*) the standard tola, being a weight of 180 standard grains;

(*b*) the standard seer, being a weight of 80 standard tolas or 14,400 standard grains;

(*c*) the standard maund, being a weight of 40 standard seers;

(*d*) the standard pound, being a weight of 7,000 standard grain;

(*e*) the standard ounce, being one-sixteenth part of the weight of a standard pound;

(*f*) the standard hundred weight, being a weight of 112 standard pounds;

(*g*) the standard ton, being a weight of 2,240 standard pounds.

(2) No weight other than the weights set forth in sub-section (1) and integral multiples or sub-multiples of any such weight shall be used as a standard weight.

Sets of standard weights.

4. (1) The Central Government shall cause to be prepared one set of such of the standard weights specified in sub-section (1) of section 3 or multiples or sub-multiples thereof as the Central Government may consider expedient, and shall cause each weight of such set to be authenticated as having been ascertained from the standard grain, and shall deposit the set in such custody as the Central Government may think fit.

(2) The Central Government shall cause similar sets of weights, similarly authenticated, to be prepared, and shall supply one set to each Provincial Government.

(3) The Central Government shall cause similar sets of weights, similarly authenticated, to be prepared and shall supply one set to the Government of any Indian State or foreign settlement situated in India which applies for it and pays the price fixed by the Central Government.

Rules.

5. (1) The Central Government may, by notification in the official Gazette, make rules for carrying into effect the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, rules made under this section may regulate—

(*a*) the preparation of the sets of standard weights referred to in section 4;

(*b*) the custody of the set of such weights which is to be maintained by the Central Government and the periodical verification and adjustment thereof;

(*c*) the periodical verification and adjustment of the sets of standard weights supplied to Provincial and other Governments.

Repeal.

6. The Indian Weights and Measures of Capacity Act, 1871, in so far as it relates to the establishment of standards of weight, is hereby repealed.

THE INDIAN MERCHANT SHIPPING (SECOND AMENDMENT) ACT, 1939.

ACT NO. X OF 1939.

[*28th March, 1939.*

An Act further to amend the Indian Merchant Shipping Act, 1923, for a certain purpose.

WHEREAS it is expedient to implement fully the provisions of Article 100 (relating to accommodation on pilgrim ships) of the International Sanitary Convention signed at Paris on the 21st day of June, 1926, and in furtherance of

that purpose further to amend sections 149 and 193 of the Indian Merchant Shipping Act, 1923 in the manner hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN MERCHANT SHIPPING (SECOND AMENDMENT) ACT, 1939.

Amendment of section 149 of Act XXI of 1923.

2. In clause (3) of section 149 of the Indian Merchant Shipping Act, 1923 (hereinafter referred to as the said Act)—

(*a*) after the words "means a Muhammadan passenger" the words "irrespective of age" shall be inserted, and

(*b*) the words commencing "but it does not include" and ending "shall be reckoned as one pilgrim" shall be omitted.

Amendment of section 193.

3. In the provisos to sub-sections (2) and (3) of section 193 of the said Act the words "of the age of twelve years or upwards" shall be omitted.

THE INSURANCE (AMENDMENT) ACT, 1939.

ACT No. XI OF 1939.

[*28th March, 1939.*

An Act to amend the Insurance Act, 1938.

WHEREAS it is expedient to amend the Insurance Act, 1938, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INSURANCE (AMENDMENT) ACT, 1939.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Amendment of section 2, Act IV of 1938.

2. In section 2 of the Insurance Act, 1938 (hereinafter referred to as the said Act),—

(*a*) to sub-clause (*a*) of clause (9) the following shall be added, namely:—

"or

"(*iii*) with the object of obtaining insurance business, employs a representative, or maintains a place of business, in British India;";

(*b*) in clause (11), after the word "double" the words "or triple" shall be inserted.

Insertion of new sections 2-A and 2-B.

2-A. In Part II of the said Act, after the heading "PROVISIONS APPLICABLE TO INSURERS" the following sections shall be inserted, namely:—

Insurers to be subject to this Act while liabilities remain unsatisfied.

"2-A. Every insurer shall be subject to all the provisions of this Act in relation to any class of insurance business so long as his liabilities in British India in respect of business of that class remain unsatisfied or not otherwise provided for.

This Act not to apply to certain insurers ceasing to enter into new contracts before commencement of Act.

2-B. The provisions of this Act shall not apply to an insurer as defined in paragraph (*i*) or (*iii*) of sub-Clause (*a*) of clause (9) of section 2 in relation to any class of his insurance business where such insurer has ceased, before the commencement of this Act, to enter into any new contracts of that class of business."

Amendment of section 7.

3. In section 7 of the said Act,—

(*a*) in clause (*j*) of sub-section (1), after the words "or its cargo" the words "and no other type of marine insurance" shall be inserted;

(*b*) in sub-section (2), for the word "transacted" the words "carried on" shall be substituted;

(*c*) in sub-section (3) and in the proviso thereto, for the words and figures "the 1st day of January, 1939," the words "the expiry of four months from the commencement of this Act" shall be substituted;

(*d*) in sub-section (4), after the words "in the case of an insurer" the words "to whom that sub-section applies," shall be inserted.

Amendment of section 8.

4. In sub-section (1) of section 8 of the said Act, after the word and figure "section 7" the words and figure "or section 98" shall be inserted.

Amendment of section 9.

5. In section 9 of the said Act, after the word and figure "section 7" the words and figure "or section 98" shall be inserted.

6.

Amendment of section 16.

7. In sub-section (2) of section 16 of the said Act,—

(*a*) for the words "four copies" the words "four certified copies" shall be substituted;

(*b*) in clause (*a*), after the words "a statement" the words "audited by a person duly qualified under the law of the insurer's country" shall be inserted;

(*c*) in clause (*b*), after the words "applicable to that class of business" the words "and similarly audited", shall be inserted.

Amendment of section 17.

8. In section 17 of the said Act,—

(*a*) after the words and figure "incorporated under the Indian Companies Act, 1913", the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby", shall be inserted;

(*b*) for the words "his accounts and balance-sheet" the words "his balance-sheet and accounts" shall be substituted;

(*c*) for the words "a copy of such accounts and balance-sheet" the words "copies of such balance-sheet and accounts" shall be substituted;

(*d*) for the words "where such copy is so sent" the words "where such copies are so sent" shall be substituted;

(*e*) for the words "to file a balance-sheet" the words "to file copies of the balance-sheet and accounts" shall be substituted;

(*f*) for the words "the copy of the accounts and balance-sheet so sent" the words "such copies so sent" shall be substituted.

Insertion of new section 17-A.

9. After section 17 of the said Act the following section shall be inserted, namely:—

This Act not to apply to preparation of accounts, etc., for periods prior to this Act coming into force.

"17-A. Nothing in this Act shall apply to the preparation of accounts by an insurer and the audit and submission thereof in respect of any accounting year which has expired prior to the commencement of this Act, and notwithstanding the other provisions of this Act, such accounts shall be prepared, audited and submitted in accordance with the law in force immediately before the commencement of this Act".

Amendment of section 27.

10. In sub-section (1) and sub-section (2) of section 27 of the said Act,—

(*i*) after the word and figure "section 7" the words and figure "or section 98" shall be inserted;

(*ii*) after the words "loans granted by him on policies of life insurance" the words "maturing for payment in India and within their surrender values" shall be inserted.

Amendment of section 28.

11. In sub-section (1) of section 28 of the said Act,—

(*a*) for the word "fourteen", in both places where it occurs, the word "thirty-one" shall be substituted;

(*b*) for the words "the principal officer." the words "a principal officer" shall be substituted.

Amendment of section 31.

12. In section 31 of the said Act,—

(*a*) after the word and figure "section 7" the words and figure "or section 98" shall be inserted;

(*b*) after the words "be kept otherwise than" the words "in the name of a public officer approved by the Central Government, or" shall be inserted.

Amendment of section 35.

13. In sub-section (4) of section 35 of the said Act, for the words and figures "and for the payment of the first instalment of the deposit under sections 3 and 7" the words and figures "under section 3 and for the payment of the instalments of the deposit under section 7 or section 98" shall be substituted.

Amendment of section 38.

14. In section 38 of the said Act,—

(*a*) in sub-section (2),—

(*i*) after the words "instrument duly attested but" the words "except where the transfer or assignment is in favour of the insurer" shall be inserted;

(*ii*) after the words "notice in writing of the transfer or assignment" the words "together with either the said endorsement or instrument itself or a copy thereof certified to be correct by both transferor and transferee or their duly authorised agents" shall be inserted;

(*iii*) the words "at his principal place of business in British India by or on behalf of the transferor or transferee" shall be omitted;

(*iv*) at the end the following proviso shall be added:—

"Provided that where the insurer maintains one or more places of business in British India, such notice shall be delivered only at the place in British India mentioned in the policy for the purpose or at his principal place of business in British India.";

(*b*) in sub-section (5), for the words, figure and brackets "From the date of the receipt of the notice referred to in sub-section (2), the insurer shall" the words, figure and brackets "Subject to the terms and conditions of the transfer or assignment, the insurer shall, from the date of the receipt of the notice referred to in sub-section (2)," shall be substituted;

(*c*) for sub-section (6) the following sub-section shall be substituted, namely:—

"(6) Any rights and remedies of an assignee or transferee of a policy of life insurance under an assignment or transfer effected prior to the commencement of this Act shall not be affected by the provisions of this section".;

(*d*) in sub-section (7), for the words "life of the policy-holder" the words "lifetime of the person whose life is insured" shall be substituted.

Amendment of section 39.

15. In section 39 of the said Act,—

(*a*) in sub-section (1), after the words "The holder of a policy of life insurance" the words "on his own life, not being an absolute assignee of the benefits under the policy," shall be inserted;

(*b*) to sub-section (2) the following shall be added, namely:—

"but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made *bona fide* by him to a nominee mentioned in the text of the policy or registered in records of the insurer.";

(*c*) for sub-section (3) the following sub-section shall be substituted, namely:—

"(3) The insurer shall furnish to the policy-holder a written acknowledgment of having registered a nomination or a cancellation or change thereof, and may charge a fee not exceeding one rupee for registering such cancellation or change.";

(*d*) in sub-section (5), for the words "lifetime of the policy-holder" the words "lifetime of the person whose life is insured" shall be substituted;

(*e*) in sub-section (6), for the word "policy-holder" the words "person whose life is insured" shall be substituted.

Amendment of section 40.

16. In section 40 of the said Act,—

(*a*) in sub-section (1), the word "licensed", in both places where it occurs, and the words and figure "under section 42" shall be omitted;

(*b*) in sub-section (2), the words and figure "licensed under section 42" shall be omitted;

(*c*) in sub-section (3), for the words "an insurance agent" the words "any person, whether an insurance agent within the meaning of this Act or not," shall be substituted.

17.

Amendment of section 47.

18. In section 47 of the said Act,—

(*a*) in sub-section (1), after the words "from the date of the maturing of the policy" the words "or, where the circumstances are such that the insurer cannot be immediately aware of such maturing, from the date on which notice of such maturing is given to the insurer," shall be inserted;

(*b*) in sub-section (4), for the words "from the death of the insured, or the maturing of the policy by survival" the words "from the maturing of the policy by survival, or from the date of receipt of notice by the insurer of the death of the insured, as the case may be," shall be substituted.

Amendment of section 48.

19. In section 48 of the said Act,—

(*a*) in sub-section (1), after the words and figure "incorporated under the Indian Companies Act, 1913", the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be inserted;

(*b*) for sub-section (2) the following sub-section shall be substituted, namely:—

"(2) This section shall not take effect, in respect of any company in existence at the commencement of this Act, until the expiry of one year therefrom, and in respect of any company incorporated after the commencement of this Act, until the expiry of two years from the date of registration to carry on life insurance business."

Amendment of section 50.

20. In section 50 of the said Act, for the words "within three months of the lapsing of a policy of life insurance," the words "before the expiry of three months from the date on which the premiums in respect of a policy of life insurance were payable but not paid," shall be substituted.

Amendment of section 53.

21. In sub-clause (*i*) of clause (*b*) of sub-section (2) of section 53 of the said Act, after the word and figure "section 7" the words and figure or section 98" shall be inserted,

Amendment of section 59.

22. In section 59 of the said Act, for the words and figure "deposit made by the company under section 7" the words and figures "deposit made by the company or the insurer, as the case may be, under section 7 or section 98" shall be substituted.

Amendment of section 63.

23. In section 63 of the said Act, for the word "agent" the word "representative" shall be substituted.

Amendment of section 65.

24. In section 65 of the said Act, for the word "incorporate" the word "unincorporate" shall be substituted.

Amendment of section 73.

25. In sub-section (1) of section 73 of the said Act,—

(*a*) for the words "make each year" the words "make in each calendar year" shall be substituted;

(*b*) for the words "income for the year" the words "income for the preceding calendar year" shall be substituted.

Amendment of section 80.

26. In sub-section (3) of section 80 of the said Act, after the words "this section" the words and figure "and section 73" shall be inserted.

Amendment of section 82.

27. In sub-section (3) of section 82 of the said Act, after the words and figures "incorporated under the Indian Companies Act, 1913," the words and figures " or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be inserted.

Amendment of section 85.

28. To sub-section (2) of section 85 of the said Act the words "or in the name of a public officer approved by the Central Government" shall be added.

Amendment of section 95.

29. In clause (*a*) of sub-section (1) of section 95 of the said Act, for the words and figure "incorporated under the provisions of the Indian Companies Act, 1913," the words and figures "incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be substituted.

Amendment of section 98.

30. In sub-section (2) of section 98 of the said Act, for the word "year" in both places where it occurs, the words "calendar year" shall be substituted.

Amendment of section 103.

31. In sub-section (1) of section 103 of the said Act, for the words "in relation to any such class of insurance business" the words "in relation to any insurance business transacted in contravention of any of the said sections" shall be substituted.

Amendment of section 114.

32. In clause (*l*) of sub-section (2) of section 114 of the said Act, after the figure and brackets "(5)," the figure and brackets "(6)," shall be inserted.

Amendment of section 116.

33. In section 116 of the said Act, for the word and figure "section 6" the words and figures "section 7 or section 98" shall be substituted.

Repeal of section 122 of Act IV of 1938 and saving of article 86 in First Schedule to Act IX of 1908.

34. Section 122 of the said Act is hereby repealed, and article 86 in the First Schedule to the Indian Limitation Act, 1908, shall have effect as if the said section had never been enacted.

Amendment of First Schedule to Act IV of 1938.

35. In Part II of the First Schedule to the said Act, in the heading to Form AA, for the words "Indian Assets" the words "Assets in India" shall be substituted.

Amendment of Third Schedule.

36. In Part II of the Third Schedule to the said Act,—

(*a*) in Form D,—

(*i*) for the entry in the first column "Commission (less that on Re-insurances)" the entry "Commission to insurance agents (less that on Re-insurances)" shall be substituted;

(*ii*) for the entry in the first column "1. Commission and allowances" the entry "1. Allowances and Commission (other than commission to insurance agents)" shall be substituted;

(*iii*) in note (*e*) the word "British" shall be omitted;

(*b*) in the fourth column of Form DD, after the word "immediate" the words "or deferred" shall be inserted;

(*c*) to Form DDD the following notes shall be added, namely:—

"A separate statement must be given in respect of each class of life insurance business for which a separate revenue account is submitted.

Insurers having their principal place of business in British India shall give the information required in the form separately for business transacted in India and business transacted outside India and insurers having their principal place of business outside British India will furnish information regarding business transacted in India only.";

(*d*) in Form DDDD,—

(*i*) the word "financial," in the three places where it occurs, shall be omitted;

(*ii*) for the word "revised" the word "revived" shall be substituted;

(*e*) in note (*c*), note (*d*) and the note denoted by an asterisk in Form E, the word "British," wherever it occurs, shall be omitted;

(*f*) in note (*d*), note (*e*) and the note denoted by an asterisk in Form F, the word "British," wherever it occurs, shall be omitted.

Amendment of Fourth Schedule.

37. In Part I of the Fourth Schedule to the said Act,—

(*a*) In regulation 2, for the word and figure "paragraph 3" the word and figure "paragraph 4" shall be substituted;

(*b*) in regulation 3, for the word and figure "paragraph 4," in the three places where they occur, the word and figure "paragraph 5" shall be substituted;

(*c*) in the proviso to regulation 4,—

(*i*) for the words "an insurance company" the words "an insurer" shall be substituted;

(*ii*) for the words "the company", in both places where they occur, the words "the insurer" shall be substituted.

THE INDIAN PATENTS AND DESIGNS (AMENDMENT) ACT, 1939.

ACT No. XII OF 1939.

[*28th March, 1939.*

An Act further to amend the law relating to the protection of Inventions and Designs.

WHEREAS it is expedient further to amend the law relating to the protection of Inventions and Designs; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN PATENTS AND DESIGNS (AMENDMENT) ACT, 1939.

Amendment of section 2, Act II of 1911.

2. For clause (7) of section 2 of the Indian Patents and Designs Act, 1911 (hereinafter referred to as the said Act), the following clause shall be substituted, namely:—

'(7) "High Court" means a High Court as defined in sub-section (1) of section 219 of the Government of India Act, 1935.'

Amendment of section 5, Act II of 1911.

3. In section 5 of the said Act,—

(*a*) in sub-section (1),—

(*i*) for the words "examine every application, and if he considers" the words "refer every application to an Examiner and if satisfied on the report of the Examiner" shall be substituted;

(*i-a*) in clause (*c*), after the words "the title" the words "of the specification" shall be inserted;

(*ii*) in clause (*e*), after the words "not a" the words "manner of" shall be inserted;

(*iii*) for clause (*f*) the following clauses shall be substituted, namely:—

"(*f*) the specification relates to more than one invention, or

(*g*) in the case of an application claiming priority under section 78-A, the specification describes and claims an invention substantially larger than or substantially different from the invention disclosed in the specification filed with the application made outside British India by virtue of which priority is claimed, or

(*h*) in the case of an application for a patent of addition under section 15-A, the invention described and claimed in the specification is not an improvement or modification of that described and claimed in the original specification";

(*b*) after sub-section (1) the following sub-section shall be inserted, namely:—

"(1-*A*) If the Controller considers, at any time before the acceptance of an application, that the invention claimed therein has been wholly or in part claimed in a specification published on or after the date which the patent applied for would bear if granted, appertaining to an application for a patent which if granted will be of prior date to the patent applied for, he may require that the applicant's specification be amended by the insertion of a reference to such other specification, by way of notice to the public.";

(*c*) in sub-section (2), after the word "amendment" the words "or the insertion of a reference" shall be inserted; and

(*d*) in sub-section (4),—

(*i*) for the words "become void" the words "be deemed to have been refused" shall be substituted;

(*ii*) in the proviso the words "by any period not exceeding three months" shall be omitted; and for the words "or revived, as the case may be,

during, but not beyond the period of extension so requested" the words "for any period so requested not exceeding in all three months from the expiration of the said period of twelve months" shall be substituted.

Amendment of section 10, Act II of 1911.

4. In clause (*b*) of the proviso to sub-section (2) of section 10 of the said Act, after the word "patent", where it occurs for the first time, the words "or by any proceedings taken for obtaining a direction of the Controller under the provisions of sub-section (1-A)" shall be inserted.

Amendment of section 14, Act II of 1911.

5. In section 14 of the said Act,—

(*a*) in sub-section (1-B), for the words "may determine" the words "may, on application made in this behalf, determine" shall be substituted;

(*b*) in the proviso to sub-section (2),—

(*i*) the words "by any period not exceeding three months" shall be omitted; and

(*ii*) for the words "during, but not beyond, the period of extension applied for" the words "for any period so applied for not exceeding in all three months from the expiration of the time for payment" shall be substituted.

Amendment of section 15, Act II of 1911.

6. In section 15 of the said Act, for sub-sections (5) and (6) the following sub-sections shall be substituted, namely:—

"(5) The Central Government or the High Court to which a petition is referred shall in considering the petition have regard to the nature and merits of the invention in relation to the public, to the profits made on the patent and to all the circumstances of the case.

(6) If it appears to the Central Government or to the High Court when the petition is referred to it, that the patent has not been sufficiently remunerative, the Central Government or the High Court, as the case may be, may by order extend the term of the patent for a further term not exceeding five or in exceptional cases ten years or may order the grant of a new patent for such term not exceeding ten years as may be specified in the order and subject to any restriction, conditions and provisions which the Central Government or the High Court, as the case may be, may think fit."

Amendment of section 26, Act II of 1911.

7. For sub-section (1) of section 26 of the said Act, the following sub-section shall be substituted, namely:—

"(1) Revocation of a patent in whole or in part may be obtained on petition to or on a counter claim in a suit for infringement before a High Court on all or any of the following grounds, namely:—

(*a*) that the invention has been the subject of a valid prior grant of a patent in British India;

(*b*) that the true and first inventor or his legal representative or assign was not the applicant or one of the applicants for the patent;

(*c*) that the patent was obtained in fraud of the rights of the person applying for the revocation or of any person under or through whom he claims;

(*d*) that the invention was not, at the date of the patent, a manner of new manufacture or improvement;

(*e*) that the invention does not involve any inventive step, having regard to what was known or used prior to the date of the patent;

(*f*) that the invention is of no utility;

(*g*) that the specification does not sufficiently and fairly describe and ascertain the nature of the invention and the manner in which the invention is to be performed;

(*h*) that the specification does not sufficiently and clearly ascertain the scope of the invention claimed;

(*i*) that the patent was obtained on a false suggestion or representation;

(*j*) that the primary or intended use or exercise of the invention is contrary to law;

(*k*) that the patentee has contravened, or has not complied with, the conditions contained in the patent;

(*l*) that the specification does not disclose the best method of performance of the invention known to the applicant for the patent at the time when the specification was left at the Patent Office;

(*m*) that prior to the date of the patent, the patentee or other persons (not being authorities administering any department of the service of His Majesty, or the agents or contractors of, or any other persons authorised in that behalf by, the Central Government) secretly worked the invention on a commercial scale (and not merely by way of reasonable trial or experiment) in British India, and thereby made direct or indirect profits in excess of such amount as the Court may in consideration of all the circumstances of the case deem reasonable:

Provided that this sub-section shall have effect in relation to the ground of revocation specified—

(*i*) in clause (*b*), subject to the provisions of section 78-A, or

(*ii*) in clause (*d*), subject to the provisions of sub-section (1) of section 13, sub-section (2) of section 21, section 38 and section 40."

Amendment of section 29, Act II of 1911

8. (*a*) To sub-section (1) of section 29 of the said Act, the following proviso shall be added, namely:—

"Provided that where a counter claim for revocation of the patent is made by the defendant, the suit, along with the counter claim, shall be transferred to the High Court for decision".

(*b*) In sub-section (2) of section 29 of the said Act, for the words "this Act" the word and figure "section 26" shall be substituted.

Substitution of new section for section 38, Act II of 1911.

9. For section 38 of the said Act the following section shall be substituted, namely:—

Public use or knowledge of invention.

"38. The public use or knowledge of an invention in British India before the date of the application for a patent thereon shall not invalidate the patent granted thereon if the knowledge has been obtained surreptitiously or in fraud of the true and first inventor or his legal representative or assign or has been communicated to the public in fraud of such inventor or his legal representative or assign or in breach of confidence:

Provided that such inventor or his legal representative or assign has not acquiesced in the public use of his invention, and that he applies for a patent within six months after the commencement of such use."

Substitution of new section for section 40, Act II of 1911.

10. For section 40 of the said Act the following section shall be substituted, namely:—

Provisions as to exhibitions and readings before learned societies.

"40. The exhibition of an invention at an industrial or other exhibition to which the provisions of this section have been extended by the Central Government by notification in the official Gazette, or the publication of any description of the invention during the period of the holding of the exhibition, or the use of the invention for the purpose of the exhibition in the place where the exhibition is held, or the use of the invention or the publica-

tion of any description thereof, during or after the period of the holding of the exhibition, by any person elsewhere without the privity or consent of the inventor or the reading of a paper by an inventor before a learned society, or the publication of that paper in the society's transactions shall not prejudice the right of the inventor to apply for and obtain a patent in respect of the invention, or the validity of any patent granted on the application:

Provided that—

(*a*) the exhibitor exhibiting the invention or the inventor reading the paper or authorising the publication thereof, as the case may be, gives to the Controller previous notice in the prescribed form; and

(*b*) the application for a patent is made before or within six months from the date of first exhibiting the invention or of the reading of the paper, as the case may be, or when it has not been so read, of the said publication."

Amendment of section 47, Act II of 1911.

11. In sub-sections (2) and (3) of section 47 of the said Act, the words "within the prescribed time" shall be omitted.

Substitution of new section for section 52, Act II of 1911.

12. For section 52 of the said Act the following section shall be substituted, namely:—

Provisions as to exhibitions.

"52. The exhibition of a design, or of any article to which a design is applied, at an industrial or other exhibition to which the provisions of this section have been extended by the Central Government by notification in the official Gazette, or the publication of a description of the design, during the period of the holding of the exhibition, or the exhibition of the design or the article or the publication of a description of the design by any person elsewhere during or after the period of the holding of the exhibition, without the privity or consent of the proprietor, shall not prevent the design from being registered or invalidate the registration thereof:

Provided that—

(*a*) the exhibitor exhibiting the design or article, or publishing a description of the design, gives to the Controller previous notice in the prescribed form; and

(*b*) the application for registration is made within six months from the date of first exhibiting the design or article or publishing a description of the design."

Amendment of section 53, Act II of 1911.

13. In sub-section (1) of section 53 of the said Act,—

(*a*) after clause (*a*) the following clause shall be inserted, namely:—

"(*aa*) to import for the purposes of sale, without the consent of the registered proprietor, any article belonging to the class in which the design has been registered, and having applied to it the design or any fraudulent or obvious imitation thereof; or";

(*b*) in sub-clause (*b*), after the words "applied to any article" the words "in any class of goods in which the design is registered" shall be inserted:

Insertion of new section 59-A in Act II of 1911.

14. After section 59 of the said Act the following section shall be inserted, namely:—

Information relating to patents.

"59-A. A person making a request to the Controller in the prescribed manner as respects any patent specified in the request or as respects any application for a patent so specified, for information to be furnished to him by the Controller of any such matters as may be prescribed affecting that patent or application, shall be entitled, subject to the payment of the prescribed fee, to have information supplied to him accordingly."

Amendment of section 65, Act II of 1911

15. In section 65 of the said Act, the word "and," in the first three places where it occurs, shall be omitted, and for the words "compelling the production of documents and awardding costs" the words "compelling the discovery and production of documents, issuing commissions for the examining of witnesses and awarding costs and such award shall be executable in any court having jurisdiction as if it were a decree of that court" shall be substituted.

Insertion of new section 70-A in Act II of 1911.

16. After the heading "*Evidence, etc.*" and before section 71 of the said Act, the following section shall be inserted, namely:—

Evidence before the Controller

"70-A. Subject to any rules made under section 77, in any proceeding under this Act before the Controller, the evidence shall be given by affidavit, in the absence of directions by the Controller to the contrary; but in any case in which the Controller thinks it right so to do he may take evidence *viva voce* in lieu of or in addition to evidence by affidavit or may allow any party to be cross-examined on the contents of his affidavit."

Insertion of new section 71-A in Act II of 1911.

17. After section 71 of the said Act the following section shall be inserted, namely:—

Evidence of documents in Patent Office.

"71-A. Printed or written copies or extracts, purporting to be certified by the Controller and sealed with the seal of the Patent Office, of or from patents, specifications and other documents in the Patent Office, and of or from registers and other books kept there, shall be admitted in evidence in all Courts in British India, and in all proceedings, without further proof or production of the originals:

Provided that a Court may, if it has reason to doubt the accuracy or authenticity of the copies tendered in evidence, require the production of the originals or such further proof as it considers necessary."

Substitution of new section for section 72, Act I of 1911

18. For section 72 of the said Act the following section shall be substituted, namely:—

Transmission of copies of specifications, etc., and inspection thereof.

"72. Copies of all such specifications, drawings and amendments left at the Patent Office, as become open to public inspection under the provisions of this Act, shall be transmitted, as soon as may be, after the printed copies thereof are available, to such authorities as the Central Government may appoint in this behalf, and shall be open to the inspection of any person at all reasonable times at places to be appointed by those authorities and approved by the Central Government."

Amendment of section 78-A, Act II of 1911.

19. In sub-section (1) of section 78-A of the said Act,—

(*a*) for the words and figures "apply such of the provisions of section 91 of the Patents and Designs Act, 1907, as relate to inventions or designs, to British India," the words, letter and figures "declare British India to be a convention country within the meaning of section 91-A of the Patents and Designs Act, 1907", shall be substituted;

(*b*) for the words "shall be entitled to a patent for his invention or to registration of his design under this Act, in priority to other applicants; and the patent or registration shall have" the words "shall, either alone or jointly with any other person, be entitled to claim that the patent that may be granted to him under this Act, for the said invention or the registration of the said design under this Act, shall be in priority to other applicants and shall have" shall be substituted.

Amendment of Schedule, Act II of 1911.

20. In the Schedule to the said Act, for the words "Before the expiration of", where they occur in the penultimate entry, the words "In respect of" shall be substituted.

Amendment of section 18, Act VIII of 1878.

21. In section 18 of the Indian Sea Customs Act, 1878, after clause (*f*) the following clause shall be inserted, namely:—

"(*ff*) goods made or produced beyond the limits of British India and intended for sale, and having applied thereto, a design in which copyright exists under the Indian Patents and Designs Act, 1911, in respect of the class to which the goods belong or any fraudulent or obvious imitation of such design except when the application of such design has been made with the license or written consent of the registered proprietor of the design;".

THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1939.

ACT NO. XIII OF 1939.

[*28th March, 1939.*

An Act further to amend the Workmen's Compensation Act, 1923, for a certain purpose.

WHEREAS doubts have been entertained whether a workman employed on wages payable otherwise than by the month or on a monthly basis may be a workman within the meaning of the Workmen's Compensation Act, 1923.

AND WHEREAS it is expedient to remove those doubts, and for that purpose further to amend section 5 of that Act in the manner hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1939.

(2) It shall come into force on the 1st day of May, 1939:

Provided that section 2 shall be deemed to have taken effect from the 30th day of June, 1934.

Amendment of section 5, Act VIII of 1923.

2. In section 5 of the Workmen's Compensation Act, 1923—

(*a*) for the words "For the purposes of this Act the monthly wages of a workman shall be calculated" the following shall be substituted, namely:—

"In this Act and for the purposes thereof the expression 'monthly wages' means the amount of wages deemed to be payable for a month's service (whether the wages are payable by the month or by whatever other period or at piece rates), and calculated";

(*b*) in clause (*b*), the words "deemed to be" shall be omitted.

Restoration of proceedings.

3. Where in any proceedings under the Workmen's Compensation Act, 1923, concluded after the 1st of July, 1934, any person has been found by a Court not to be a workman within the meaning of that Act only by reason of the fact that his wages were payable otherwise than by the month or on a monthly basis, such finding shall be void and of no effect; and the Court shall, notwithstanding anything to the contrary in the Indian Limitation Act, 1908, or any other law for the time being in force, on application made within six months from the commencement of this Act by any person prejudicially affected by such finding, restore the proceedings at, and continue the proceedings from, the stage reached immediately before the order embodying or based on such finding was made.

THE COTTON GINNING AND PRESSING FACTORIES (AMENDMENT) ACT, 1939.

ACT No. XIV OF 1939.

[*28th March, 1939.*

An Act to amend the Cotton Ginning and Pressing Factories Act, 1925 for certain purposes.

WHEREAS it is expedient to amend the Cotton Ginning and Pressing Factories Act, 1925, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE COTTON GINNING AND PRESSING FACTORIES (AMENDMENT) ACT, 1939.

Amendment of section 9 of Act XII of 1925.

2. In section 9 of the Cotton Ginning and Pressing Factories Act, 1925 (hereinafter referred to as the said Act)—

(*a*) after sub-section (1) the following sub-section shall be inserted, namely:—

"(1-A) In any cotton ginning factory, whether erected before or after the commencement of this Act—

(*a*) no structural alterations or additions, the construction of which commenced after the 27th day of February, 1939, shall be made so as to minimise the degree of compliance of the factory as a whole with the requirements set forth in clauses (*a*) and (*b*) of sub-section (1), and

(*b*) every structural addition (whether actually attached to any existing structure in the factory or not), the construction of which commenced after the last-mentioned date, shall be constructed in accordance with plans and specifications approved by the prescribed authority:

Provided that nothing in this sub-section shall apply to any factory in which, after any alteration or addition has been made, only roller gins are used where the number of such gins is not more than four,";

(*b*) in clause (*a*) of sub-section (4), after the word, figure and brackets "sub-section (1)" the word, letter, figure and brackets "sub-section (1-A)" shall be inserted.

Amendment of section 14.

3. (1) Section 14 of the said Act shall be renumbered as sub-section (1) of section 14, and in the said section as so renumbered—

(*a*) for the words and figure "in accordance with section 4" the words and figure "with the mark prescribed under section 4 for the factory in which they were pressed," shall be substituted;

(*b*) the proviso shall be omitted.

(2) To the said section as so renumbered the following sub-section shall be added, namely:—

"(2) Any bale marked in accordance with the provisions of section 4 shall, within the meaning of the Indian Evidence Act, 1872, be presumed for all purposes as between the parties to a contract for the purchase of baled cotton, to have been so marked before leaving the factory in which it was pressed."

THE INDIAN FINANCE ACT, 1939.

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the incidence and rate of excise duty on khandsari *sugar leviable under the Sugar (Excise Duty) Act, 1934, to vary certain duties leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the incidence and rate of excise duty on *khandsari* sugar leviable under the Sugar (Excise Duty) Act, 1934, to vary the duty on raw cotton leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1939.

(2) It extends to the whole of British India.

Fixation of salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1939, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule under that section.

Excise duty on *khandsari* sugar.

3. In the Sugar (Excise Duty) Act, 1934,—

(*a*) in clause (*a*) of section 2, the words "wherein, or within the precincts of which, twenty or more workers are working or were working on any day of the preceding twelve months, and" shall be omitted.

(*b*) in clause (*i*) of sub-section (2) of section 3, for the words "one rupee and five annas" the words "eight annas" shall be substituted.

Import duty on raw cotton.

4. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 46 (3), for the words "six pies per lb." in the fourth column, the words "one anna per lb." shall be substituted.

Inland postage rates.

5. For the year beginning on the 1st day of April, 1939, the Schedule contained in Schedule I to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and super-tax.

6. (1) Subject to the provisions of sub-section (2)—

(*a*) income-tax for the year beginning on the 1st day of April, 1939, shall be charged at the rates specified in Part I of Schedule II, and

(*b*) rates of super-tax for the year beginning on the 1st day of April, 1939, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of Schedule II.

(2) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined in accordance with the provisions of that section with reference to the rates specified in Schedule II.

(3) For the purpose of this section and of Schedule II, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

(4) Notwithstanding anything contained in sub-section (1) or sub-section (2), where more than half of the total income of any individual or Hindu undivided family consists of income from salaries, interest on securities or dividends in respect of which the individual or Hindu undivided family is deemed, under the provisions of section 49-B of the Indian Income-tax Act, 1922, to have paid income-tax imposed in British India, or consists of income falling under more than one of those heads—

(*a*) income-tax for the year beginning on the 1st day of April, 1939, shall be charged in respect of such total incomes at the rates of income-tax which were imposed for the year beginning on the 1st day of April, 1938, in respect of incomes of individuals or Hindu undivided families, and

(*b*) in cases in which super-tax has been deducted under the provisions of section 18 of the said Act or would have been so deductible had the Indian Income-tax (Amendment) Act, 1939, come into force on the 1st day of April, 1938, the rates of super-tax for the year beginning on the 1st day of April, 1939, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates of super-tax which were imposed for the year beginning on the 1st day of April, 1938, in respect of incomes of individuals or Hindu undivided families, as the case may be.

(5) In respect of income to which sub-section (4) applies, the provisions of section 17 of the Indian Income-tax Act, 1922, shall apply to the assessment to be made for the year beginning on the 1st day of April, 1939, as though the Indian Income-tax (Amendment) Act, 1939, had not been passed.

SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 5.]

THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

[*See* section 7.]

Letters.

For a weight not exceeding one tola	One anna.
For every tola, or fraction thereof, exceeding one tola	Half an anna.

Postcards.

Single	Nine pies.
Reply	One and a half annas.

Book, Pattern and Sample Packets.

For the first two and a half tolas or fraction thereof	Six pies.
For every additional two and a half tolas, or fraction thereof, in excess of two and a half tolas	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas	Quarter of anna.
For a weight exceeding ten tolas and not exceeding twenty tolas.	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas	Half an anna.
In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—	
For a weight not exceeding ten tolas	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas	Quarter of an anna.

Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.

Parcels.

For a weight not exceeding forty tolas	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas.	Four annas."

SCHEDULE II.

[*See* section 6.]

PART I.

RATES OF INCOME-TAX.

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of his Part applies—

	Rate.
1. On the first Rs. 1,500 of total income	*Nil.*
2. On the next Rs. 3,500 of total income	Nine pies in the rupee.
3. On the next Rs. 5,000 of total income	One anna and three pis in the rupee.
4. On the next Rs. 5,000 of total income	Two annas in the rupee.
5. On the balance of total income	Two annas and six pies in the rupee.

Provided that—

(*i*) no income-tax shall be payable on a total income which does not exceed Rs. 2,000;

(*ii*) the income-tax payable shall in no case exceed half the amount by which the total income exceeds Rs. 2,000.

B. In the case of every company and local authority, and in every case in which, under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

	Rate.
On the whole of total income	Two annas and six pies in the rupee.

PART II.

RATES OF SUPER-TAX.

A. In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraph B of this Part applies—

	Rate.
1. On the first Rs. 25,000 of total income	*Nil.*
2. On the next Rs. 10,000 of total income	One anna in the rupee.
3. On the next Rs. 20,000 of total income	Two annas in the rupee.
4. On the next Rs. 70,000 of total income	Three annas in the rupee.
5. On the next Rs. 75,000 of total income	Four annas in the rupee.
6. On the next Rs. 1,50,000 of total income	Five annas in the rupee.
7. On the next Rs. 1,50,000 of total income	Six annas in the rupee.
8. On the balance of total income	Seven annas in the rupee.

B. In the case of every company and local authority—

	Rate.
On the whole of total income	One anna in the rupee.

THE EMPLOYMENT OF CHILDREN (AMENDMENT) ACT, 1939.

ACT NO. XV OF 1939.

[*8th April, 1939.*

An Act to amend the Employment of Children Act, 1938.

WHEREAS it is expedient to amend the Employment of Children Act, 1938, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE EMPLOYMENT OF CHILDREN (AMENDMENT) ACT, 1939.

(2) It shall come into force on the 1st day of October, 1939.

Amendment of section 2 of Act XXVI of 1938

2. In section 2 of the Employment of Children Act, 1938 (hereinafter referred to as the said Act), after the words "in this Act" the letter and brackets "*a*" shall be inserted, and to the said section as so amended the following shall be added, namely:—

'(*b*) "occupier" of a workshop means the person who has ultimate control over the affairs of the workshop;

(*c*) "prescribed" means prescribed by rules made under this Act;

(*d*) "workshop" means any premises (including the precincts thereof) wherein any industrial process is carried on, but does not include any premises to which the provisions of section 50 of the Factories Act, 1934, for the time being apply.'

Amendment of section 3.

3. To section 3 of the said Act, the following sub-section shall be added, namely:—

"(3) No child who has not completed his twelfth year shall be employed, or permitted to work, in any workshop wherein any of the processes set forth in the Schedule is carried on:

Provided that nothing in this sub-section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family only and without employing hired labour or to any school established by, or receiving assistance or recognition from, a Provincial Government."

Insertion of new sections 3-A, 3-B and 3-C.

4. After section 3 of the said Act the following sections shall be inserted, namely:—

Power to amend the Schedule.

"3A. The Provincial Government, after giving, by notification in the official Gazette, not less than three months' notice of its intention so to do, may, by like notification, add any description of process to the Schedule, and thereupon the Schedule shall have force in the Province as if it has been enacted accordingly.

Notice to inspector before carrying on work in certain processes.

3-B. Before work in any of the processes set forth in the Schedule is carried on in any workshop after the 1st day of October, 1939, the occupier shall send to the inspector, within whose local limits the workshop is situated, a written notice containing—

(*a*) the name and situation of the workshop,

(*b*) the name of the person in actual management of the workshop,

(*c*) the address to which communications relating to the workshop should be sent, and

(*d*) the nature of the processes to be carried on in the workshop.

Disputes as to age.

3-C. If any question arises between an inspector and an employer as to whether any child has or has not completed his twelfth or fifteenth year, as the case may be, the question shall, in the absence of a certificate as to the age of such child, granted by a prescribed medical authority, be referred by the inspector for decision to the prescribed medical authority."

Amendment of section 4.

5. In section 4 of the said Act, after the word and figure "section 3" the words, letter and figure "or fails to give notice as required by section 3-B" shall be inserted.

Amendment of section 5.

6. For sub-section (2) of section 5 of the said Act the following sub-section shall be substituted, namely:—

"(2) Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates."

Amendment of section 7.

7. In clause (*b*) of sub-section (2) of section 7 of the said Act, for the words "the authorities" the words "the medical authorities" shall be substituted.

Insertion of Schedule.

8. To the said Act the following Schedule shall be added, namely:—

"THE SCHEDULE.

(*See* SECTIONS 3, 3-A AND 3-B.)

List of processes.

1. *Bidi*-making.
2. Carpet-weaving.
3. Cement manufacture, including bagging of cement.
4. Cloth-printing, dyeing and weaving.
5. Manufacture of matches, explosives and fireworks.
6. Mica-cutting and splitting.
7. Shellac manufacture.
8. Soap manufacture.
9. Tanning.
10. Wool cleaning."

THE REGISTRATION OF FOREIGNERS ACT, 1939.

ACT NO. XVI OF 1939.

[8th April, 1939.

An Act to provide for the registration of foreigners in British India.

WHEREAS it is expedient to provide for the registration of foreigners entering, being present in, and departing from, British India;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE REGISTRATION OF FOREIGNERS ACT, 1939.

(2) It extends to the whole of British India.

Definitions.

2. In this Act—

(*a*) the word "foreigner" shall denote a person who is not—

(*i*) a British subject domiciled in the United Kingdom; or

(*ii*) a British Indian subject; or

(*iii*) a ruler or subject of an Indian State; or

(*iv*) a person duly appointed by a foreign Government to exercise diplomatic functions; or

(*v*) a consul or a vice-consul;

(*b*) "prescribed" means prescribed by rules made under this Act.

Power to make rules.

3. The Central Government may after previous publication, by notification in the official Gazette, make rules with respect to foreigners for any or all of the following purposes, that is to say—

(a) for requiring any foreigner entering, or being present in, British India to report his presence to a prescribed authority within such time and in such manner and with such particulars as may be prescribed;

(b) for requiring any foreigner moving from one place to another place in British India to report, on arrival at such other place, his presence to a prescribed authority within such time and in such manner and with such particulars as may be prescribed;

(c) for requiring any foreigner who is about to leave British India to report the date of his intended departure and such other particulars as may be prescribed to such authority and within such period before departure as may be prescribed;

(d) for requiring any foreigner entering, being present in, or departing from, British India to produce, on demand by a prescribed authority, such proof of his identity as may be prescribed;

(e) for requiring any person having the management of any hotel, boarding-house, sarai or any other premises of like nature to report the name of any foreigner residing therein for whatever duration, to a prescribed authority within such time and in such manner and with such particulars as may be prescribed;

(f) for requiring any person having the management or control of any vessel or aircraft to furnish to a prescribed authority such information as may be prescribed regarding any foreigner entering, or intending to depart from, British India in such vessel or aircraft, and to furnish to such authority such assistance as may be necessary or prescribed for giving effect to this Act;

(g) for providing for such other incidental or supplementary matters as may appear to the Central Government necessary or expedient for giving effect to this Act.

Burden of proof.

4. If any question arises with reference to this Act or any rule made there under, whether any person is or is not a foreigner, or is or is not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person.

Penalties.

5. Any person who contravenes, or attempts to contravene, or fails to comply with, any provision of any rule made under this Act shall be punished, if a foreigner, with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both, or if not a foreigner, with fine which may extend to five hundred rupees.

Power to exempt from application of Act.

6. The Central Government may, by order, declare that any or all of the provisions of the rules made under this Act shall not apply, or shall apply only with such modifications or subject to such conditions as may be specified in the said order, to or in relation to any individual foreigner or any class or description of foreigner:

Provided that a copy of every such order shall be placed on the table of both Houses of Central Legislature as soon as may be after its promulgation.

Protection to persons acting under this Act.

7. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Application of other laws not barred.

8. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Foreigners Act, 1864 and any other law for the time being in force.

THE INDIAN SUCCESSION (AMENDMENT) ACT, 1939.

ACT No. XVII OF 1939.

[21st April, 1939.

An Act, to amend the Indian Succession Act, 1925, as respects intestate succession among Parsis.

WHEREAS it is expedient to amend the law relating to intestate succession among Parsis;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN SUCCESSION (AMENDMENT) ACT, 1939.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Substitution of new sections for sections 50 to 56 of Act XXXIX of 1925.

2. For sections 50 to 56 (both inclusive) of the Indian Succession Act, 1925, the following sections shall be substituted, namely:—

General principles relating to intestate succession.

"50. For the purpose of intestate succession among Parsis—

(a) there is no distinction between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive;

(b) a lineal descendant of an intestate who has died in the lifetime of the intestate without leaving a widow or widower or any lineal descendant or a widow of any lineal descendant shall not be taken into account in determining the manner in which the property of which the intestate has died intestate shall be divided; and

(c) where a widow of any relative of an intestate has married again in the lifetime of the intestate, she shall not be entitled to receive any share of the property of which the intestate has died intestate, and she shall be deemed not to be existing at the intestate's death.

Division of a male intestate's property among his widow, children and parents.

51. (1) Subject to the provisions of sub-section (2), the property of which a male Parsi dies intestate shall be divided—

(a) where he dies leaving a widow and children, among the widow and children, so that the share of each son and of the widow shall be double the share of each daughter, or

(b) where he dies leaving children but no widow, among the children, so that the share of each son shall be double the share of each daughter.

(2) Where a male Parsi dies leaving one or both parents in addition to children or a widow and children, the property of which he dies intestate shall be divided so that the father shall receive a share equal to half the share of a son and the mother shall receive a share equal to half the share of a daughter.

Division of a female intestate's property among her widower and children.

52. The property of which a female Parsi dies intestate shall be divided—

(a) where she dies leaving a widower and children, among the widower and children so that the widower and each child receive equal shares, or

(b) where she dies leaving children but no widower, among the children in equal shares.

Division of share of pre-deceased child of intestate leaving lineal descendants.

53. In all cases where a Parsi dies leaving any lineal descendant, if any child of such intestate has died in the lifetime of the intestate, the division of the share of the property of which the intestate has died intestate which such child would have taken if living at the intestate's death shall be in accordance with the following rules, namely:—

(*a*) If such deceased child was a son, his widow and children shall take shares in accordance with the provisions of this Chapter as if he had died immediately after the intestate's death:

Provided that where such deceased son has left a widow or a widow of a lineal descendant but no lineal descendant, the residue of his share after such distribution has been made shall be divided in accordance with the provisions of this Chapter as property of which the intestate has died intestate, and in making the division of such residue the said deceased son of the intestate shall not be taken into account.

(*b*) If such deceased child was a daughter, her share shall be divided equally among her children.

(*c*) If any child of such deceased child has also died during the lifetime of the intestate, the share which he or she would have taken if living at the intestate's death shall be divided in like manner in accordance with clause (*a*) or clause (*b*) as the case may be.

(*d*) Where a remoter lineal descendant of the intestate has died during the lifetime of the intestate, the provisions of clause (*c*) shall apply ***mutatis mutandis*** to the division of any share to which he or she would have been entitled if living at the intestate's death by reason of the predecease of all the intestate's lineal descendants directly between him or her and the intestate.

Division of property where intestate leaves no lineal descendant but leaves a widow or widower or a widow of any lineal descendant.

54. Where a Parsi dies without leaving any lineal descendant but leaving a widow or widower or a widow of a lineal descendant, the property of which the intestate dies intestate shall be divided in accordance with the following rules, namely:—

(*a*) If the intestate leaves a widow or widower but no widow of a lineal descendant, the widow or widower shall take half the said property.

(*b*) If the intestate leaves a widow or widower and also a widow of any lineal descendant, his widow or her widower shall receive one-third of the said property, and the widow of any lineal descendant shall receive another one-third, or if there is more than one such widow, the last mentioned one-third shall be divided equally among them.

(*c*) If the intestate leaves no widow or widower but one widow of a lineal descendant, she shall receive one-third of the said property or, if the intestate leaves no widow or widower but more than one widow of a lineal descendant, two-thirds of the said property shall be divided among such widows in equal shares.

(*d*) The residue after the division specified in clause (*a*), (*b*) or (*c*) has been made shall be distributed among the relatives of the intestate in the order specified in Part I of Schedule II. The next-of-kin standing first in Part I of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity.

(*e*) If there are no relatives entitled to the residue under clause (*d*), the whole of the residue shall be distributed in proportion to the shares specified among the persons entitled to receive shares under this section.

Division of property where intestate leaves neither lineal descendants nor a widow or widower nor a widow of any lineal descendant.

55. When a Parsi dies leaving neither lineal descendants nor a widow or widower nor a widow of any lineal descendant, his or her next-of-kin, in the order set forth in Part II of Schedule II, shall be entitled to succeed to the whole of the property of which he or she dies intestate. The next-of-kin standing first in Part II of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propinquity.

Division of property where there is no relative entitled to succeed under the other provisions of this Chapter.

56. Where there is no relative entitled to succeed under the other provisions of this Chapter to the property of which a Parsi has died intestate, the said property shall be divided equally among those of the intestate's relatives who are in the nearest degree of kindred to him."

Substitution of Schedule II to Act XXXIX of 1925.

3. For Schedule II to the Indian Succession Act, 1925, the following Schedule shall be substituted, namely:—

"SCHEDULE II.

PART I.

(*See section 54.*)

(1) Father and mother.

(2) Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as have predeceased the intestate.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(5) Paternal grandfather's father and mother.

(6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.

PART II.

(*See section 55.*)

(1) Father and mother.

(2) Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as shall have predeceased the intestate.

(3) Paternal grandfather and paternal grandmother.

(4) Children of the paternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(5) Paternal grandfather's father and mother.

(6) Paternal grandfather's father's children and the lineal descendants of such of them as have predeceased the intestate.

(7) Uterine brothers and sisters and the lineal descendants of such of them as have predeceased the intestate.

(8) Maternal grandfather and maternal grandmother.

(9) Children of the maternal grandfather and the lineal descendants of such of them as have predeceased the intestate.

(10) Widows of brothers or half-brothers.

(11) Paternal grandfather's son's widow.

(12) Maternal grandfather's son's widow.

(13) Widowers of deceased lineal descendants of the intestate who have not married again before the death of the intestate.

(14) Maternal grandfather's father and mother.

(15) Children of the maternal grandfather's father and lineal descendants of such of them as have predeceased the intestate.

(16) Children of the paternal grandmother and the lineal descendants of such of them as have predeceased the intestate.

(17) Paternal grandmother's father and mother.

(18) Children of the paternal grandmother's father and the lineal descendants of such of them as have predeceased the intestate."

THE INDIAN TARIFF (SECOND AMENDMENT) ACT, 1939.

Act No. XVIII of 1939.

[*21st April, 1939.*

An Act further to amend the Indian Tariff Act, 1934.

Whereas it is expedient further to amend the Indian Tariff Act, 1934, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title. 1. This Act may be called The Indian Tariff (Second Amendment) Act, 1939.

Amendment of First Schedule to Act XXXII of 1934. 2. In the First Schedule to the Indian Tariff Act, 1934,—

(*a*) in Item No. 10 (2), in the last column, for the figure "1939" the figure "1940" shall be substituted;

(*b*) in Item No. 28 (5),—

(*i*) in the fourth column, for the words and figures "Re. 1-5 per cwt." the words "twelve annas per cwt." shall be substituted;

(*ii*) in the last column, for the figure "1939" the figure "1946" shall be substituted;

(*c*) for the Items contained in Section X the following Items shall be substituted, namely:—

"43	Wood Pulp	Protective.	25 per cent. *ad valorem* or Rs 30 per ton, whichever is higher.	..	..	March 31st, 1942
44	Writing Paper—					
	(*a*) Ruled or printed forms (including letter paper with printed headings) and envelopes made of writing paper and account and manuscript books and binding thereof.	Protective.	Nine pies per lb. or 25 per cent. *ad valorem*, whichever is higher.	..	..	March 31st, 1942.
	(*b*) All other sorts . .	Protective.	Nine pies per lb.	..	..	March 31st, 1942.
44 (1)	Printing Paper, excluding poster and stereo and all coated papers, but including art paper, all sorts which contain no mechanical wood pulp or in which the mechanical wood pulp amounts to less than 70 per cent. of the fibre content.	Protective.	Nine pies per lb.	..	..	March 31st, 1942.
44 (2)	Printing Paper, all sorts not otherwise specified which contain mechanical wood pulp amounting to not less than 70 per cent. of the fibre content.	Revenue.	25 per cent. *ad valorem*.	..	..	..

44 (3)	PAPER including poster and stereo and all coated papers except art paper, all sorts, not otherwise specified.	Revenue	25 per cent. *ad valorem.*	..	..	..
44 (4)	PASTE BOARD, MILLBOARD, CARDBOARD AND STRAWBOARD, all sorts.	Revenue	25 per cent. *ad valorem.*	..	..	..
44 (5)	TRADE CATALOGUES and ADVERTISING CIRCULARS imported by packet, book or parcel post.	Free	..	..	..	..
44 (6)	PAPER MONEY	Free	..	..	..	..
44 (7)	NEWSPAPERS old, in bales and bags.	Revenue	25 per cent. *ad valorem.*	..	..	..
45	Articles made of PAPER and PAPIER MACHE; STATIONERY including drawing and copy books, labels advertising circulars, sheet or card almanacs and calendars Christmas, Easter and other cards, including cards in booklet forms; including also waste paper but excluding paper and stationery otherwise specified.	Revenue	25 per cent. *ad valorem.*	..	..	..
45 (1)	BOOKS, PRINTED, including covers for printed books, maps, charts and plans, proofs, music manuscripts, and illustrations specially made for binding in books.	Free	..	..	..	..
45 (2)	PRINTS, ENGRAVINGS and PICTURES (including photographs and picture post-cards) on paper or cardboard.	Revenue	50 per cent. *ad valorem.*	..	..	..

(*d*) in Items Nos. 46, 46 (1), 47, 47 (1), 48 and 48 (4), in the last column, for the figure "1939", wherever it occurs, the figure "1940" shall be substituted;

(*e*) in Item No. 49, for the entry in the last column the following entry shall be substituted, namely:—

"The duration applicable to the fabric of which the article is wholly or mainly made."

THE COAL MINES SAFETY (STOWING) ACT, 1939.

ACT No. XIX OF 1939.

[*21st April, 1939.*

An Act to make further provision for safety in coal mines.

WHEREAS it is expedient to make further provision for safety in coal mines by taking measures to facilitate or require therein the carrying out of the operation known as stowing, and to provide for the creation of a fund for the assistance of such operation, in the manner hereinafter provided;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE COAL MINES SAFETY (STOWING) ACT, 1939.

(2) It extends to the whole of British India except Assam and the Punjab.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "agent", "mine" and "owner" have the meanings respectively assigned to them in section 3 of the Indian Mines Act, 1923;

(*b*) "Board" means the Coal Mines Stowing Board constituted under section 3;

(*c*) "Chief Inspector" and "Inspector" mean the persons respectively appointed to be Chief Inspector of Mines and Inspector of Mines under sub-section (1) of section 4 of the Indian Mines Act, 1923, and the provisions of that Act shall apply to the Chief Inspector and to all Inspectors while exercising their powers under this Act or the rules made thereunder;

(*d*) "fund" means the Coal Mines Stowing Fund;

(*e*) "prescribed" means prescribed by rules made under this Act;

(*f*) "soft coke" means all coke which is unsuitable for metallurgical purposes, and "hard coke" means all coke which is not soft coke;

(*g*) "stowing" means the operation of filling with sand or other incombustible material space left under ground in a coal mine by the extraction of coal.

Constitution of Board.

3. (1) The Central Government shall, as soon as may be after the commencement of this Act, constitute a Board to be called the Coal Mines Stowing Board to administer the fund, and such Board shall be a body corporate and have perpetual succession and a common seal, and shall by the said name sue and be sued.

(2) The Board shall consist of the following members, namely:—

(*i*) a person in the service of the Crown, appointed by the Central Government, as Chairman;

(*ii*) the Chief Inspector, or an Inspector appointed by the Central Government in this behalf;

(*iii*) two persons nominated by the Indian Mining Association;

(*iv*) one person nominated by the Indian Mining Federation;

(*v*) one person nominated by the Indian Colliery Owners' Association:

Provided that if, within the prescribed period, any body fails to make the nomination which it is entitled to make under this sub-section, the Central Government may itself nominate a person to fill the place on the Board.

(3) Where a nominated member dies, resigns, ceases to reside in British India or becomes incapable of acting, the Central Government shall, on the recommendation of the body which would have been entitled to make the nomination if it had been a first nomination under sub-section (2), or where such recommendation is not made within the prescribed period, may, on its own initiative, nominate a person to fill the vacancy.

(4) No act done by the Board shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Board.

Power to Board to co-opt members.

4. (1) The Board may, at any time and for such period as it thinks fit co-opt as members of the Board any persons possessing such technical qualifications as may be prescribed.

(2) A member co-opted under sub-section (1) shall exercise all the powers and functions of a member under this Act, except that he shall not be entitled to vote on any question coming before the Board.

Imposition of excise duty.

5. With effect from such date as the Central Government may, by notification in the official Gazette, appoint in this behalf, there shall be levied and collected on all coal raised and despatched, and on all soft coke manufactured and despatched, from collieries in

British India a duty of excise as may, by notification in the official Gazette, be fixed from time to time by the Central Government, subject to a maximum rate of three annas per ton; similarly there shall be levied and collected on such descriptions of hard coke as may be prescribed a duty of excise as may, by notification in the official Gazette, be fixed from time to time by the Central Government, subject to a maximum rate of one and a half times the rate of excise duty for the time being in force in respect of coal and soft coke.

Imposition of customs duty.

6. During the period in which a duty of excise is being levied under section 5, the Central Government may, by notification in the official Gazette, impose on all coal and soft coke and on such descriptions of hard coke as may be prescribed under section 5, imported into British India from any foreign country or brought into British India from the territory of any Indian State (not being territory which has been declared under section 5 of the Indian Tariff Act, 1934, to be foreign territory for the purposes of that section), a duty of customs at rates equivalent to the rates of the duty of excise levied under section 5 of this Act.

Payment to Board of sum equivalent to the net proceeds of the excise duty.

7. The Central Government shall, as soon as may be in each financial year, pay to the Board a sum equivalent to the net proceeds [determined in like manner to that provided in sub-section (1) of section 144 of the Government of India Act, 1935] of the duty of excise realised under section 5 during the preceding year.

Moneys received by the Board to be credited to the fund.

8. (1) The sum referred to in section 7 and any other moneys received by the Board shall be credited to a fund to be called the Coal Mines Stowing Fund, which shall be applied by the Board in such manner and subject to such conditions as may be prescribed, to—

(*i*) meeting the expenses in connection with the administration and the furtherance of the objects of this Act; and

(*ii*) the grant of stowing materials and other assistance for stowing operations to owners, agents or managers of coal mines.

(2) The Board shall keep accounts of the fund, and such accounts shall be examined and audited at the prescribed times by auditors appointed in this behalf by the Central Government.

Powers of Inspectors.

9. (1) The Chief Inspector or any Inspector may make such examination and inquiries as he thinks fit in order to ascertain whether the provisions of this Act and of any rules and orders made thereunder are being complied with.

(2) The Chief Inspector or any Inspector may, with such assistants, if any, as he thinks fit, enter, inspect and examine at any time by day or night any coal mine in respect of which assistance is being, or has been, given under this Act, in order to ascertain the amount of sand or other incombustible material used in stowing in the mine or to ensure that stowing has been, or is being, done effectively:

Provided that the power conferred by this sub-section shall not be exercised in such a manner as unreasonably to impede or obstruct the working of the mine.

(3) Without prejudice to the provisions of section 19 of the Indian Mines Act, 1923, the Chief Inspector or any Inspector may, by order in writing addressed to the owner, agent or manager of a coal mine, require him to take such protective measures, including stowing, in the mine as the Chief Inspector or the Inspector may think necessary, if in the opinion of the Chief Inspector or Inspector—

(*a*) the extraction or reduction of pillars in any part of the mine is likely to cause the crushing of pillars or the premature collapse of any part of the workings or otherwise endanger human life or the mine, or

(*b*) adequate provision against the outbreak of fire or flooding has not been made by providing for the sealing off and isolation of any part of the mine or for restricting the area that might be affected by fire or flooding, as the case may be.

Application of Act IV of 1923.

10. The provisions of sub-sections (3) to (6) (both inclusive) of section 19 of the Indian Mines Act, 1923, shall apply to an order made under sub-section (3) of section 9 of this Act as they apply to an order made under sub-section (2) of section 19 of that Act, and all the provisions of the Indian Mines Act, 1923 [except sub-section (1) of section 11 thereof], affecting committees appointed for the purposes of that Act or relating to the disposal of references made to such committees, shall apply, ***mutatis mutandis*** and so far as may be, to a committee appointed to inquire into a reference under this Act and to the disposal of such reference.

Committees of Inquiry.

11. (1) A committee appointed to inquire into a reference arising out of an order passed under sub-section (3) of section 9 shall consist of—

(*a*) the Chairman of the Board as Chairman;

(*b*) four members selected by the Chairman of the Board as follows:—

(*i*) two, from a panel of eight persons nominated by the Indian Mining Association;

(*ii*) one, from a panel of four persons nominated by the Indian Mining Federation;

(*iii*) one, from a panel of four persons nominated by the Indian Colliery Owners' Association; and

(*c*) one member appointed by the Central Government to represent the interests of persons employed in coal mines.

(2) No person shall be nominated to the panels referred to in clause (*b*) of sub-section (1) unless he possesses such technical qualifications as may be prescribed.

(3) If any body fails, within the prescribed period, to make any nomination which it is entitled to make under sub-section (1) or to fill any vacancy in a pan l, the Central Government shall itself nominate a sufficient number of persons to complete the panel.

Power to make rules.

12. (1) The Central Government may, after previous publication, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing provisions, such rules may provide for any or all of the following purposes, namely:—

(*a*) the nomination, and term of office, of members of the Board appointed or nominated under section 3;

(*b*) the powers and functions of, and the conduct of business by, the Board;

(*c*) prescribing the technical qualifications to be possessed by co-opted members of the Board and by persons nominated to the panels referred to in section 11;

(*d*) prescribing the descriptions of hard coke on which a duty of excise may be levied under section 5;

(*e*) regulating the levy, collection and payment of the duty of excise; and the imposition, collection and payment of the duty of customs;

(*f*) prescribing the manner in which and the conditions under which sums at the credit of the fund may be applied;

(*g*) prescribing the form in which the accounts of the fund shall be kept and the times at which such accounts shall be audited, and regulating the publication of the abstract of such accounts and the report of the auditors thereon, and prescribing the procedure in relation to any items of expenditure from the fund disallowed by the auditors;

(*h*) any other matter which is to be or may be prescribed.

Application to Crown mines.

13. This Act applies to coal mines belonging to the Crown.

THE SUGAR INDUSTRY (PROTECTION) ACT, 1939.

ACT NO. XX OF 1939.

[21st April, 1939.

An Act to provide for the continuance for a further period of the protection conferred on the sugar industry in British India.

WHEREAS it is expedient to provide for the continuance for a further period of the protection conferred on the sugar industry in British India, and to extend the date before which the Central Government is required under section 3 of the Sugar Industry (Protection) Act, 1932, to lay before the Indian Legislature the proposals referred to in the said section;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE SUGAR INDUSTRY (PROTECTION) ACT, 1939.

Amendment of section 3 of Act XIII of 1932.

2. In section 3 of the Sugar Industry (Protection) Act, 1932, for the figure "1939" the figure "1941" shall be substituted.

Amendment of First Schedule to Act XXXII of 1934.

3. In Item No. 17 of the First Schedule to the Indian Tariff Act, 1934—

(*a*) in the fourth column, for the words and figures "*plus* Rs. 7-4-0 per cwt." the words and figures "*plus* Rs. 6-12-0 per cwt." shall be substituted;

(*b*) in the last column, for figure "1939" the figure "1941" shall be substituted.

THE CHITTAGONG PORT (AMENDMENT) ACT, 1939.

ACT NO. XXI OF 1939.

[21st April, 1939.

An Act further to amend the Chittagong Port Act, 1914, for a certain purpose.

WHEREAS it is expedient further to amend the Chittagong Port Act, 1914, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CHITTAGONG PORT (AMENDMENT) ACT, 1939.

Amendment of section 80 of Bengal Act V of 1914.

2. In section 80 of the Chittagong Port Act, 1914, for the word "loans," the words and figures "loans contracted before the 1st day of January, 1939," shall be substituted.

THE CRIMINAL LAW AMENDMENT ACT, 1939.

ACT NO. XXII OF 1939.

[21st April, 1939.

An Act further to amend the Indian Penal Code and the Code of Criminal Procedure, 1898, for a certain purpose.

WHEREAS it is expedient further to amend the Indian Penal Code and the Code of Criminal Procedure, 1898, for the purpose hereinafter appearing; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE CRIMINAL LAW AMENDMENT ACT, 1939.

Amendment of section 176, Act XLV of 1860.

2. ~~To section~~ 176 of the Indian Penal Code, the following shall be added, namely:—

"or, if the notice or ~~information~~ ~~required~~ to be given is required by an order passed under sub-section (1) of section 565 of the Code of Criminal Procedure, 1898, with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Amendment of section 565, Act V of 1898.

3. Sub-section (5) of section 565 of the Code of Criminal Procedure, 1898, shall be omitted and sub-section (6) of that section shall be re-numbered as sub-section (5).

Amendment of Schedule II, Act V of 1898.

4. In Schedule II to the Code of Criminal Procedure, 1898, in the entry relating to section 176 of the Indian Penal Code,—

(*a*) after the second paragraph in column 2 the following paragraph shall be inserted, namely:—

"If the notice or information is required by an order passed under sub-section (1) of section 565 of this Code.";

(*b*) in columns 3, 4, 5, 6 and 8, opposite the paragraph inserted by clause (*a*), the word "Ditto" shall be inserted;

(*c*) in column 7, opposite the paragraph inserted by clause (*a*), the following paragraph shall be inserted, namely:—

"Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both."

THE INDIAN SOFT COKE CESS COMMITTEE (RECONSTITUTION AND INCORPORATION) ACT, 1939.

ACT NO. XXIII OF 1939.

[21st April, 1939.

An Act to reconstitute and incorporate the Committee constituted under the Indian Soft Coke Cess Act, 1929.

WHEREAS it is expedient to reconstitute and incorporate the Committee constituted under the Indian Soft Coke Cess Act, 1929;

It is hereby enacted as follows:—

Short title, commencement and duration.

1. (1) This Act may be called THE INDIAN SOFT COKE CESS COMMITTEE (RECONSTITUTION AND INCORPORATION) ACT, 1939.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf, and shall

remain in force as long only as sections 2 to 7 of the Indian Soft Coke Cess Act, 1929, remain in force.

Reconstitution of the Indian Soft Coke Cess Committee.

2. On the commencement of this Act, the Committee constituted under sub-section (1) of section 4 of the Indian Soft Coke Cess Act, 1929, shall stand dissolved, and shall be reconstituted in the manner provided in section 4 of the said Act as amended by section 4 of this Act.

Vesting of moneys in the reconstituted committee.

3. All the moneys held by the dissolved Committee shall vest in the Committee as reconstituted under section 2.

Amendment of Act VIII of 1929.

4. In the Indian Soft Coke Cess Act, 1929,—

(1) in the long title and in the preamble, the word "and", where it occurs for the first time, shall be omitted;

(2) in sub-section (1) of section 3, the word "and", where it occurs for the second time, shall be omitted; and

(3) in section 4,—

(*a*) in sub-section (1),—

(*i*) in clause (*iv*), for the word "seven" the word "four" shall be substituted, and the word "and" shall be omitted;

(*ii*) after clause (*v*) the following clause shall be inserted, namely:—

"(*vi*) three persons nominated by the Indian Colliery Owners' Association.";

(*b*) after sub-section (1) the following sub-section shall be inserted, namely:—

"(1-A) The Committee constituted under sub-section (1) shall be called the Soft Coke Cess Committee and shall be a body corporate and have perpetual succession and a common seal and shall by the said name sue and be sued."

THE INDIAN CENSUS ACT, 1939.

ACT No. XXIV OF 1939.

[26*th* September, 1939

An Act to provide for certain matters in connection with the taking of the census.

WHEREAS it has been determined to take a census of British India during the year 1941, and whereas it is expedient to provide for certain matters in connection with the taking of such census;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN CENSUS ACT, 1939.

(2) It extends to the whole of British India.

Appointment of census staff.

2. (1) The Central Government may appoint a Census Commissioner to supervise the taking of the census throughout British India, and Superintendents of Census Operations to supervise the taking of the census within the several Provinces.

(2) The Provincial Government may appoint persons as census-officers to take, or aid in, or supervise the taking of, the census within any specified local area.

(3) A declaration in writing, signed by any authority authorised by the Provincial Government in this behalf, that any person has been duly appointed a census-officer for any local area shall be conclusive proof of such appointment.

(4) The Provincial Government may delegate to such authority as it thinks fit the power of appointing census-officers conferred by sub-section (2).

Status of census authorities as public servants.

3. The Census Commissioner, all Superintendents of Census Operations and all census-officers shall be deemed to be public servants within the meaning of the Indian Penal Code.

Discharge of duties of census-officer in certain cases.

4. (1) (*a*) Every officer in command of any body of men belonging to His Majesty's naval, military or air forces or of any vessel of war,

(*b*) every person (except a pilot or harbour-master) having charge or control of a vessel,

(*c*) every person in charge of a lunatic asylum, hospital, workhouse, prison, reformatory or lock-up or of any public, charitable, religious or educational institution,

(*d*) every keeper, secretary or manager of any *sarai*, hotel, boarding-house, lodging-house, emigration depot or club,

(*e*) every manager or officer of a railway or any commercial or industrial establishment, and

(*f*) every occupant of immovable property wherein at the time of the taking of the census persons are living,—

shall, if so required by the District Magistrate or by such authority as the Provincial Government may appoint in this behalf, perform such of the duties of a census-officer in relation to the persons who at the time of the taking of the census are under his command or charge, or are inmates of his house, or are present on or in such immovable property, or are employed under him, as such Magistrate or authority may, by written order, direct.

(2) All the provisions of this Act relating to census-officers shall apply, so far as may be, to all persons while performing such duties under this section, and any person refusing or neglecting to perform any duty which under this section he is directed to perform shall be deemed to have committed an offence under section 187 of the Indian Penal Code.

Power to call upon certain persons to give assistance.

5. The District Magistrate, or such authority as the Provincial Government may appoint in this behalf for any local area, may, by written order, which shall have effect throughout the extent of his district or of such local area, as the case may be, call upon—

(*a*) all owners and occupiers of land, tenure-holders, and farmers and assignees of land-revenue, or their agents, and

(*b*) all members of district, municipal, *panchayat* and other local authorities and officers and servants of such authorities,

to give such assistance as shall be specified in the order towards the taking of a census of the persons who are, at the time of the taking of the census, on the lands of such owners, occupiers, tenure-holders, farmers and assignees, or within the areas for which such local authorities are established, as the case may be, and the persons to whom an order under this section is directed shall be bound to obey it and shall, while acting in pursuance of such order, be deemed to be public servants within the meaning of the Indian Penal Code.

Asking of questions and obligation to answer.

6. (1) A census-officer may ask all such questions of all persons within the limits of the local area for which he is appointed as, by instructions issued in this behalf by the Provincial Government and published in the official Gazette, he may be directed to ask.

(2) Every person of whom any question is asked under sub-section (1) shall be legally bound to answer such question to the best of his knowledge or belief:

Provided that no person shall be bound to state the name of any female member of his household, and no woman shall be bound to state the name of her husband or deceased husband or of any other person whose name she is forbidden by custom to mention.

Occupier to permit access and affixing of numbers.

7. Every person occupying any house, enclosure, vessel or other place shall allow census-officers such access thereto as they may require for the purposes of the census and as, having regard to the customs of the country, may be reasonable, and shall allow them to paint on, or affix to, the place such letters, marks, or numbers as may be necessary for the purposes of the census.

Occupier or manager to fill up schedule.

8. (1) Subject to such orders as the Provincial Government may issue in this behalf, a census-officer may, within the local area for which he is appointed, leave or cause to be left a schedule at any dwelling-house or with the manager or any officer of any commercial or industrial establishment, for the purpose of its being filled up by the occupier of such house or of any specified part thereof or by such manager or officer with such particulars as the Provincial Government may direct regarding the inmates of such house or part thereof, or the persons employed under such manager or officer, as the case may be, at the time of the taking of the census.

(2) When such schedule has been so left, the said occupier, manager or officer, as the case may be, shall fill it up or cause it to be filled up to the best of his knowledge or belief so far as regards the inmates of such house or part thereof or the persons employed under him, as the case may be, at the time aforesaid, and shall sign his name thereto and, when so required, shall deliver the schedule so filled up and signed to the census-officer or to such person as the census-officer may direct.

Penalties.

9. (a) Any census-officer or any person lawfully required to give assistance towards the taking of a census who refuses or neglects to use reasonable diligence in performing any duty imposed upon him or in obeying any order issued to him in accordance with this Act or any rule made thereunder, or any person who hinders or obstructs another person in performing any such duty or in obeying any such order; or

(b) any census-officer who intentionally puts any offensive or improper question or knowingly makes any false return or, without the previous sanction of the Central Government or the Provincial Government, discloses any information which he has received by means of, or for the purposes of, a census return, or

(c) any person who intentionally gives a false answer to, or refuses to answer to the best of his knowledge or belief, any question asked of him by a census-officer which he is legally bound by section 6 to answer, or

(*d*) any person occupying any house, enclosure, vessel or other place who refuses to allow a census-officer such reasonable access thereto as he is required by section 7 to allow, or

(*e*) any person who removes, obliterates, alters or damages before the 31st day of March, 1941 any letters, marks or numbers which have been painted or affixed for the purposes of the census, or

(*f*) any person who, having been required under section 8 to fill up a schedule, knowingly and without sufficient cause fails to comply with the provisions of that section, or makes any false return thereunder,—

shall be punishable with fine which may extend to two hundred rupees.

Sanction required for prosecutions.

10. No prosecution under this Act shall be instituted except with the previous sanction of the Provincial Government or of an authority authorised in this behalf by the Provincial Government.

Operation of other laws not barred.

11. Nothing in this Act shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence under this Act:

Provided that no such prosecution shall be instituted except with the previous sanction referred to in section 10.

Jurisdiction.

12. No Court inferior to that of a Presidency Magistrate or a Magistrate of the second class shall try, whether under this Act or under any other law, anything which constitutes an offence under this Act.

Records of census not open to inspection not admissible in evidence.

13. No person shall have a right to inspect any book, register or record made by a census-officer in the discharge of his duty as such, or any schedule delivered under section 8, and notwithstanding anything to the contrary in the Indian Evidence Act, 1872, no entry in any such book, register, record or schedule shall be admissible as evidence in any civil proceeding whatsoever or in any criminal proceeding other than a prosecution under this Act or any other law for any act or omission which constitutes an offence under this Act.

Temporary suspension of other law as to mode of taking census in municipalities.

14. Notwithstanding anything in any enactment or rule with respect to the mode in which a census is to be taken in any municipality, the municipal authority, in consultation with the Superintendent of Census Operations or with such other authority as the Provincial Government may authorise in this behalf, shall, at the time appointed for the taking of the census of British India during the year 1941, cause the census of the municipality to be taken wholly or in part by any method authorised by or under this Act.

Power in regard to expenses.

15. Notwithstanding anything in any enactment or rule in regard to municipal, local, union or village funds, the Provincial Government may direct that the whole or any part of any expenses incurred for anything done in accordance with this Act or the rules made thereunder may be charged to any municipal, local, union or village fund constituted for, and on behalf of, the area within which such expenses were incurred.

Grant of statistical abstracts.

16. The Census Commissioner for British India or any Superintendent of Census Operations or such person as the Provincial Government may authorise in this behalf may, if he so thinks fit, at the request and cost (to be

determined by him) of any local authority or person, cause abstracts to be prepared and supplied containing any such statistical information as can be derived from the census returns for British India or the Province, as the case may be, being information which is not contained in any published report and which in his opinion it is reasonable for that authority or person to require.

Power to make rules.

17. (1) The Central Government may make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Central Government may make rules providing—

(a) for the appointment of census-officers and of persons to perform any of the duties of census-officers or to give assistance towards the taking of a census, and for the general instructions to be issued to such officers and persons;

(b) for the enumeration of persons employed on railways and their families and of other classes of the population for which it may be necessary or expedient to make special provision.

THE INDIAN SALT (AMENDMENT) ACT, 1939.

ACT No. XXV OF 1939.

[26th September, 1939

An Act further to amend the Indian Salt Act, 1882 for certain purposes.

WHEREAS it is expedient further to amend the Indian Salt Act, 1882 for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN SALT (AMENDMENT) ACT, 1939.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Amendment of section 1 of Act XII of 1882.

2. In section 1 of the Indian Salt Act, 1882 (hereinafter referred to as the said Act), for the words and figures "sections 2, 7 and 8," the word and figure "section 7," shall be substituted.

Amendment of section 3.

3. In section 3 of the said Act,—

(a) in the definition of "Assistant Commissioner" the words "an Assistant Commissioner of Northern India Salt-revenue, and also includes" shall be omitted;

(b) in the definition of "Salt-revenue-officer" the words "any officer of the Northern India Salt Department and also includes" shall be omitted.

Substitution of new section for section 5.

4. For section 5 of the said Act the following section shall be substituted, namely:—

Appointment of officers to control administration of salt-revenue.

"5. The Central Government may, by notification in the official Gazette, appoint with such designation as may be specified therein, one or two officers to control the administration of salt-revenue under this Act, and where two officers are so appointed, may, by like notification, from time to time define the territorial limits of their respective jurisdictions."

Amendment of section 22.

5. In the last paragraph of section 22 of the said Act, for the words "Commissioner of Northern India Salt-revenue" the words and figure "officer appointed under section 5" shall be substituted.

6. In section 30 of the said Act, for the words "the Commissioner of Northern India Salt-revenue" the words and figure "an officer appointed under section 5" shall be substituted.

Amendment of section 30.

THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1939.

ACT No. XXVI OF 1939.

[26th September, 1939

An Act further to amend the Code of Civil Procedure, 1908 *for a certain purpose.*

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908 for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1939.

Amendment of rule 48 of Order XXI of the First Schedule to Act V of 1908.

2. In sub-rule (1) of rule 48 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, for the words "in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be," the following shall be substituted, namely:—

"in this behalf,—

(*a*) where such salary or allowances are to be disbursed within the local limits to which this Code for the time being extends, the officer or other person whose duty it is to disburse the same shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be;

(*b*) where such salary or allowances are to be disbursed beyond the said limits, the officer or other person within those limits whose duty it is to instruct the disbursing authority regarding the amount of the salary or allowances to be disbursed shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be, and shall direct the disbursing authority to reduce the aggregate of the amounts from time to time to be disbursed by the aggregate of the amounts from time to time remitted to the Court."

THE INDIAN TEA CESS (AMENDMENT) ACT, 1939.

ACT No. XXVII OF 1939.

[26th September, 1939

An Act further to amend the Indian Tea Cess Act, 1903 *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Tea Cess Act, 1903 for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN TEA CESS (AMENDMENT) ACT, 1939.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Amendment of section 4 of Act IX of 1903.

2. In clause (*d*) of sub-section (2) of section 4 of the Indian Tea Cess Act, 1903, for the words "two on the recommendation of the Government of Bengal of which one is to represent the Tea Planters in North Bengal and one" the words "one on the recommendation of the Terai Indian Planters' Association, one on the recommendation of the Government of Bengal" shall be substituted.

THE MEDICAL DIPLOMAS ACT, 1939.

ACT No. XXVIII OF 1939.

[26th September, 1939

An Act to make the provision referred to in sub-section (1) *of section* 120 *of the Government of India Act*, 1935.

WHEREAS it is expedient to make the provision relating to medical diplomas granted in the United Kingdom or Burma which is referred to in sub-section (1) of section 120 of the Government of India Act, 1935;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MEDICAL DIPLOMAS ACT, 1939.

(2) It extends to the whole of British India.

Definitions.

2. In this Act—

(*a*) "diploma" has the meaning assigned to it in sub-section (7) of section 120 of the Government of India Act, 1935;

(*b*) "United Kingdom" means the United Kingdom of Great Britain and Northern Ireland.

Conditions for excluding from practice British subjects domiciled in the United Kingdom or India who hold medical diplomas granted in the United Kingdom on the ground of inadequacy of such diplomas.

3. So long as the condition set out in sub-section (3) of section 120 of the Government of India Act, 1935 continues to be fulfilled, a British subject domiciled in the United Kingdom or India who, by virtue of a medical diploma granted to him in the United Kingdom, is, or is entitled to be, registered in the United Kingdom as a qualified medical practitioner shall not, by or under any law for the time being in force, be excluded from practising medicine, surgery or midwifery in British India or in any part thereof, or from being registered as qualified so to do, on the ground that such diploma does not furnish a sufficient guarantee of his possession of the requisite knowledge and skill for the practice of medicine, surgery and midwifery, except in accordance with the following conditions, namely:—

(*a*) Notice of every proposal for excluding the holders of any such diploma from practice or registration shall be given in such form and in such manner as the Central Government may by rules made in this behalf prescribe, to the university or other body granting that diploma, and where such proposal is not made by the Central Government, to the Central Government also.

(*b*) No such proposal shall become operative until the expiration of twelve months after the notices referred to in clause (*a*) have been given.

(*c*) Such a proposal shall not become operative or, as the case may be, shall cease to operate, if His Majesty's Privy Council, on an application made to them under sub-section (2) of section 120 of the Government of India Act, 1935, determine that the diploma in question ought to be recognised as furnishing such a sufficient guarantee as aforesaid.

Conditions for excluding from practice British subjects domiciled in Burma who hold medical diplomas granted in the United Kingdom or Burma on a similar ground.

4. A British subject domiciled in Burma who, by virtue of a medical diploma granted to him in the United Kingdom or Burma, is, or is entitled to be, registered in the United Kingdom as a qualified medical practitioner shall not, by or under any law for the time being in force, be excluded from practising medicine, surgery or midwifery in British India or in any part thereof, or from being registered as qualified so to do, on the ground that such diploma does not furnish a sufficient guarantee of his possession of the requisite knowledge and skill for the practice of medicine, surgery and midwifery, except in accordance with conditions such as are set out in clauses (*a*), (*b*) and (*c*) of section 3.

THE INDIAN TARIFF (FOURTH AMENDMENT) ACT, 1939.

ACT No. XXIX OF 1939.

[26*th September*, 1939

An Act further to amend the Indian Tariff Act, 1934 for a certain purpose, and to validate the levy and collection of certain duty under that Act.

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934 for the purpose hereinafter appearing, and to validate the levy and collection of duty on the import of wood pulp during the period commencing the 1st day, and ending the 20th day, of April, 1939;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN TARIFF (FOURTH AMENDMENT) ACT, 1939.

Amendment of First Schedule to Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934, in paragraph (*c*) of Item No. 22 (5), to the entry in the fourth column the words and figure "or 25 per cent. *ad valorem*, whichever is higher" shall be added.

Validation of the levy and collection of certain duty.

3. The declaration inserted, in exercise of the power conferred by section 3 of the Provisional Collection of Taxes Act, 1931, in the Indian Tariff (Second Amendment) Bill, 1939 shall be deemed always to have applied to the provision in the said Bill relating to the duty on the import of wood pulp, notwithstanding that the said provision purported to impose a revenue, and not a protective, duty; and all duty levied and collected on the import of wood pulp during the period commencing the 1st day, and ending the 20th day, of April, 1939 is hereby declared to have been as validly levied and collected as if the said declaration had always applied to the said provision.

THE COMMERCIAL DOCUMENTS EVIDENCE ACT, 1939.

ACT No. XXX OF 1939.

[26*th September*, 1939

An Act to amend the Law of Evidence with respect to certain commercial documents.

WHEREAS it is expedient to amend the Law of Evidence with respect to certain commercial documents;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE COMMERCIAL DOCUMENTS EVIDENCE ACT, 1939.

(2) It extends to the whole of British India.

Statements of relevant facts in scheduled documents to be themselves relevant facts.

2. Notwithstanding anything contained in the Indian Evidence Act, 1872, statements of facts in issue or of relevant facts made in any document included in the Schedule as to matters usually stated in such document shall be themselves relevant facts within the meaning of that Act.

Presumption as to genuineness of documents.

3. For the purposes of the Indian Evidence Act, 1872, and notwithstanding anything contained therein, a Court—

(a) shall presume, within the meaning of that Act, in relation to documents included in Part I of the Schedule, and

(b) may presume, within the meaning of that Act, in relation to documents included in Part II of the Schedule,—

that any document purporting to be a document included in Part I or Part II of the Schedule, as the case may be, and to have been duly made by or under the appropriate authority, was so made and that the statements contained therein are accurate.

Definition.

4. In the Schedule the expression "recognised Chamber of Commerce" means a Chamber of Commerce recognised by the Government of its country as being competent to issue certificates of origin, and includes any other association similarly recognised.

THE SCHEDULE.

(*See* sections 2 and 3.)

PART I.

Documents in relation to which the Court "SHALL presume".

1. Lloyd's Register of Shipping.

2. Lloyd's Daily Shipping Index.

3. Lloyd's Loading List.

4. Lloyd's Weekly Casualty Reports.

5. Certificate of delivery of goods to the Manchester Ship Canal Company.

6. Official log book, Supplementary Official log book and official wireless log kept by a British ship.

7. Certificate of Registry, Safety Certificate, Safety Radio-Telegraphy Certificate, Exemption Certificate, Certificate of Survey, Declaration of Survey, International Load Line Certificate, British India Load Line Certificate, Report of Survey of a ship provisionally detained as unsafe, Report of Survey to be served upon the master of a ship declared unsafe upon survey, Docking Certificate, Memorandum issued under Article 56 of the International Convention for the Safety of Life at Sea, 1929.

8. Certificates A and B issued under the Indian Merchant Shipping Act, 1923.

9. The following documents relating to marine insurance, namely, insurance policy, receipt for premium, certificate of insurance and insurance cover note.

10. Certificate concerning the loss of country craft issued by the appropriate authority under Department of Commerce, Mercantile Marine Department Circular No. 2 of 1938.

11. Protest made before a Notary Public or other duly authorised official by a master of a ship relating to circumstances calculated to affect the liability of the ship-owner.

12. Licence or permit for radio-telegraph apparatus carried in ships or aircraft.

13. Certificate of registration of an aircraft granted by the Government of the country to which the aircraft belongs.

14. Certificate of airworthiness of an aircraft granted or validated by, or under the authority of, the Government of the country to which the aircraft belongs.

15. Licences and certificates of competency of aircraft personnel granted or validated by, or under the authority of, the Government of the country to which the personnel belongs.

16. Ground Engineer's Licence issued by a competent authority authorised in this behalf by Government.

17. Consular Certificate in respect of goods shipped or shut out, consular certificates of origin and consular invoice.

18. Certificate of origin of goods issued (but not merely attested) by a recognised Chamber of Commerce, or by a British Consular officer or British or Indian Trade Commissioner or Agent.

19. Receipt for payment of customs duty issued by a Customs authority.

20. Schedule issued by a Port, Dock, Harbour, Wharfage or Warehouse authority, or by a Railway company, showing fees, dues, freights or other charges for the storage, transport or other services in connection with goods.

21. Tonnage schedule and schedule of fees, commission or other charges for services rendered, issued by a recognised Chamber of Commerce.

22. The publication known as the Indian Railway Conference Association Coaching and Goods Tariffs.

23. Copy, certified by the Registrar of Companies, of the memorandum or the articles of association of a company, filed under the Indian Companies Act, 1913.

24. Protest, noting and certifying the dishonour of a bill of exchange, made before a Notary Public or other duly authorised official.

PART II.

Documents in relation to which the Court "MAY presume".

1. Survey Report issued by a competent authority—
(i) in respect of cargo loaded; or
(ii) certifying the quantity of coal loaded; or
(iii) in respect of the security of hatches.

2. Official log book, Supplementary Official log book and official wireless log kept by a foreign ship.

3. Dock certificate, dock chalan, dock receipt or warrant, Port Warehouse certificate or warrant, issued by, or under the authority of, a Port, Dock, Harbour or Wharfage authority.

4. Certificate issued by a Port, Dock, Harbour, Wharfage or other authority having control of acceptance of goods for shipping transport or delivery, relating to the date or time of shipment of goods, arrival of goods for acceptance, arrival of vessels or acceptance or delivery of goods, or to the allocation of berthing accommodation to vessels.

5. Export Application issued by a Port authority showing dues paid, weight and measurement and the shutting out of a consignment.

6. Certificate or receipt showing the weight or measurement of a consignment issued by the official measurer of the Conference Lines, or by a sworn or licensed measurer, or by a recognised Chamber of Commerce.

7. Reports and publications issued by a Port authority showing the movement of vessels, and certificates issued by such authority relating to such movements.

8. Certificate of safety for flight signed by a licensed Ground Engineer.

9. Aircraft Log Book, Journey Log Book and Log Book, maintained by the owner or operator in respect of aircraft.

10. Passenger List or Manifest of Goods carried in public transport aircraft.

11. Passenger ticket issued by a steamship company or air transport company.

12. Air Consignment Note and Baggage Check, issued by an air transport company in respect of goods carried by air, and the counterfoil or duplicate thereof retained by the carrier.

13. Aircraft Load Sheet.

14. Storage warrant of a warehouse recognised by a Customs, Excise, Port, Dock, Harbour or Wharfage authority.

15. Acknowledgment receipt for goods granted by a Port, Dock, Harbour, Wharfage or Warehouse authority or by a Railway or Steamship company.

16. Customs or Excise pass and Customs or Excise permit or certificate, issued by a Customs or Excise authority.

17. *Force majeure* certificate issued by a recognised Chamber of Commerce.

18. Receipt of a Railway or Steamship company granted to a consignor in acknowledgment of goods entrusted to the company for transport.

19. Receipt granted by the Posts and Telegraphs Department.

20. Certificate or survey award issued by a recognised Chamber of Commerce relating to the quality, size, weight or valuation of any goods, count of yarn or percentage of moisture in yarn and other goods.

21. Copy, certified by the Registrar of Companies, of the Balance Sheet, Profit and Loss Account, and audit report of a company, filed with the said Registrar under the Indian Companies Act, 1913, and the rules made thereunder.

THE INDIAN CARRIAGE BY AIR (AMENDMENT) ACT, 1939.

ACT No. XXXI OF 1939.

An Act to amend the Indian Carriage by Air Act, 1934, for a certain purpose.

WHEREAS it is expedient to amend the Indian Carriage by Air Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN CARRIAGE BY AIR (AMENDMENT) ACT, 1939.

Amendment of section 2 of Act XX of 1934.

2. In section 2 of the Indian Carriage by Air Act, 1934, after sub-section (3) the following sub-section shall be inserted, namely:—

"(3-*A*) Any reference in the First Schedule to agents of the carrier shall be construed as including a reference to servants of the carrier".

THE INDIAN RUBBER CONTROL (AMENDMENT) ACT, 1939.

ACT No. XXXII OF 1939.

An Act further to amend the Indian Rubber Control Act, 1934.

WHEREAS the Agreement between the Governments of France, the United Kingdom, India, the Netherlands and Siam to regulate production and export of rubber, signed in London on the 7th day of May, 1934, as amended by the Protocols of the 27th day of June, 1935, the 22nd day of May, 1936 and the 5th day of February, 1937, has been revised in accordance with the recommendation, accepted by all the said Governments, of the International Rubber Regulation Committee of the 29th day of March, 1938 and has come into force as so revised on the 1st day of January, 1939;

AND WHEREAS it is expedient further to amend the Indian Rubber Control Act, 1934 for the purpose of implementing the said Agreement as so revised, and for certain other purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN RUBBER CONTROL (AMENDMENT) ACT, 1939.

(2) It shall be deemed to have come into force on the 1st day of January, 1939.

Amendment of section 1 of Act XXVIII of 1934.

2. In sub-section (4) of section 1 of the Indian Rubber Control Act, 1934 (hereinafter referred to as the said Act), for the figure "1938" the figure "1943" shall be substituted.

Amendment of section 2.

3. In section 2 of the said Act,—

(*a*) clause (*a*) shall be renumbered as clause (*aa*), and before the said clause as so renumbered, the following clause shall be inserted, namely:—

'(*a*) "Agreement" means the Agreement between the Governments of France, the United Kingdom, India, the Netherlands and Siam to regulate production and export of rubber, signed in London on the 7th day of May, 1934, as amended by the Protocols of the 27th day of June, 1935, the 22nd day of May, 1936 and the 5th day of February, 1937, and as revised in accordance with the recommendation, accepted by all the said Governments, of the International Rubber Regulation Committee of the 29th day of March, 1938;';

(*b*) in clause (*b*)—

(*i*) for the words "by sea or by land" the words "by land, sea or air" shall be substituted;

(*ii*) the words "and Burma" shall be omitted;

(*c*) after clause (*c*) the following clause shall be inserted, namely:—

'(*cc*) "International Rubber Regulation Committee" means the Committee referred to in Article 15 of the Agreement;';

(*d*) for clause (*d*) the following clause shall be substituted, namely:—

'(*d*) "net exports" of rubber means the difference between the total exports of rubber during a period and the total imports of crude rubber during the same period exclusive of rubber imported from Burma;';

(*e*) for clause (*g*) the following clause shall be substituted, namely:—

'(*g*) "to plant" means to propagate a rubber plant from seed or any living portion of the rubber plant that may be used to propagate it; "new planting" means planting in an area which has not since the 1st day of June, 1934 carried any rubber plants or substituting in an area carrying rubber plants and other growths, rubber growths for those other growths; "to replant" means to plant, in such circumstances as not to constitute new planting, on any one acre of an area carrying rubber plants on the 1st day of June, 1934 more than thirty rubber plants; and "to supply" means so to plant on any one acre of such an area thirty rubber plants or less;';

(*f*) for clause (*h*) the following clause shall be substituted, namely:—

'(*h*) "rubber" means—

(*i*) crude rubber, that is to say, rubber prepared from the leaves, bark or latex of any rubber plant,

(*ii*) the latex of any rubber plant, whether fluid or coagulated, in any stage of the treatment to which it is subjected during the process of conversion into rubber, and

(*iii*) latex in any state of concentration, and includes, for the purposes of determining net exports and regulating export, the rubber content of any article manufactured wholly or partly from crude rubber in India;';

(*g*) for clause (*i*) the following clause shall be substituted, namely:—

'(*i*) "rubber plant" includes plants, trees, shrubs and vines, and any leaves, flowers, seeds, buds, twigs, branches, roots and any living portion thereof, that may be used to propagate any of the following, namely:—

(*i*) *Hevea Brasiliensis* (Para rubber),

(*ii*) *Manihot Glaziovii* (Ceara rubber),

(*iii*) *Castilloa elastica*,

(*iv*) *Ficus elastica* (Rambong),

(*v*) any other plant, tree, shrub or vine which the Committee may, by notification in the Gazette of India, declare to be a rubber plant for the purposes of this Act;'.

Amendment of section 6. **4.** To sub-section (1) of section 3 of the said Act the following shall be added, namely:—

"and such Committee shall be a body corporate and have perpetual succession and a common seal, and shall by the said name sue and be sued".

Amendment of section 8. **5.** In section 8 of the said Act,—

(*a*) sub-sections (1) and (2) shall be renumbered as sub-section (2) and (3) respectively, and the following shall be inserted as sub-section (1), namely:—

Annual report and Accounts. "(1) The Committee shall publish an annual report on the working of this Act.";

(b) after sub-section (3) as so renumbered, the following sub-section shall be inserted, namely:—

"(4) If any item of expenditure is disallowed under sub-section (3), an appeal shall lie to the Central Government whose decision in the matter shall be final."

Amendment of section 10.

6. In section 10 of the said Act, after clause (a) the following clause shall be inserted, namely:

"(aa) regulating the term of office of members of the Committee, and the circumstances in which, and the authority by which, members may be removed;".

Substitution of new section for section 11.

7. For section 11 of the said Act the following section shall be substituted, namely:—

Limitation of application of Act.

"11. Nothing in this Act shall apply to the export of rubber by parcel post or to the re-export of rubber contained in imported manufactured articles."

Amendment of section 12.

8. In section 12 of the said Act,—

(a) in sub-section (1), the words "or Burma" shall be omitted;

(b) in sub-section (2), for the words "grown, produced or contained in an article manufactured in a country other than India and Burma" the words "grown or produced in any country other than India" shall be substituted.

Amendment of section 15.

9. In sub-section (2) of section 15 of the said Act, for the word "twelve" the word "ten" shall be substituted.

Amendment of section 16.

10. In sub-section (1) of section 16 of the said Act,—

(a) after the words "for any period shall" the words, figures and brackets, "subject to the provisions of sub-section (2) of section 17," shall be inserted;

(b) the proviso shall be omitted.

Amendment of section 17.

11. To sub-section (2) of section 17 of the said Act the following proviso shall be added, namely:—

"Provided that the Committee may refuse, either absolutely or for such period as it thinks fit, to grant such licence and certificate—

(a) in respect of rubber under attachment by order of a competent Court, or

(b) where a *bona fide* dispute exists as to the person entitled to receive the quota,

and where such refusal is absolute, may cancel the unexhausted balance of the quota."

Amendment of section 18.

12. In sub-section (1) of section 18 of the said Act, the words "or British Burma" and the words "and Burma" shall be omitted.

Amendment of section 19.

13. In section 19 of the said Act,—

(a) in sub-section (1), after the words "licences issued against it" the words, figures and brackets, " the amount, if any, thereof transferred under sub-section (2) of section 16" shall be inserted;

(b) in sub-section (2), the words "and Burma" shall be omitted.

Amendment of section 20.

14. In sub-section (1) of section 20 of the said Act,—

(a) for the words "from a port in British India" the words "or shall be exported" shall be substituted;

(b) after the words "quantity to be shipped" the words "or exported" shall be inserted.

Amendment of section 21.

15. In section 21 of the said Act,—

(a) in sub-section (1), for the words commencing "relating to the area" and ending "manufactured in the factory" the following shall be substituted, namely:—

"and documents relating to the area planted with rubber, or to the production (including costs of production), manufacture, sale or export of rubber produced on the estate or manufactured in the factory, or to the ownership of the estate or factory, or to any other matter";

(b) in sub-section (2),—

(i) after the words "any return" the words "or document" shall be inserted;

(ii) after the words "may cancel" the words "or suspend for such period as it thinks fit" shall be inserted;

(iii) for the word and figure "section 15" the word and figure "section 17" shall be substituted.

Amendment of section 22.

16. In section 22 of the said Act,—

(a) in sub-section (1),—

(i) in clause (a), for the words "per hundred pounds" the words "for every hundred pounds or part thereof" shall be substituted;

(ii) in clause (b), after the words "accounts of quotas" the words "or other documents relating thereto" shall be inserted;

(b) in sub-section (2), for the words "international" the words "institution or" shall be substituted.

Omission of section 23.

17. Section 23 of the said Act shall be omitted.

Amendment of section 24.

18. In clause (b) of section 24 of the said Act, the words "or British Burma" and the words "and Burma" shall be omitted.

Amendment of section 25.

19. In section 25 of the said Act, after the words "no order" the words "cancelling or suspending the unexhausted balance of any quota or" shall be inserted.

Substitution of new sections for sections 26, 27 and 28.

20. For sections 26, 27 and 28 of the said Act the following sections shall be substituted, namely:—

Control of cultivation of rubber.

"26. So long as this Act remains in force no person shall, save in pursuance of a written permission granted by or on behalf of the Committee under this Act,—

(a) carry out new planting of rubber plants on any land except for the purpose of supply, or

(b) after the expiry of the year 1940, replant any land with rubber plants where any limitations on such replanting have been imposed under sub-section (3) of section 27.

Permission for new planting.

27. (1) The total area in British India in respect of which permission for new planting otherwise than for the purpose of supply may be granted in the years 1939 and 1940 shall be such area, being as nearly as may be five *per centum* of the total area which was planted with rubber plants on the 31st day of December, 1938 as the Committee may, by notification in the Gazette of India, specify in this behalf, or such larger area as the Committee may, by like notification, designate as being fixed in this behalf for those years by the International Rubber Regulation Committee, and shall not thereafter in any period exceed such area as the Committee may, in like manner, designate as so fixed for that period:

Provide that such area may be modified to provide for such transfers of permissions for new plantings between British India and an Indian State as may be consented to by the Committee under this Act and under any law or order having the force of law of the Indian State concerned.

(2) A permission granted for new planting during the years 1939 and 1940 shall cease to be of effect at the end of the year 1940, and any such permission granted thereafter shall cease to be of effect at the end of the particular period referred to in sub-section (1) within which it was granted.

(3) Until the end of the year 1940 there shall be no restrictions upon replanting, but thereafter replanting shall be subject to such limitations, if any, as the Committee may, by notification in the Gazette of India, designate as imposed in this behalf by the International Rubber Regulation Committee.

(4) Where under sub-section (3) any limitations have been imposed on replanting, the provisions of sections 28, 28-A, 29 and 30 shall apply to permissions to replant as they apply to permissions for new planting.

Transfer of permission for new planting.

28. With the consent of the Committee—

(*a*) a permission for new planting under section 26 may be transferred within British India, wholly or in part, and

(*b*) where provision in this behalf is made by or under any law or order having the force of law of an Indian State, a permission for new planting granted under this Act or under such law or order may be transferred, wholly or in part, to or from that Indian State, as the case may be.

Rules as to principles governing grants of permission for new planting, etc.

28-A. The Committee shall make by-laws to regulate the principles and procedure to be followed in granting permissions for new planting and for giving consent to transfers of such permissions."

Amendment of section 29.

21. In sub-section (1) of section 29 of the said Act,—

(*a*) for the words "to plant rubber plants or to replant" the words "for new planting of" shall be substituted;

(*b*) after the words "the Committee" the words "in such form as the Committee may specify" shall be inserted.

Amendment of section 31.

22. In section 31 of the said Act,—

(*a*) in sub-section (1), for the words "such returns" the words "such documents, plans or returns" shall be substituted;

(*b*) in sub-section (3), for the words "to plant rubber plants on that estate or to replant any part of that estate" the words "for new planting of rubber plants on that estate or may cancel any such permission already given" shall be substituted.

Amendment of section 32.

23. In section 32 of the said Act, for the words "by sea or by land" the words "by land, sea or air" shall be substituted.

Substitution of new sections for section 33.

24. For section 33 of the said Act the following sections shall be substituted, namely:—

Prohibition of export of rubber plants except to territories to which the Agreement applies.

"33. (1) No person shall export rubber plants except to a territory specified in the Schedule (being a territory to which the Agreement applies):

Provided that the export of rubber plants to such territories shall be subject to such conditions as the Central Government may think fit to prescribe.

(2) Every person exporting rubber plants to, or importing rubber plants from, a territory specified in the Schedule shall, within such time and in such manner as may be prescribed, submit to the Committee a return showing the particulars of such exportation or importation.

(3) The Committee shall compile from such returns and submit to the Central Government at such times and in such form as may be prescribed consolidated statements of the total quantities and descriptions of rubber plants so exported and imported.

Power to amend the Schedule.

33-A. If while this Act remains in force, the Government of any country accedes to the Agreement, and Central Government may, by notification in the official Gazette, amend the Schedule by the insertion of the descriptions of the territories by virtue of which accession the Agreement will thereafter apply."

Amendment of section 36.

25. In section 36 of the said Act,—

(a) after clause (a) the following clause shall be inserted, namely:—

"(aa) prescribing the conditions under which rubber plants may be exported to territories specified in the Schedule, and the times within which and the form in which returns of imports and exports of rubber plants from and to such territories shall be submitted to the Committee;";

(b) in clause (c), after the word "stocks" the words "of rubber and of imports and exports of rubber plants from and to territories specified in the schedule" shall be inserted.

Amendment of section 37.

26. In section 37 of the said Act, for the words and figure "of section 33" the words, figures and brackets "of sub-section (1) of section 33" shall be substituted.

Amendment of section 38.

27. In section 38 of the said Act,—

(a) after the words "as required by" the words, figures and brackets "sub-section (2) of section 33 or" shall be inserted;

(b) after the word and figure "section 34" the words "the person importing or exporting rubber plants or" shall be inserted.

Amendment of section 39

28. In section 39 of the said Act,—

(a) for the words "holding stocks of rubber" the words "importing or exporting rubber plants or holding stocks of rubber, as the case may be" shall be substituted;

(b) for the words, figures and brackets "sub-section (1) of section 31" the words, figures and brackets "sub-section (2) of section 33" shall be substituted;

(c) after the word and figure "section 34" the words, figures and brackets "or any document, plan or return under sub-section (1) of section 31" shall be inserted.

Amendment of section 42.

29. In section 42 of the said Act, for the words "plants rubber plants or causes rubber plants to be planted" the words "carries out new planting of rubber plants or causes such new planting to be carried out" shall be substituted.

Insertion of new Chapter.

30. After section 44 of the said Act the following Chapter shall be inserted, namely:—

"CHAPTER VI.

SUSPENSION OF OPERATION OF ACT.

Suspension of operation of certain provisions of this Act.

45. (1) If the Central Government is satisfied that an emergency has arisen rendering it necessary for the security of India that certain of the restrictions imposed by this Act should cease to be imposed, the Central Government may, by notification in the official Gazette, suspend, either indefinitely or for such period as may be specified in the notification, the operation of all the provisions of this Act except those relating to the planting and export of rubber plants.

(2) If partial suspension of the Agreement under paragraph (c) of Article 21 thereof is intimated to the Central Government, the Central Government shall, by notification in the official Gazette, suspend indefinitely the operation of all the provisions of this Act except those relating to the planting and export of rubber plants.

(3) Where the operation of certain provisions of this Act has under sub-section (1) or sub-section (2) been suspended indefinitely, such suspension may at any time while this Act remains in force be removed by the Central Government by notification in the official Gazette in this behalf."

Insertion of Schedule.

31. To the said Act the following Schedule shall be added, namely:—

"THE SCHEDULE.

(*See* sections 33 and 33-A.)

List of territories outside India to which the Agreement applies.

1. French Indo-China.

2. Burma, Ceylon, the Federated Malay States, the Unfederated Malay States, the Straits Settlements, the State of North Borneo, Brunei and Sarawak.

3. The Netherlands Indies.

4. Siam."

THE INDIAN RAILWAYS (AMENDMENT) ACT, 1939.

ACT NO. XXXIII OF 1939.

[28*th September*, 1939

An Act further to amend the Indian Railways Act, 1890, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Railways Act, 1890, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN RAILWAYS (AMENDMENT) ACT, 1939.

Insertion of new section 42-B in Act IX of 1890.

2. In the Indian Railways Act, 1890, after section 42-A, the following section shall be inserted, namely:—

Power of the Federal Railway Authority to fix maximum and minimum rates.

42-B. (1) The Federal Railway Authority may by general or special order fix maximum and minimum rates for the whole or any part of a railway, other than a minor railway, and prescribe the conditions in which such rates will apply.

(2) Any complaint that a railway administration is contravening any order issued by the Federal Railway Authority in accordance with the provisions of this section shall be determined by that Authority.''

THE REPEALING AND AMENDING ACT, 1939.

ACT NO. XXXIV OF 1939.

[28*th September*, 1939.

An Act to amend certain enactments and to repeal certain other enactments.

WHEREAS it is expedient that certain amendments should be made in the enactments specified in the First Schedule; and whereas it is also expedient that the enactments specified in the Second Schedule, which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by expressed specific repeal should be expressly and specifically repealed;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE REPEALING AND AMENDING ACT, 1939.

Amendment of certain enactments.

2. The enactments specified in the First Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

Repeal of certain enactments.

3. The enactments specified in the Second Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Savings.

4. The repeal by this Act of any enactments shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to; and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing; nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

THE FIRST SCHEDULE.

AMENDMENTS.

(*See* Section 2.)

Year. 1	No. 2	Short title. 3	Amendments. 4
			Act of the Governor of Bombay in Council.
1879	VI	The Bombay Port Trust Act, 1879.	In the second paragraph of section 39, for the words "the said purposes" the words "the general purposes of this Act" shall be substituted.
			Acts of the Governor General in Council.
1882	XIX	The Punjab University Act, 1882.	In sub-section (*1*) of section 2, for the words "Central Government for the time being" the words "Governor-General" shall be substituted.
1890	IX	The Indian Railways Act, 1890.	In Chapter V,— (*i*) for the heading "RAILWAY COMMISSIONS AND TRAFFIC FACILITIES" the following heading shall be substituted, namely:— " TRAFFIC FACILITIES " ; (*ii*) the sub-headings "*Railway Commissions*" and "*Traffic Facilities*" shall be omitted; (*iii*) in section 98, for the words "in those provisions" the words " in the foregoing provisions of this Chapter" shall be substituted.
1903	X	The Victoria Memorial Act, 1903.	In clause (*e*) of sub-section (*1*) of section 2, for the words "the Secretary to the Government of India in the Foreign Department" the words "the Political Secretary" shall be substituted.
1903	XIV	The Indian Foreign Marriage Act, 1903.	In sub-section (*2*) of section 1, the words "the Shan States" shall be omitted
1904	VIII	The Indian Universities Act, 1904.	In sub-section (*1*) of section 6, for the words "Universities of Calcutta and" the words "University of Calcutta" shall be substituted. In sub-section (*1*) of section 8, for the words "and by notification" the words "by notification" shall be substituted In the First Schedule, in the first entry under the heading "*The University of the Punjab*" for the words "Chief Judge" the words "Chief Justice" shall be substituted.
1908	IX	The Indian Limitation Act, 1908.	In article 7 of the First Schedule, the words and figure "not provided for by this Schedule, article 4" shall be omitted.
1911	II	The Indian Patents and Designs Act 1911.	In sub-section (*1a*) of section 21A, the words "the Secretary of State for India in Council or", in both places where they occur, shall be omitted
1913	VII	The Indian Companies Act, 1913.	In sub-section (*6*) of section 83, for the words " a further fine to twenty-five rupees " the words " a further fine not exceeding twenty-five rupees " shall be substituted. In proviso (*2*) of section 107, for the words " such Central Government " the words " the Central Government " shall be substituted.

Year. 1	No. 2	Short title. 3	Amendments. 4
1913	VII	The Indian Companies Act, 1913.	In sub-section (*1*) of section 207, the word "to" between the words "sent out" and "make a declaration" shall be omitted.
1920	V	The Provincial Insolvency Act, 1920.	In section 20, for the words "this sub-section" the words "this section" shall be substituted.
			Acts of the Indian Legislature.
1922	XI	The Indian Income-tax Act, 1922.	In sub section (*1*) of section 17, for the word and figures "section 17" the word and figures "section 27" shall be substituted.
1923	XIV	The Indian Cotton Cess Act, 1923.	In clause (*ia*) of section 4, for the words "Expert Adviser to the Imperial Council of Agricultural Research" the words "Agricultural Commissioner with the Government of India" shall be substituted.
1924	II	The Cantonments Act, 1924.	In Chapter III, for the heading "BOARDS AND CANTONMENT BOARDS" the followidg heading shall be substituted, namely :— "CANTONMENT BOARDS".
			In clause (*a*) of sub-section (*3*) of section 119, and in sub-section (*1*) of section 233, for the words "that Authority" the words "it" shall be substituted.
			In sub-section (*2*) of section 131, for the words "that Authority" the words "that Board" shall be substituted.
			In the second column of Schedule V, opposite the entry relating to section 126, after the words "Board's notice to" the words "remove," shall be inserted.
1929	VII	The Trade Disputes Act, 1929.	In sub-section (*1*) of section 18A, (*i*) for the word "them" the word "it" for the word "their", where it first occurs, the word "its", and where it occurs for the second time, the word "the" shall be substituted ; and (*ii*) for the words "or by a railway company" the words "or by the Federal Railway Authority or a railway company operating a Federal Railway" shall be substituted.
			Acts of the Central Legislature.
1938	VIII	The Indian Tea Control Act, 1938.	In sub-section (*4*) of section 27, for the words, brackets and figure "upto a total area in each province as may be determined under sub-clause (*3*)" the words, brackets and figure "upto such total area in each province as may be notified under sub-section (*3*)" shall be substituted
1939	VII	The Indian Income-tax (Amendment) Act, 1939.	In sub-clause (*iv*) of clause (*a*) of section 36, for the words 'after the words "made by an Income-tax officer"' the words figures and brackets 'after the word and figure "section 46" inserted by sub-clause (*iii*) of this clause' shall be substituted.

THE SECOND SCHEDULE.

REPEALS.

(*See* Section 3.)

Year.	No.	Short title.	Extent of repeal.
1	2	3	4
			Act of the Governor General in Council.
1850	V	The Indian Coasting Trade Act, 1850.	The whole.
			Acts of the Indian Legislature.
1922	VII	The Indian Emigration Act, 1922	Section 32.
1923	V	The Indian Boilers Act, 1923.	The second proviso to section 6.
1924	IV	The Central Board of Revenue Act, 1924.	Section 4 and the Schedule.
1929	XXI	The Transfer of Property (Amendment) Supplementary Act, 1929.	The Schedule.
1933	XIII	The Safeguarding of Industries Act, 1933	The whole.

THE DEFENCE OF INDIA ACT, 1939.

ACT No. XXXV OF 1939.

[29*th September*, 1939.

An Act to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences.

WHEREAS an emergency has arisen which renders it necessary to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences;

AND WHEREAS the Governor-General in his discretion has declared by Proclamation under sub-section (1) of section 102 of the Government of India Act, 1935, that a grave emergency exists whereby the security of India is threatened by war;

It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent, commencement and duration.

1. (1) This Act may be called THE DEFENCE OF INDIA ACT, 1939.

(2) It extends to the whole of British India, and it applies also—

(*a*) to British subjects and servants of the Crown in any part of India;

(*b*) to British subjects who are domiciled in any part of India wherever they may be;

(*c*) in respect of the regulation and discipline of any naval, military or air force raised in British India, to members of, and persons attached to, employed with, or following, that force, wherever they may be; and

(*d*) to, and to persons on, ships and aircraft registered in British India wherever they may be.

(3) This section shall come into force at once, and the remaining provisions of this Act shall come into force in such areas and on such date or dates as the Central Government may, by notification in the official Gazette, appoint.

(4) It shall be in force during the continuance of the present war and for a period of six months thereafter.

CHAPTER II.

EMERGENCY POWERS.

Powers to make rules.

2. (1) The Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, or may empower any authority to make orders providing for, all or any of the following matters, namely:—

(i) ensuring the safety and welfare of His Majesty's forces, ships and aircraft, and preventing the prosecution of any purpose likely to prejudice the operations of His Majesty's forces or the forces of His Majesty's allies;

(ii) prohibiting anything likely to prejudice the training, discipline or health of His Majesty's forces;

(iii) preventing any attempt to tamper with the loyalty of persons in, or to dissuade (otherwise than with advice given in good faith to the person dissuaded for his benefit or that of any member of his family or any of his dependents) persons from entering, the service of His Majesty;

(iv) preventing anything likely to assist the enemy or to prejudice the successful conduct of war, including—

(*a*) communications with the enemy or agents of the enemy,

(*b*) acquisition, possession without lawful authority or excuse and publication of information likely to assist the ememy,

(*c*) contribution to, participation in, or assistance in, the floating of loans raised by or on behalf of the enemy, and

(*d*) advance of money to, or contracts or commercial dealings with, the enemy, enemy subjects or persons residing, carrying on business, or being, in enemy territory;

(v) preventing the spreading without lawful authority or excuse of false reports or the prosecution of any purpose likely to cause disaffection or alarm, or to prejudice His Majesty's relations with foreign powers, or to promote feelings of enmity and hatred between different classes of His Majesty's subjects;

Explanation.—To point out, without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of His Majesty's subjects does not amount to promoting such feelings within the meaning of this clause.

(vi) requiring the publication of news and information;

(vii) regulating the conduct of persons in respect of areas the control of which is considered necessary or expedient, and the removal of persons from such areas;

(viii) requiring any person or class of persons to comply with a scheme of defence;

(ix) ensuring the safety of ports, dockyards, light-houses, lightships, aerodromes, railways, telegraphs, post offices, signalling apparatus and all other means of communication, sources of water-supply, works for the supply of water, gas or electricity and any other place or thing the protection of which is necessary for the defence of British India;

(x) the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do, or abstain from doing, anything;

(xi) the control of persons entering, departing from, or travelling in, British India, and of foreigners residing or being in British India;

(xii) prohibiting or regulating traffic, and the use of vessels, buoys, lights and signals, in ports and territorial, tidal and inland waters;

(xiii) restricting the charter of foreign vessels;

(xiv) regulating the structure and equipment of vessels used or likely to be used by the Central Government, for the purpose of ensuring the safety thereof and of persons therein;

(xv) regulating work in dockyards and shipyards in respect of the construction and repairs of vessels;

(xvi) prohibiting or regulating the sailings of vessels from ports, traffic at aerodromes and the movement of aircraft, and traffic on railways, tramways and roads, and reserving, and requiring to be adapted, for the use of the Central Government, all or any accommodation in vessels, aircraft, railways, tramways or road vehicles for the carriage of persons, animals or goods;

(xvii) impressment of vessels, aircraft, vehicles and animals for transport;

(xviii) prohibiting or regulating the use of postal, telegraph or telephonic services, including the taking possession of such services and the delaying, seizing, intercepting or interrupting of postal articles or telegraphic or telephonic messages;

(xix) regulating the delivery otherwise than by postal or telegraphic service of postal articles and telegrams;

(xx) the control of any trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to, articles or things of any description whatsoever which can be used in connection with the conduct of war or for maintaining supplies and services essential to the life of the community;

(xxi) ensuring the ownership and control of mines by British subjects;

(xxii) controlling the use or disposal of, or dealings in, coin, bullion, securities or foreign exchange;

(xxiii) the control of any road or pathway, waterway, ferry or bridge, river, canal or other source of water-supply;

(xxiv) the requisitioning of any property, movable or immovable, including the taking possession thereof and the issue of any orders in respect thereof;

(xxv) prohibiting or regulating the possession, use or disposal of—

(a) explosives, inflammable substances, arms and ammunitions of war,

(b) vessels,

(c) wireless telegraphic apparatus,

(d) aircraft, and

(e) photographic and signalling apparatus and any means of recording information;

(xxvi) applying the provisions of the Sea Customs Act, 1878, and in particular section 19 thereof, to the prohibition or restriction of the import or export of goods to a particular person or a particular class of persons;

(xxvii) prohibiting or regulating the bringing into, or taking out of, British India and the possession, use or transmission of ciphers and other secret means of communicating information;

(xxviii) prohibiting or regulating the publication of inventions and designs;

(xxix) preventing the disclosure of official secrets;

(xxx) prohibiting or regulating meetings, assemblies, fairs and processions;

(xxxi) preventing or controlling any use, calculated to prejudice the public safety, the maintenance of public order, the defence of British India or the prosecution of war, of uniforms, flags and insignia and of anything similar thereto;

(xxxii) ensuring the accuracy of any report or declaration legally required of any person;

(xxxiii) preventing the unauthorized change of names;

(xxxiv) preventing anything likely to cause misapprehension in respect of the identity of any official person, official document or official property or in respect of the identity of any person, document or property purporting to be, or resembling, an official person, official document or official property;

(xxxv) entry into, and search of, any place reasonably suspected of being used for any purpose prejudicial to the public safety or interest, to the defence of British India or to the efficient prosecution of war, and for the seizure and disposal of anything found there and reasonably suspected of being used for such purpose.

(3) The rules made under sub-section (1) may further—

(i) provide for the arrest and trial of persons contravening any of the rules;

(ii) provide that any contravention of, or any attempt to contravene, and any abetment of, or attempt to abet, the contravention of any of the provisions of the rules, or any order issued under any such provision, shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both;

(iii) provide for the seizure, detention and forfeiture of any property in respect of which such contravention, attempt or abetment as is referred to in the preceding clause has been committed;

(iv) confer power and impose duties—

(a) upon the Central Government or officers and authorities of the Central Government as respects any matter, notwithstanding that that

matter is one in respect of which the Provincial Legislature also has power to make laws, and

(b) upon any Provincial Government or officers and authorities of any Provincial Government as respects any matter notwithstanding that that matter is one in respect of which the Provincial Legislature has no power to make laws;

(v) prescribe the duties and powers of public servants and other persons as regards preventing the contravention of, or securing the observance of, the rules;

(vi) provide for preventing obstruction and deception of, and disobedience to, any person acting, and interference with any notice issued, in pursuance of the rules;

(vii) prohibit attempts by any person to screen from punishment any one, other than the husband or wife of such person, contravening any of the rules;

(viii) empower or direct any authority to take such action as may be specified in the rules or as may seem necessary to such authority for the purpose of ensuring the public safety or interest or the defence of British India;

(ix) provide for charging fees in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the rules.

(4) The Central Government may by order direct that any power or duty which by rule under sub-section (1) is conferred or imposed upon the Central Government shall in such circumstances and under such conditions, if any, as may be specified in the direction be exercised or discharged—

(a) by any officer or authority subordinate to the Central Government, or

(b) whether or not the power or duty relates to a matter with respect to which a Provincial Legislature has power to make laws, by any Provincial Government or by any officer or authority subordinate to such Government, or

(c) by any other authority.

(5) A Provincial Government may by order direct that any power or duty which by rule made under sub-section (1) is conferred or imposed on the Provincial Government, or which, being by such rule conferred or imposed on the Central Government, has been directed under sub-section (4) to be exercised or discharged by the Provincial Government, shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority, not being an officer or authority subordinate to the Central Government.

Effect of rules, etc., inconsistent with other enactments.

3. Any rule made under section 2, and any order made under any such rule, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

Special powers to control civilian personnel employed in connexion with His Majesty's forces.

4. The Central Government may, by notification in the official Gazette, direct by general or special order that any persons who, not being members of His Majesty's forces, are attached to, or employed with, or following, those forces, shall be subject to naval, military or air force law, and thereupon such persons shall be subject to discipline, and liable to punishment for offences, under the Indian Navy (Discipline) Act, 1934, the Indian Army Act, 1911, or the Indian Air Force Act, 1932, as the case may require, as if they were included in such class of persons subject to any of those Acts as may be specified in the notification.

Enhanced penalties.

5. (1) If any person, with intent to wage war against His Majesty or to assist any State at war with His Majesty, contravenes any provision of the rules made under section 2 or any order issued under any such rule, he shall be punishable with death, or transportation for life, or imprisonment for a term which may extend to ten years, and shall also be liable to fine.

(2) If any person—

(*a*) contravenes any such provision of, or any such rule or order made under, the Indian Aircraft Act, 1934, as may be notified in this behalf by the Central Government, or

(*b*) in any area notified in this behalf by a Provincial Government, contravenes any such provision of, or any such rule made under, the Indian Arms Act, 1878, the Indian Explosives Act, 1884, or the Explosive Substances Act, 1908, as may be notified in this behalf by the Provincial Government,

he shall, notwithstanding anything contained in any of the aforesaid Acts or rules made thereunder, be punishable with imprisonment for a term which may extend to five years, or, if his intention is to assist any State at war with His Majesty or to wage war against His Majesty, with death, transportation for life, or imprisonment for a term which may extend to ten years, and shall in either case also be liable to fine.

(3) For the purposes of this section, any person who attempts to contravene, or abets or attempts to abet, or does any act preparatory to, a contravention of, a provision of any law, rule or order, shall be deemed to have contravened that provision.

Temporary amendments of Acts.

6. During the continuance of this Act,—

(1) section 1 of the Geneva Convention Act, 1911, shall have effect in British India as if, in sub-section (1) thereof, for the words "shall be liable on summary conviction to a fine not exceeding ten pounds", the words "shall be punishable with imprisonment for a term which may extend to six months and shall also be liable to a fine" had been substituted;

(2) section 5 of the Indian Official Secrets Act, 1923, shall have effect as if—

(*a*) in sub-section (1) thereof, after the words "in his possession or control" the words "any information likely to assist the enemy, as defined in the rules made under the Defence of India Act, 1939, or" had been inserted, and after the words "in such a place" the words "or which relates to, or is used in, a protected area, as defined in the rules made under the Defence of India Act, 1939, or relates to anything in such an area," had been inserted; and

(*b*) for sub-section (4) thereof, the following sub-section had been substituted, namely:—

"(4) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to five years, or, if such offence is committed with intent to assist any State at war with His Majesty, or to wage war against His Majesty, with death, or transportation for life, or imprisonment for a term which may extend to ten years, and shall in either case also be liable to fine.";

(3) the Indian Press (Emergency Powers) Act, 1931, shall have effect as if in sub-section (1) of section 4 thereof, after clause (*b*), the following word and clause had been inserted, namely:—

"or

(*bb*) directly or indirectly convey any 'confidential information', any 'information likely to assist the enemy' or any 'prejudicial report', as defined

in the rules made under the Defence of India Act, 1939, or are calculated to instigate the contravention of any of those rules,";

(4) the Indian Aircraft Act, 1934, shall have effect as if—

(a) at the end of clause (r) of sub-section (2) of section 5 the following words had been inserted, namely:—

"including the taking of steps necessary to secure compliance with, or to prevent contravention of, the rules regulating such matters, or, where any such rule has been contravened, to rectify, or to enable proceedings to be taken in respect of, such contravention";

(b) in clause (b) of sub-section (1) of section 8, for the words, brackets, letters and figures "clause (h) or clause (i) of sub-section (2) of section 5", the words, brackets, letters and figures "clauses (d), (e), (h), (i), (k) or (l) of sub-section (2) of section 5, or the commission of an offence punishable under section 11," had been substituted;

(c) in section 11, after the words "in the air" the words "or in such a manner as to interfere with any of His Majesty's forces, ships or aircraft" had been inserted;

(d) in section 13, for the words, brackets, figures and letters "clause (i) or clause (l) of sub-section (2) of section 5" the words, brackets, figures and letters "clauses (c), (d), (e), (h) (i), (j), (k) or (l) of sub-section (2) of section 5, or punishable under section 11" had been substituted; and

(e) section 14 had been omitted; and

(5) the Indian Navy (Discipline) Act, 1934, shall have effect as if for section 90 of the Naval Discipline Act as set forth in the First Schedule to the first named Act the following section had been substituted, namely:—

"90. (1) If any person who would not otherwise be subject to this Act enters into an engagement with the Central Government to serve His Majesty—

(a) in a particular ship, or

(b) in such particular ship or in such ships as the Officer Commanding the Indian Navy, or any officer empowered in this behalf by the Officer Commanding the Indian Navy, may from time to time determine,

and agrees to become subject to this Act upon entering into the engagement, that person shall, so long as the engagement remains in force, and notwithstanding that for the time being he may not be serving in any ship, be subject to this Act, and the provisions of this Act shall apply in relation to that person, as if while subject to this Act, he belonged to His Majesty's navy and were borne on the books of one of His Majesty's ships in commission.

(2) The Central Government may by order direct that, subject to such exceptions as may in particular cases be made by or on behalf of the Officer Commanding the Indian Navy, persons of any such class as may be specified in the order shall, while subject to this Act by virtue of this section, be deemed to be officers or petty officers, as the case may be, for the purposes of this Act or of such provisions of this Act as may be so specified; and any such order may be varied or revoked by a subsequent order."

Saving and temporary amendment of Act VIII of 1938.

7. (1) Notwithstanding anything contained in the Indian Tea Control Act, 1938, the Central Government may appoint any person to be an additional member of, and to act as Chairman of, the Indian Tea Licensing Committee during the continuance of this Act, and on such appointment being made and until this Act ceases to be in force, the Chairman of the said Committee elected under section 5 of that Act shall cease to exercise the functions of Chairman.

(2) If in pursuance of any scheme for the control of import of Indian tea into the United Kingdom, the Central Government considers it necessary or expedient so to do, it may by order direct the Indian Tea Licensing Committee to apportion the requirement of the United Kingdom among the tea estates in accordance with such principles as may be laid down in the order, and the said Committee shall comply with such order.

(3) If at any time during the continuance of this Act, the agreement referred to in the preamble to the Indian Tea Control Act, 1938 is determined or otherwise ceases to be valid as between the parties thereto, the provisions of that Act shall, notwithstanding the said determination or invalidity of the agreement, continue in force:

Provided that nothing in this sub-section shall be construed as continuing the Indian Tea Control Act, 1938 in force after the 31st day of March, 1943.

CHAPTER III.

SPECIAL TRIBUNALS.

Constitution of Special Tribunals.

8. (1) The Provincial Government may for the whole or any part of the Province constitute Special Tribunals which shall consist of three members appointed by the Provincial Government.

(2) No person shall be appointed as a member of a Special Tribunal unless he—

(*a*) is qualified under sub-section (3) of section 220 of the Government of India Act, 1935, for appointment as a Judge of a High Court; or

(*b*) has for a total period of not less than three years exercised, whether continuously or not, the powers under the Code of Criminal Procedure, 1898 (hereafter in this Chapter referred to as the Code) of any one or more of the following, namely:—

(i) Sessions Judge, Additional Sessions Judge, Chief Presidency Magistrate, Additional Chief Presidency Magistrate,

(ii) District Magistrate, Additional District Magistrate.

(3) At least one member of a Special Tribunal shall be qualified for appointment thereto under clause (*a*) of sub-section (2), and where only one member is so qualified under that clause, at least one other member shall be qualified for appointment under clause (*b*) of that sub-section by virtue of having exercised powers exclusive of those specified in sub-clause (ii) of the said clause (*b*).

Jurisdiction of Special Tribunals.

9. The Provincial Government may, by general or special order, direct that a Special Tribunal shall try any offence—

(*a*) under any rule made under section 2, or

(*b*) punishable with death, transportation or imprisonment for a term which may extend to seven years,—

triable by any Court having jurisdiction within the local limits of the jurisdiction of the Special Tribunal, and may in any such order direct the transfer to the Special Tribunal of any particular case from any other Special Tribunal or any other Criminal Court not being a High Court.

Procedure of Special Tribunals.

10. (1) A Special Tribunal may take cognizance of offences without the accused being committed to it for trial.

(2) Save in cases of trials of offences punishable with death or transportation for life, it shall not be necessary in any trial for a Special Tribunal to take down the evidence at length in writing, but the Special Tribunal

shall cause a memorandum of the substance of what each witness deposes to be taken down in the English language, and such memorandum shall be signed by a member of the Special Tribunal and shall form part of the record.

(3) A Special Tribunal shall not be bound to adjourn any trial for any purpose unless such adjournment is, in its opinion, necessary in the interests of justice.

(4) A Special Tribunal shall not, merely by reason of a change in its members, be bound to recall and rehear any witness who has given evidence, and it may act on the evidence already recorded by or produced before it.

(5) After an accused person has once appeared before it, a Special Tribunal may try him in his absence if, in its opinion, his absence has been brought about by the accused himself for the purpose of impeding the course of justice, or if the behaviour of the accused in Court has been such as, in the opinion of the Special Tribunal, to impede the course of justice.

(6) In the event of any difference of opinion among the members of a Special Tribunal, the opinion of the majority shall prevail.

(7) The Provincial Government may, by notification in the Official Gazette, make rules providing for—

(i) the times and places at which Special Tribunals may sit; and

(ii) the procedure to be adopted in the event of any member of a Special Tribunal being prevented from attending throughout the trial of any accused person.

(8) A Special Tribunal shall, in all matters in respect to which no procedure has been prescribed by this Act or by rules made thereunder, follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates.

Exclusion of public from proceedings of Special Tribunals.

11. In addition, and without prejudice, to any powers which a Special Tribunal may possess by virtue of any law for the time being in force to order the exclusion of the public from any proceedings, if at any stage in the course of a trial of any person before a Special Tribunal application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the trial would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the Special Tribunal may make an order to that effect, but the passing of sentence shall in any case take place in public.

Powers of Special Tribunals.

12. A Special Tribunal shall have all the powers conferred by the Code on a Court of Session exercising original jurisdiction.

Sentences of Special Tribunals.

13. (1) A Special Tribunal may pass any sentence authorised by law.

(2) A person sentenced by a Special Tribunal—

(*a*) to death or transportation for life, or

(*b*) to imprisonment for a term extending to ten years under section 5 of this Act or under sub-section (4) of section 5 of the Indian Official Secrets Act, 1923, as amended by section 6 of this Act—

shall have a right of appeal to the High Court within whose jurisdiction the sentence has been passed, but save as aforesaid and notwithstanding the provisions of the Code, or of any other law for the time being in force, or of any thing having the force of law by whatsoever authority made or done, there shall be no appeal from any order or sentence of a Special Tribunal, and no Court shall have authority to revise such order or sentence, or to transfer any case from a Special Tribunal, or to make any order under section 491 of the Code,

or have any jurisdiction of any kind in respect of any proceedings of a Special Tribunal.

(3) The powers conferred upon the Provincial Government and the Governor-General by Chapter XXIX of the Code shall apply in respect of a person sentenced by a Special Tribunal.

CHAPTER IV.

SUPPLEMENTAL.

Jurisdiction of ordinary Courts.

14. Save as otherwise expressly provided by or under this Act, the ordinary criminal and Civil Courts shall continue to exercise jurisdiction.

Ordinary avocations of life to be interfered with as little as possible.

15. Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India.

Savings as to orders.

16. (1) No order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority.

Protection of action taken under the Act.

17. (1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(2) Save as otherwise expressly provided under this Act, no suit or other legal proceeding shall lie against the Crown for any damage caused or likely to be caused by anything in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

Protection from prosecution, etc., of members of military and police forces of Indian States while serving His Majesty.

18. Every provision of law for the time being in force which gives protection, whether specifically or otherwise, to members of His Majesty's military forces or of the police forces in British India from any prosecution or other legal proceedings or from any other liability shall apply also to members of the military or police forces respectively of any Indian State, while attached to, operating with or assisting any of His Majesty's military forces or any police force in British India.

Compensation to be paid in accordance with certain principles for compulsory acquisition of immovable property, etc.

19. (1) Where by or under any rule made under this Act any action is taken of the nature described in sub-section (2) of section 299 of the Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner and in accordance with the principles, hereinafter set out, that is to say:—

(*a*) Where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement.

(*b*) Where no such agreement can be reached, the Central Government shall appoint as arbitrator a person qualified under sub-section (3) of section 220 of the above-mentioned Act for appointment as a Judge of a High Court.

(*c*) The Central Government may, in any particular case, nominate a person having expert knowledge as to the nature of the property acquired, to

assist the arbitrator, and where such nomination is made, the person to be compensated may also nominate an assessor for the said purpose.

(*d*) At the commencement of the proceedings before the arbitrator, the Central Government and the person to be compensated shall state what in their respective opinions is a fair amount of compensation.

(*e*) The arbitrator in making his award shall have regard to—

(i) the provisions of sub-section (1) of section 23 of the Land Acquisition Act, 1894, so far as the same can be made applicable; and

(ii) whether the acquisition is of a permanent or temporary character.

(*f*) An appeal shall lie to the High Court against an award of an arbitrator except in cases where the amount thereof does not exceed an amount prescribed in this behalf by rule made by the Central Government.

(*g*) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section.

(2) The Central Government may make rules for the purpose of carrying into effect the provisions of this section.

(3) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

(*a*) the procedure to be followed in arbitrations under this section;

(*b*) the principles to be followed in apportioning the costs of proceedings before the arbitrator and on appeal;

(*c*) the maximum amount of an award against which no appeal shall lie.

Definition.

20. In this Act, unless there is anything repugnant in the subject or context, the expression "Provincial Government" means, in relation to a Chief Commissioner's Province, the Chief Commissioner.

Repeal and saving.

21. The Defence of India Ordinance, 1939, is hereby repealed; and any rules made, anything done and any action taken in exercise of any power conferred by or under the said Ordinance shall be deemed to have been made, done or taken in exercise of powers conferred by or under this Act as if this Act had commenced on the 3rd day of September, 1939.

INDIAN AIR FORCE VOLUNTARY RESERVE (DISCIPLINE) ACT, 1939.

ACT No. XXXVI OF 1939.

[29*th September*, 1939.

An Act to provide for the discipline of members of the Indian Air Force Volunteer Reserve raised in British India on behalf of His Majesty.

WHEREAS it is expedient to provide for the discipline of members of the Indian Air Force Volunteer Reserve raised in British India on behalf of His Majesty;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN AIR FORCE VOLUNTEER RESERVE (DISCIPLINE) ACT, 1939.

(2) It extends to the whole of British India and applies to members of the Indian Air Force Volunteer Reserve wherever they may be.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Power to make rules for regulation of the Indian Air Force Volunteer Reserve.

2. The Central Government may make rules for the government, discipline and regulation of the Indian Air Force Volunteer Reserve.

Liability to Indian Air Force Act, 1932.

3. Every member of the Indian Air Force Volunteer Reserve, while undergoing training in any unit, or otherwise, in pursuance of rules made under section 2, or when called into actual service in the Indian Air Force, in pursuance of the said rules, shall be subject to the Indian Air Force Act, 1932, in the same manner as a person belonging to His Majesty's Indian Air Force, and shall continue to be so subject until duly released from such training or service, as the case may be.

Penalty for failure to attend when required or called up.

4. (1) If any member of the Indian Air Force Volunteer Reserve, when required, in pursuance of rules made under section 2, to join a unit or attend at any place for the purpose of undergoing training, fails without reasonable excuse to join or attend in accordance with such requirement, he shall be punishable with fine which may extend to two hundred rupees.

(2) If any member of the Indian Air Force Volunteer Reserve, when called into actual service in the Indian Air Force, and required by such call to join any unit or attend at any place, fails without reasonable excuse to comply with such requirement at or within such time as the Central Government may, by order, direct, he shall be liable to be apprehended and punished in the same manner as a person in or belonging to the Indian Air Force deserting or improperly absenting himself from duty, except that the punishment shall not exceed imprisonment which may extend to two years.

Rule of evidence.

5. When any member of the Indian Air Force Volunteer Reserve is required, in pursuance of the rules made under section 2, to join any unit or attend at any place for the purpose of undergoing training, or is called into actual service in the Indian Air Force, a certificate purporting to be signed by an officer appointed in this behalf under the said rules and stating that the said member failed to join or attend in accordance with such requirement or call shall, without proof of the signature or appointment of such officer, be evidence of the matter stated therein.

Jurisdiction.

6. No Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try an offence punishable under sub-section (1) of section 4.

Repeal and saving.

7. The Indian Air Force Volunteer Reserve (Discipline) Ordinance, 1939, is hereby repealed; and any rules made, anything done and any action taken under the said Ordinance shall be deemed to have been made, done or taken under this Act as if this Act had commenced on the 16th day of September, 1939.

THE INDIAN AIRCRAFT (AMENDMENT) ACT, 1939.

ACT No. XXXVII OF 1939.

[29th *September*, 1939.

An Act further to amend the Indian Aircraft Act, 1934, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Aircraft Act, 1934, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN AIRCRAFT (AMENDMENT) ACT, 1939.

THE FEDERAL COURT OF INDIA.

[Original Jurisdiction.]

PRESENT:—SIR MAURICE GWYER, C.J., SIR SHAH SULAIMAN AND SIR S. VARADACHARIAR, JJ.

The United Provinces .. *Plaintiffs**

v.

The Governor-General in Council .. *Defendant.*

Cantonments Act (II of 1924), S. 106—Constitutional validity—Government of India (Adaptation of Indian Laws) Order, 1937—Effect—Government of India Act, 1919, S. 84 (2)—Competence of Indian Legislature—If can be challenged in Court of law—Original jurisdiction of Federal Court.

The then Indian Legislature had power to legislate with respect to Cantonments (Entry I—central) and there is no doubt that the Devolution Rules (1920) in making "Criminal Law" a central subject (Entry No. 30) gave the then Indian Legislature power not only to create criminal offences but also to provide for the destination of fines imposed in respect of such offences. S. 106 of the Cantonments Act was within the competence of the then Indian Legislature. Even if it related to a provincial subject, the Act, once passed could not have been successfully challenged in any Court of law. The practical effect of the Transitory Provisions Order was to postpone for two years the coming into effect of so much of the Adaptation Order as relates to S. 106 of the Act of 1924, that is, until 1st of April, 1939.

The Federal Court has by S. 204 (1) of the Act exclusive Original Jurisdiction in any dispute between the Governor-General in Council or Federation, and any province if and in so far as the dispute involves any question whether of law or fact on which the existence or extent of a legal right depends. So, where the issue is as to the validity or otherwise of S. 106 of Act II of 1924, it is clearly a dispute involving a question on which the existence of a legal right depends.

Dr. N. P. Asthana (Advocate-General, U.P.) and *Sri Narain Sahai* instructed by *Bannerji (Agent)* for United Provinces.

Sir Brojendra Mitter (Advocate-General of India) and *K. K. Raisadd* instructed by *K. Y. Bhandarkar (Agent)* for Governor-General in Council.

Gwyer, C.J.:—In this suit between the United Provinces and the Governor-General in Council, the plaintiffs pray for a declaration that certain provisions of the Cantonments Act, 1924, were *ultra vires* the then Indian Legislature and were therefore not a law in force in British India when Part III of the new Constitution Act came into operation; that all fines imposed and realized by Criminal Courts for offences committed within the cantonment areas in the United Provinces ought to be credited to provincial revenues; and that the plaintiffs are entitled to recover and adjust all such sums wrongly credited to Cantonment Funds since 1924. The declaration prayed for in the original plaint was limited to the last two matters; but by

* Suit No. 3 of 1938. 23rd March, 1939.

Gwyer, C.J.

leave of the Court the plaintiffs were allowed to amend it in order that the Court might be in a position to determine the real matter in issue in the case.

The Governor-General in Council by his defence denies that any provisions of the Cantonments Act, 1924, were invalid; and he contends further that the dispute with the plaintiffs is not one which is justiciable before this Court and that this Court has therefore no jurisdiction to entertain the suit.

The facts in the case are not in dispute and may be shortly summarised. A cantonment is a place in or in the vicinity of which any of His Majesty's regular forces or regular air forces are quartered and which has been declared by notification to be a cantonment for the purposes of the Acts in that behalf for the time being in force. The administration of cantonment areas, almost from their first establishment, has been for obvious military reasons subject to special regulations. The first general Cantonments Act, a consolidating and amending measure, was passed in 1889 and repealed a large number of existing Acts and Regulations. The Act of 1889 was followed by another consolidating and amending Act in 1910 (Act XV of 1910), and later by the very elaborate Code of 1924, an Act of 292 sections and six schedules (Act II of 1924), which superseded all previous legislation and is, though it has not itself escaped amendment, the principal Act relating to the subject which is now in force.

Part of the administrative machinery of every cantonment area is the Cantonment Fund, which is credited with revenue derived from various sources and is required to be applied for the purposes, express or implied, for which any statutory powers and duties are conferred or imposed upon the administrative authority of the area; *see* Ss. 106 and 109 of the Act of 1924. Among the above sources of revenue are all fines recovered from persons convicted of offences committed within the cantonment (*i*) under the Act, or any rule or by-law made thereunder, (*ii*) under S. 34 of the Police Act, 1864, or any corresponding enactment for the time being in force, (*iii*) under Chapters XIII and XIV of the Indian Penal Code, (*iv*) under S. 156 of the Army Act, (*v*) under the provisions of any enactment providing for the crediting of a fine to the Cantonment Fund, and (*vi*) under any other enactment for the time being in force in respect of which the Governor-General in Council has, by general or special order, directed that the fines realized thereunder shall be credited to the Cantonment Fund. These provisions have not been affected by any subsequent legislation up to 1st April, 1937, and were therefore, if otherwise valid, laws in force immediately before the commencement of Part III of the Constitution Act. Statutory provisions with regard to Cantonment Funds first appeared in the Cantonments Act, 1889. The provisions of that Act which relate to them were substantially reproduced in the consolidating and amending Act of 1910; and S. 106 of the Act of 1924 only differs in this respect from the earlier statutes by the addition of the provisions (*v*) and (*vi*) set out above.

Between the enactment of the Cantonments Act, 1910, and the Cantonments Act, 1924, respectively the Montagu-Chelmsford Reforms, embodied in the Government of India Act, 1919, had introduced profound and far-reaching changes in the constitutional structure of British India and in the relations

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between the Central and the Provincial Governments; and it is one of those changes that has given rise to the present suit. Up to 1919 the Government of India was essentially a unitary Government, with a concentration of authority at the centre. Every Provincial Government was under a statutory obligation to obey the orders of the Governor-General in Council and was under his superintendence, direction and control in all matters relating to the Government of its Province; and the Central Legislature was supreme over all persons and matters in British India. The Government of India Act, 1919, did not by any specific enactment alter those relationships; but it added a new section (S. 45-A) to the existing Code which provided that statutory rules might be made (*a*) for the classification of subjects in relation to the functions of Government as central and provincial subjects for the purpose of distinguishing the functions of local Governments and local legislatures from the functions of the Governor-General in Council and the Indian Legislature, (*b*) for the devolution of authority in respect of provincial subjects to local Governments, and (*c*) for the allocation of revenues or other moneys to those Governments. These rules were to be made by the Governor-General in Council, with the sanction of the Secretary of State in Council, and by S. 129-A (1) of the Act were not to be subject to repeal or alteration by the Indian Legislature or by any local legislature.

It was thus that the Devolution Rules, 1920, came into existence; and they gave to the Provinces for the first time a quasi-independence of the Centre by allotting to them sources of revenue of their own and assigning them separate administrative and legislative spheres. Article 3 (1) of the Rules provided that,

"for the purpose of distinguishing the functions of the local Governments and local legislatures of Governors' Provinces from the functions of the Governor-General in Council and the Indian Legislature, subjects shall in those Provinces be classified in relation to the functions of Government as central and provincial subjects in accordance with the lists set out in Schedule I".

This Schedule consisted of two parts, Part I setting out the central subjects and Part II the provincial subjects.

In Part I were the following entries:—

"1. (*b*) Naval and Military works and cantonments;

"30. Criminal law, including criminal procedure;

"41. Legislation in regard to any provincial subject, in so far as such subject is in Part II of this Schedule stated to be subject to legislation by the Indian Legislature, and any powers relating to such subject reserved by legislation to the Governor-General in Council."

In Part II the following entry is material:—

"17. Administration of justice, including constitution, powers, maintenance and organisation of Courts of civil and criminal jurisdiction within the Province; subject to legislation by the Indian Legislature as regards High Courts, Chief Courts, and Courts of Judicial Commissioners, and any courts of criminal jurisdiction."

Lastly, Art. 14 of the Rules provided that certain sources of revenue should, in the case of Governors' Provinces, be allocated to the local Government as sources of provincial revenue, and among them was included "receipts accruing in respect of provincial subjects."

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In 1926 the then Government of the United Provinces addressed the Government of India, claiming the proceeds of fines in cantonment areas as among the "receipts accruing in respect of provincial subjects", inasmuch as the fines in question accrued in respect of the administration of justice; and they advanced for the first time the contention that S. 106 of the Cantonments Act of 1924. was *ultra vires*. The Government of India appear at that time to have accepted this contention, but later they rejected it. The new Provincial Government, after the coming into force of Part III of the Constitution Act, adhered to the view of their predecessors and insisted that the fines should be credited to Provincial revenues, and since the Government of India still maintained the contrary, the present proceedings were begun.

The Advocate-General of the United Provinces contended before us on behalf of the plaintiffs that "receipts accruing in respect of the administration of justice" *prima facie* included all fines imposed by all Criminal Courts throughout the Province. He contended also that, if S. 106 of the Act of 1924, required them to be credited to the Cantonment Fund, it was repugnant to, and inconsistent with, the Devolution Rules and therefore by implication repealed or altered them, which, by reason of S. 129-A of the Government of India Act, 1919, no Act of the then Indian Legislature had power to do. He argued therefore that the Act of 1924 was to that extent *ultra vires* and a nullity. This is the substance of the plaintiff's case, and it appears, if I may use an old and familiar simile, to be as full of holes as a colander.

No doubt fines imposed by Criminal Courts in the Provinces would be properly credited to provincial revenues as receipts accruing in respect of the administration of justice, but only if not otherwise appropriated by competent authority; and Entry No. 30 in the list of central subjects, "Criminal law, including criminal procedure", clearly includes the power to legislate for the destination of fines for any criminal offences with respect to which it was competent for the Indian Legislature to legislate. The case of *Toronto City Corporation* v. *The King*,[1] is conclusive on this point. Under S. 91 of the British North America Act, 1867, the exclusive legislative authority of the Dominion Parliament is declared to extend (*inter alia*) to "criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters". By S. 92 the Provincial Legislatures have exclusive power to make laws (*inter alia*) in relation to

> "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of criminal and of civil jurisdiction, and including procedure in civil matters in those courts".

In the case cited the question arose whether the Dominion Parliament, by virtue of its exclusive legislative authority with respect to criminal law, was competent to direct the manner in which fines imposed for infractions of the criminal law should be appropriated. The Judicial Committee held that the Dominion Parliament was competent so to direct, and their judgment, with reference to the language of S. 91 above cited, contains the following passage:—

1. (1932) A.C. 98.

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"Plainly, and indeed admittedly, this confers on the Dominion Parliament the exclusive right by legislation to create and define crimes and to impose penalties for their commission. In their Lordships' opinion it no less empowers the Dominion Legislature to direct how penalties for the infraction of the criminal law shall be applied. It has always been regarded as within the scope of criminal legislation to make provision for the disposal of penalties inflicted, as innumerable instances show, and the power to do so is, if not essential, at least incidental, to the power to legislate on criminal matters, for it may well go to the efficacy of such legislation. If the power to direct the manner of application of penalties were to be dissociated from the power to create such penalties and were to be lodged in another authority, it is easy to see how penal legislation might be seriously affected, if not stultified". *Ibid.*, at p. 104.

The similarity of the language in Ss. 91 and 92 of the British North America Act to that of the Devolution Rules will not escape attention; and there can be no doubt that the Devolution Rules, in making criminal law a central subject, gave the then Indian Legislature power not only to create criminal offences but also to provide for the destination of fines imposed in respect of such offences.

It will thus be seen that the Indian Legislature had power under the Devolution Rules to legislate with respect to cantonments [Entry No. 1 (*b*) of the list of central subjects] and with respect to criminal law (Entry No. 30), and that the latter power included a power to legislate with respect to the destination of fines imposed for breaches of the criminal law; and that if the legislature chose to legislate as regards any courts of criminal jurisdiction in a Province, including of course courts in cantonment areas, such legislation would prevail over any provincial legislation with respect to the administration of justice within the Province (*see* the concluding words of Entry No. 17 in the list of provincial subjects). In these circumstances there appear to be no grounds on which the legislative competence of the Indian Legislature to enact S. 106 of the Cantonments Act, 1924, could successfully be challenged.

I am also of opinion that the competence of the Indian Legislature to enact that section could not at any time have been made the subject of legal proceedings. By S. 84 (2) of the then Government of India Act the validity of any Act of the Indian Legislature, or of any local legislature, was not to be open to question in any legal proceedings on the ground that the Act affected a provincial subject or a central subject as the case might be. The plaintiffs urged that this provision could not apply where an Act of the Indian Legislature sought to repeal or alter or amend the Devolution Rules, since this was something which the Legislature was forbidden to do by S. 129-A of the Act. In my opinion S. 129-A had reference to legislation purporting in terms to repeal or alter or amend the Devolution Rules, and not to legislation which was merely inconsistent with the rules and therefore could only be said to repeal or to alter them by implication. Indeed, if any other interpretation were adopted, the whole purpose of S. 84 (2) would have been defeated, for that enactment was clearly designed to make the new distribution of powers between the Centre and the Provinces an administrative and domestic arrangement only. The Provincial Governments and Legislatures, though they obtained a much greater measure of freedom than they had enjoyed hitherto, still remained subject to central control; and the

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Central Legislature still retained by virtue of S. 84 (2) of the Act the power to legislate for the whole of British India. The Provinces in other words were far from having acquired an autonomous status. The new administrative and legislative spheres assigned to them were not exclusive; and for protection against the invasion of the latter they had to rely on the good sense and *bona fides* of the Government of India and not on any Court of law. And I may point out that Art. 4 of the Devolution Rules themselves provided that,

> "where any doubt arises as to whether a particular matter does or does not relate to a provincial subject, the Governor-General in Council shall decide whether the matter does or does not so relate, and his decision shall be final".

If any doubt remained, it was removed once and for all by the Governor-General's assent to the Act of 1924. For these reasons therefore I hold that, even if S. 106 of the Cantonments Act, 1924, had, contrary to the opinion which I have already expressed, related to a provincial and not a central subject, the Act once passed could not have been successfully challenged in any Court of law. Accordingly, it was a law in force in British India immediately before the commencement of Part III of the Constitution Act, and by reason of S. 292 of that Act it continued in force in British India until altered or repealed or amended by a competent legislature or other competent authority.

It remains to consider the legal position since the coming into force of Part III of the Constitution Act on 1st April, 1937. It is not in dispute that S. 106 of the Act of 1924 has not been altered or repealed or amended up to the present time. There are, however, two Orders in Council which have a bearing on the matter and on which it is necessary to say a few words: the Government of India (Adaptation of Indian Laws). Order, 1937, and the India and Burma (Transitory Provisions) Order, 1937. By S. 293 of the Act, His Majesty is given power to provide by Order in Council that any law in force in British India shall, until repealed or amended by a competent legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty necessary or expedient for bringing the provisions of that law into accord with the provisions of the Constitution Act. Under this power the very elaborate Government of India (Adaptation of Indian Laws) Order, 1937, has been made, an Order running to some two hundred and seventy pages and covering the whole body of existing Indian legislation. Among the Indian Acts in which modifications and adaptations have thus been effected is the Cantonments Act, 1924, in S. 106 of which the whole of paragraph (*c*) is now to be omitted, that is to say, the whole of the provisions relating to the crediting of fines to the Cantonment Fund. I assume, though I do not know, that this adaptation or modification was made, because it was thought that after 1st April, 1937, all fines imposed for breaches of the criminal law must under the new Constitution necessarily be credited to provincial revenues and that S. 106 of the Act of 1924 could only be brought into accord with this state of things by the omission of the provisions to which I have referred. But whatever the reason for the adaptation or modification and whether or not it proceeded on a correct interpretation of

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the law, I do not think that it can now be challenged; and accordingly, but for the provisions of the other Order which I have mentioned and to which I advert below, it appears that on 1st April, 1937, the date when the adaptation Order came into operation, the provisions of S. 106 of the Cantonments Act, 1924, relating to the crediting of fines to the Cantonment Fund would have ceased to have effect.

The other Order, the India and Burma (Transitory Provisions) Order, 1937, was made under powers conferred by S. 310 (1) of the Constitution Act, which recites (*inter alia*) that difficulties may arise in relation to the transition from the provisions of the previous Government of India Act to the provisions of the Constitution Act and that the nature of the difficulties and of the provision which should be made for meeting them could not at the date of the passing of the Act be fully foreseen. His Majesty is accordingly empowered to make by Order in Council such temporary provision for the purpose of removing any of these difficulties as might be specified in the Order. One of the difficulties which required to be dealt with appears to have arisen from the fact that certain sources of revenue, appropriated immediately before Part III of the Constitution Act came into force for the use of provincial revenues or of certain specified local funds, became after that date an exclusively central subject. It would clearly have been highly inconvenient if these sources of revenue were suddenly cut off, before the Provincial Governments and Legislatures had had an opportunity of taking stock of the situation; and accordingly the Order in question provided (*inter alia*) that in every Province, notwithstanding anything contained in the Constitution Act or in any Order in Council made thereunder, but subject to any provision to the contrary which might be made by an Act of the Indian, the Federal or the Provincial Legislature passed in the exercise of the powers respectively conferred on them by the Act, any tax, fine, penalty or other sum required by or under any law in force immediately before the commencement of Part III of the Constitution Act to be credited to any local fund or other fund should, during the two financial years next following 1st April, 1937, continue to be so credited and should not, during those years, be deemed to be part of the revenues of the Province. Thus the *status quo* was to be preserved for a period of at least two years, in the absence of legislation to the contrary; and no local fund found itself automatically and at once deprived of any existing source of revenue by the coming into force of Part III of the Constitution Act, merely because that particular source of revenue had now become a matter within the exclusive competence of the Central Legislature.

But "criminal law", which was a central subject under the Devolution Ruples, remained a central subject under the Constitution Act; *see* Entry No. 1 of Part I of List III in the Seventh Schedule to the Act. It is true that List III is the "Concurrent Legislative List" and that the Provincial Legislatures have also power to legislate with respect to the matters enumerated in it; but a provincial law which is repugnant to any provision of a law which the Central Legislature is competent to enact with respect to any matter enumerated in the Concurrent Legislative List is void to the extent

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of the repugnancy; *see* S. 107 (1) of the Act. Nor is there anything in the Provincial Legislative List (List II of the Seventh Schedule) which gives a wider legislative competence to the new Provincial Legislatures than their predecessors had possessed for the present purpose under the Devolution Rules: *see* entry No. 2 of that List. If I am right in my view of the competence of the then Indian Legislature to enact S. 106 of the Cantonments Act, 1924, it follows that the Central Legislature would have been no less competent to enact it after Part III of the Constitution Act had come into force, and the provisions of the Transitory Provisions Order were not required for the purpose of confining the *status quo* in cantonment areas for the specified period of two years by anything in the new Act. The *status quo* was continued in this particular case by the Constitution Act itself, until the Central Legislature, and no other legislature, chose to alter it. But the provisions of the Adaptation Order, as I have already said, did affect the *status quo* because as soon as that Order became operative no fines could any longer be paid into Cantonment Funds; and accordingly the practical effect of the Transitory Provisions Order was to postpone for two years the coming into effect of so much of the Adaptation Order as relates to S. 106 of the Act of 1924, that is, until 1st April of the current year. On and after that date, unless the Adaptation Order is amended, the fines will no longer be credited to the Cantonment Funds, but will be credited to the revenues of the Province.

In my opinion therefore the plaintiffs are not entitled to any of the declarations for which they ask. It would not in these circumstances be necessary to go into the question of jurisdiction raised by the Advocate-General of India; but in view of its importance and its possible bearing on future cases I think it right to express an opinion upon it.

I do not think that the plaintiffs would in any event have been entitled to the declarations for which they originally asked, in proceedings against the Governor-General in Council. Their proper course would have been to take proceedings against a named Cantonment Board, though it is scarcely necessary to say that such proceedings could not have been brought in this Court. It was for that reason that the Court gave leave to amend, since the validity of S. 106 of the Act of 1924 was the real question in issue, and though it could have been raised equally well in proceedings against a Cantonment Board, that would have involved an appeal to the High Court and afterwards to this Court before the matter was finally settled. I have no doubt that it was competent for this Court to entertain a suit for a declaration that S. 106 of the Act of 1924 was *ultra vires*. The Federal Court has by S. 204 (1) of the Act an exclusive original jurisdiction in any dispute between the Governor-General in Council (or, after Federation, the Federation) and any Province, if and in so far as the dispute involves any question, whether of law or fact, on which the existence or extent of a legal right depends. It is admitted that the legal right of the Province to have the fines now under discussion credited to provincial revenues and not to the Cantonment Funds depends upon the validity or otherwise of S. 106 of the Act of 1924. The plaintiffs deny the validity of the section, the defendant

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asserts it; and it seems to me that this is clearly a dispute involving a question on which the existence of a legal right depends. The question might, as I have said, have been raised in proceedings to which a Cantonment Board was itself a party; but it is convenient to all concerned that it should be disposed of in the proceedings now before the Court. A Cantonment Board is, it is true, a corporation with statutory powers or duties of its own; but it is not an independent body and the Central Government exercises a considerable measure of control over it, more indeed at the present time than it did before the Constitution Act came into force, as a reference to the adaptations and modifications which the Adaptation Order has made in the Act of 1924 plainly shows. I think that in these circumstances the Governor-General in Council has a sufficient interest in the subject-matter of the challenged enactment to make it possible for us to entertain a suit against him at the instance of the plaintiffs for a declaration that the enactment is *ultra vires.* It is undesirable that any attempt should be made to define what interest would be sufficient for this purpose; but I have no doubt that it is sufficient in the present case. If it be said, as indeed the Advocate-General of India argued, that a declaration granted against the Governor-General in Council would not be binding on any Cantonment Board, I can only say that I should be very greatly surprised if a subordinate statutory body disregarded a pronouncement of this Court and I should be even more surprised if the Central Government did not take all necessary steps to see that subordinate bodies over which it is able to exercise a substantial measure of control obeyed the law as laid down by this Court. I decline indeed to contemplate the possibility of any other state of things; and I draw attention to the observations of the Judicial Committee in the case of *Fischer* v. *The Secretary of State for India in Council.*[1]

There is one other matter on which it seems desirable that something should be said. The Advocate-General of India complained of the pleading which he was called upon to answer, and there was in my opinion substance in his criticisms. The rules with regard to pleadings which are to be found in O. 21 of the Federal Court Rules are to be strictly followed; and particular attention should be given to r. 2, which provides that every pleading shall contain, and contain only, a statement in a concise form of material facts on which the party pleading relies, but not the evidence by which those facts are to be proved, nor any argumentative matter; and to r. 5, which provides that wherever the contents of any document are material, it shall be sufficient to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material. Adherence to these rules will enable the opposite party to know exactly what case he has to meet, will be of material assistance to the Court, and will tend to shorten proceedings by clarifying and defining the real issues in the case.

The action will be dismissed and judgment entered for the Governor-General in Council, with costs.

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1. (1898) L.R. 26 I.A. 16: I.L.R. 22 Mad. 270 at 280 (P.C.).

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Sulaiman, J.—In this suit the United Provinces claim against the Governor-General in Council a declaration of their alleged legal right to have all fines imposed and realized by the Criminal Courts for offences committed within Cantonment areas credited to Provincial revenues and their right to recover and adjust all such sums so far credited since 1924. A further relief, on which the claim was really based, has been allowed to be added, that S. 106 of the Cantonments Act (Act II of 1924) was *ultra vires*. Under this section, a Cantonment Fund was formed to which were to be credited all fines recovered from persons convicted of certain offences committed within each Cantonment. The defendant although admitting the main facts does not admit that the United Provinces Government were entitled to fines before the new Act came into force or that they are now entitled to receive the fines disposed of by competent legislation. It is denied that S. 106 (*c*) was *ultra vires*. It is pleaded that the plaintiff has no cause of action against the defendant because the defendant never claimed the Cantonment Fund or any fines imposed or realised by Criminal Courts in Cantonment areas. It is also urged that the Federal Court has no jurisdiction to entertain the present suit, so far as the two original reliefs are concerned.

It appears that on 29th March, 1929, the Government of India (Army Department) agreed with the Government of the United Provinces that S. 106 (*c*) was *ultra vires* and that the proceeds of magisterial fines must be credited to Provincial revenues and could go into the Cantonment Funds only in the form of a contribution from Provincial revenues. But this decision was apparently not fully put into effect. Subsequently, in March, 1935, the Government of India, accepting the view of the Punjab Government, took up the attitude that S. 106 (*c*) was *intra vires* and would continue in operation for two years. Although the official correspondence that passed were admitted on behalf of the defendant, it is unnecessary to refer to them as it cannot possibly be suggested that a previous admission on a point of law is in any way binding on him.

Jurisdiction.—Under S. 204 of the Government of India Act, 1935, the Federal Court, to the exclusion of any other Court, has original jurisdiction in any dispute between a Province and the Centre, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. The jurisdiction of the Court to entertain a suit in which such a dispute arises cannot be seriously denied; but whether that dispute involves any question on which the existence or extent of a legal right depends is quite another matter, which cannot be determined without going into the merits.

So far as the claim of the United Provinces to recover the fines since the coming into force of the new Government of India Act is concerned, there can be no doubt that a question as to a legal right is involved, irrespective of the final decision whether that claim is well-founded or not. But, as regards the position under the Act of 1919, it has been argued that inasmuch as a Province had no right to sue in any Court of law the claim for such fines cannot be regarded as being based on a 'legal right'. The answer to

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this question depends on what is meant by 'legal right', that is to say, whether it means a right recognised by law or enforceable in a Court of law.

Legal Right.—The learned Advocate-General of India has relied on the definition of the term 'legal right' as given by Dr. T. E. *Holland* in his *Jurisprudence* (13th Edition, p. 82) as,

"If, irrespectively of his having, or not having, either the might, or moral right on his side, the power of the State will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes."

But that very definition shows that the protection under 'the power of the State' would be sufficient, and remedy through a Court of law is not essential. *John Austin* in his *Lectures on Jurisprudence* (1929, Vol. I, Lect. XVI, p. 398) also remarked that,

"A person has a right, when the law authorizes him to exact from another an act or forbearance. The test of a right is that (independently of positive provision) the acts or forbearances enjoined are not incapable of being enforced civilly or in the way of civil action, *i.e.*, at the discretion or pleasure of the party towards whom they are to be done or observed."

The capability of its being enforced by action does not at all seem to be a necessary ingredient. Indeed, *Sir John Salmond* in his *Jurisprudence* (7th Edition, 1924, pp. 239-40) has definitely expressed the opinion that,

"Although a legal right is commonly accompanied by the power of instituting legal proceedings for the enforcement of it, this is not invariably the case, and does not pertain to the essence of the conception."

According to him the term 'legal right' is,

"used in a wider and laxer sense to include any legally recognised interest, whether it corresponds to a legal duty or not, and in this generic sense a legal right may be defined as any advantage or benefit which is in any manner conferred upon a person by a rule of law" (p. 246).

That the enforceability by action cannot be a true test would become obvious from the familiar instance of a legal right not being extinguished and yet action on it being barred by prescription or lapse of time. A debt barred by time nevertheless exists and repayment of it is perfectly valid, even though it cannot be enforced by action in a Court of law. Numerous other instances of unenforceable legal rights can be mentioned like claims against Foreign States or Sovereigns, interests due on foreign bonds or claims for foreign lands, claims exceeding either the territorial or pecuniary jurisdiction of a Court. The term 'legal right' used in S. 204 obviously means right recognised by law and capable of being enforced by the power of a State, but not necessarily in a Court of law. It is a right of a party recognised and protected by a rule of law, the violation of which would be a legal wrong done to his interest and respect for which is a legal duty, even though no action may actually lie. The only ingredients seem to be a legal recognition and a legal protection. The mere fact that under the previous Act the Provincial Governments were subordinate administrations under the control of the Central Government and could only have made a representation to the Governor-General in Council or the Secretary of State, would not be sufficient in itself for holding that the former could not possibly possess any 'legal rights' at all against the Central Government, even in

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respect of rights conferred upon them by the provisions of the Act or the rules made thereunder.

In the *"Alexander"*[1] where formerly there was no remedy at Common Law in respect of necessaries furnished to a foreign ship, but a new Statute gave such jurisdiction, it was held that as the Act was a remedial measure, it governed even cases where the cause of action had arisen before the Act came into force. Dr. Lushington observed:

"I am not aware of any principle or decision which establishes the doctrine, that where a statute affords a new mode of suing, the cause of action must necessarily arise subsequently to the period when the statute comes into operation. On the contrary, where a statute creates a new jurisdiction, the new jurisdiction, I apprehend, takes up all past cases, and there is not the slightest injustice in this; for although the circumstances may have occurred prior to the passing of the statute, the suit or action may have been commenced subsequently."

And so if a "legal right" really existed under the old Act, S. 204 of the new Act would not be inapplicable merely because the right related to an earlier period.

Cause of Action.—But it has not been suggested that the Governor-General in Council, who has been sued, received the fines as to which a declaration has been sought. The Cantonments Act (II of 1924), consolidating and amending the previous law relating to the administration of Cantonments, came into force on the 1st May, 1924. Under S. 11 every Cantonment Board is a body corporate having perpetual succession and with power to acquire and hold property and to sue and be sued by its name. Under S. 60 it has power to impose taxes. Under S. 106 in every Cantonment, a Cantonment Fund has to be formed to which certain specified sums have to be credited. Under S. 107 (3) a Board has authority to invest the funds and also to dispose of such investments or vary them for others of a like nature. Under S. 108 the properties acquired, provided or maintained by a Board vest in it and belong to it and are under its direction, management and control. Under S. 109 the Cantonment Fund and all properties vested in a Board are to be applied for the purposes specified.

It follows that the amounts of the fines which had been credited to the Cantonment funds were under the control of Cantonment Boards and have been disbursed by them. The Cantonment Boards have not been made defendants in this suit and no relief is claimed against them. Had Cantonment Boards been made parties, they would have been entitled to claim protection under S. 272 and also to ask for notice required by S. 273. If the United Provinces desired to get a declaration of their right to recover the fines from the Cantonment Boards and claim adjustments, they could have sued the Boards directly in the Provincial Courts, as to which S. 204 would have been inapplicable. The two reliefs originally asked for by the United Provinces should have been claimed against the Cantonment Boards which are in every sense boards of a local Self-Government in Cantonment areas, and those reliefs should not, in reality, be directed against the Governor-General in Council.

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1. (1841) 1 W.Rob. 288: 166 E.R. 580.

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But under the amended S. 79 (*a*), C.P.C., in the case of a suit against the Central Government, the Governor-General in Council is the authority to be named as defendant. The Central Government has certainly been disputing the claim of the plaintiff and maintaining the validity of S. 706 (*c*), and the Governor-General in Council may have issued directions under S. 106 (*c*) (*vi*) and has made rules under S. 111, which would have to be modified if the section were found to be *ultra vires*. There is thus a dispute between the parties within the meaning of S. 204. But the utmost that the United Provinces can, in the absence of the Cantonment Boards, claim against the Governor-General in Council is a declaration as to the invalidity of that section.

Legislative Power.—Under S. 45 of the Act of 1919, every Local Government had to obey the orders of the Governor-General in Council and was under his superintendence, direction and control. The powers of a local legislature were limited by S. 80-A. Under S. 65 (1) (*a*) the Indian Legislature had a general power to make 'laws for all persons, for all Courts, and for all places and things within British India'. This power was conferred in the widest terms and would be comprehensive, unless there was some other obstacle in the way of exercising it. S. 84 (2) also laid down that,

> "nothing in the Government of India Act or in any rule made thereunder should be construed as diminishing in any respect the powers of the Indian Legislature as laid down in S. 65".

It further provided that,

> "the validity of any Act of the Indian Legislature should not be open to question in any legal proceedings on the ground that the Act affected a Provincial subject."

Thus, so long as the Act remained in force the power of the Indian Legislature was almost supreme. Under S. 72-D (3) (*iii*) expenditure of which the amount was prescribed by or under any law did not require to be submitted to the local Council. The language of S. 84 (2) was, however, not so wide as it might have been. In the first place, the sub-section did not say that nothing should diminish the powers; it merely said that nothing should be construed as diminishing the powers. Again, it did not say that an Act of the Indian Legislature shall not be invalid on the ground that it affected a Provincial subject; it merely said that the validity of any such Act shall not be open to question in any legal proceedings. Ss. 65 and 84 read together subordinated the other provisions of the Act and the rules made thereunder to the power of the Indian Legislature. On the other hand, S. 129-A (1) laid down specially that the rules made by the Governor-General in Council, with the sanction of the Secretary of State in Council, should not be subject to repeal or alteration by the Indian Legislature. This latter provision would mean that the Indian Legislature had no power to repeal or alter any such rule, and would have apparently come into conflict with the general provisions of S. 65 (if they had stood by themselves unless they were interpreted as being mutually exclusive, one referring to the specific rules made for the purposes mentioned in sections like S. 45 and the other dealing with legislation regarding persons, Courts, places and things. While the old Act was in force Courts were undoubtedly debarred under S. 84 (2) from construing S. 129-A so as to diminish the power of the Indian Legislature, and the

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validity of an Indian Act could not be questioned in a Court of Law. The classification of subjects under the rules was therefore bound to be construed so as not to come into conflict with any Central legislation. But S. 84 is no longer in force and the bar imposed by it has now been removed. Still, every endeavour should be made to interpret the classification as being subject to all such legislation. If, however, a conflict be inevitable, even then, reading the three sections together the conclusion is, on the whole, irresistible that the Indian Legislature prior to April, 1937, possessed full power of making laws, including matters which by implication might even be contrary to the rules. In this view the validity of S. 106 (*c*) of the Cantonments Act cannot at all be disputed.

The Devolution Rules.—I am further of the opinion that on a proper interpretation of the Devolution Rules themselves they did not in any way invalidate the aforesaid section, as it did not at all effect a repeal or alteration of the rules.

Under S. 45-A (1) (*b*) of the Government of India Act, 1919, provision could be made by rules under the Act for the classification of subjects, the devolution of authority in respect of provincial subjects to local Governments and the allocation of revenues or other moneys to those Governments. S. 129-A provided that the rules made under the Act should not be subject to repeal or alteration by the Indian Legislature or by any local legislature. Devolution rules were framed by the Governor-General in Council with the sanction of the Secretary of State in Council under S. 45-A. Under r. 3 (1) functions were classified as Central and Provincial subjects in accordance with the lists in Schedule I. Under sub-r. (2) any matter which was included in the list of Provincial subjects, Part II of Schedule I, was, to the extent of such inclusion, excluded from any Central subject of which, but for such inclusion it would form part. Under r. 4 where any doubt arose as to whether a particular matter did or did not relate to a Provincial subject, the Governor-General in Council was to decide the matter finally. Under r. 14 (1) (*b*) the sources of revenue allocated to the local Government included receipts accruing in respect of Provincial subjects.

Schedule I, Part I, contained the Central subjects and No. 1 (*b*) included Cantonments; No. 30 was Criminal Law including Criminal Procedure, and No. 47 comprised all other matters not included among Provincial subjects. Part II contained the Provincial subjects and included serial No. 17 in the following terms:—

> "Administration of Justice, including constitution, powers, maintenance and organisation of Courts of civil and criminal jurisdiction within the province; subject to legislation by the Indian Legislature as regards High Courts, Chief Courts, and Courts of Judicial Commissioners, and any Courts of criminal jurisdiction."

Serial No. 50 was as follows:—

> "Imposition by legislation of punishments by fine, penalty, or imprisonment for enforcing any law of the Province relating to any Provincial subject; subject to legislation by the Indian Legislature in the case of any subject in respect of which such a limitation is imposed under these rules:"

It is thus clear that on the one hand Cantonments were a Central subject and so were Criminal Law and Procedure as also all other matters not

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included among Provincial subjects. On the other hand, Administration of Justice was a Provincial subject and in express terms it included constitution, powers, maintenance and organisation of civil and criminal Courts; but this was subject to legislation by the Indian Legislature 'as regards Courts' of criminal jurisdiction and High Courts but not other matters. It is also clear that imposition of fine for enforcing any law of the Province relating to any Provincial subject was specifically assigned to the Provinces; but even this was subject to legislation by the Indian Legislature in the case of any subject in respect of which such a limitation was imposed under the rules. It is equally clear that the lists did not specifically refer to fines imposed under Central laws much less did they specifically mention fines realised under such laws within Cantonments. The question is whether they came under I (1-*b*), I, (30) or I, (47), or else II, (17).

Cantonments.—Cantonments were no doubt assigned to the Centre, while Administration of Justice to the Provinces. But it cannot be said that Cantonments with their entire administration were expressly excepted and the Administration of Justice did not extend to such areas. The Government of India themselves had not taken this view as they handed over the Administration of Justice in Cantonment areas to the Provinces. Had Administration of Justice not been specially assigned to the Provinces, the subject "Cantonments" would have included such administration. But under r. 3 (2) the Administration of Justice in Cantonments, which would otherwise have formed part of the subject "Cantonments" must be deemed to be excluded from it, owing to its inclusion in the Provincial list. This rule as to over-lapping gave predominance to the Provincial subjects. If Administration of Justice were to be confined to areas outside Cantonments, there would still be a curtailment of that power. The scope of the Administration of Justice must therefore extend to Cantonments also just as to other areas. It is accordingly not possible to hold that Cantonments were wholly outside the jurisdiction of the Provinces.

Administration of Justice.—The Administration of Justice refers to the constitution, powers, maintenance and organisation of Courts as also akin matters, and may not necessarily include the appropriation of all fines realised under Central legislation, even though Serial No. 17 made this Provincial power subject to Central legislation only 'as regards Courts' of criminal jurisdiction. That the expression "Administration of Justice" did not include "Imposition of fines, etc.," follows from the fact that such an imposition was mentioned separately under serial No. 50 as a distinct and independent subject. The two must therefore form separate and not overlapping categories. The remarks of their Lordships of the Privy Council in *P. V. Valin* v. *J. Langlois,*[1] may well be quoted in this connection:

> "But one thing at least is clear that those words (*i.e.*, administration of justice) do not point expressly or by any necessary implication to the particular subject of election petitions; and when we find in the same Act another clause which deals expressly with those petitions there is not the smallest difficulty in taking the two clauses together and placing upon them both a consistent construction."

1. (1879) 5 A.C. 115 at 119.

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If Administration of Justice had been intended to include imposition of fines as well, there would have been no necessity for mentioning such imposition under a separate head and confining it to the enforcement of Provincial laws only. The imposition of fines under Criminal legislation of the Centre would more appropriately come under the category "Criminal Law and Procedure" and not "Administration of Justice". If so directed by Central legislation, the fines when realized would be receipts accruing in respect of Criminal Law and Procedure, and not receipts accruing in respect of Administration of Justice.

Criminal legislation.—When a Legislature can declare certain acts or omissions as criminal offences, and has power to prohibit them, it must necessarily possess authority to enforce the observance of its prohibitions by the imposition of criminal sanctions or penalties for disobedience, otherwise this power would be wholly abortive. With the power to prohibit an Act, there must co-exist the incidental power to impose punishment for the violation of such a prohibition.

The subject Criminal Law including Criminal Procedure is obviously used in its general and wide sense so as to occupy the entire field except what has been excepted and carved out of it in Part II. As the language used in the Devolution Rules is very similar to that employed in the Canadian Constitution (S. 92 No. 27 and S. 92 No. 14), the words, which Lord Herschell is reported to have used in *A. G. for Ontario* v. *A. G. for the Dominion*[1] and Lefroy; Canada's Federal System (1913), p. 320, are equally applicable:

"It is all the criminal law in the widest and fullest sense, except that part of it which is necessary for the purpose of enforcing, whether by fine, penalty or imprisonment, any of the laws validly made under the 16 clauses under which laws are to be made by the Provincial Government."

Again, it was observed in *A. G. for Ontario* v. *Hamilton Street Railway Co.*,[2] that,

"It is therefore the criminal law in its widest sense that is reserved. . . . The fact that from the Criminal Law generally there is one exception . . . renders it more clear, if anything were necessary to render it more clear, that with that exception the criminal law in its widest sense is reserved over the exclusive authority of the Dominion Parliament."

In *Bradlaugh* v. *Clarke*[3], the Earl of Selborne stated that it was known to be

"the Law that every unappropriated penalty goes to the King, and that a common informer cannot have any right to, or interest in, a penalty imposed by a public statute unless it is given to him either expressly, or by a just and reasonable implication from the words which the Legislature has used."

In the *Toronto City Corporation* v. *The King*[4], S. 1036 of the Criminal Code of Canada had provided that fines imposed in the Province of Ontario should be paid over to the Municipal or local authority. Their Lordships

1. (1896) A.C. 348.
2. (1903) A.C. 524 at 528-9.
3. (1883) 8 A.C. 354 at 368.
4. (1932) A.C. 98.

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of the Privy Council upholding the validity of the provision laid down at p. 104:

"In the case of fines, it is only those which are 'unappropriated' which belong to the Crown, *i.e.*, those the disposition of which has not been by competent authority otherwise directed. The criminal law provides many instances in which fines imposed for particular crimes or offences are directed to be paid over to named persons or institutions, for example, to a common informer. The motive may be either the encouragement of the detection and prosecution of crime or the recognition of the special claim of a particular institution or object to the benefit of this source of revenue. In so far as the legislature directs the special application of fines the prerogative right to fines is abrogated. . . . It has always been regarded as within the scope of criminal legislation to make provision for the disposal of penalties inflicted, as innumerable instances show, and the power to do so is, if not essential, at least incidental, to the power to legislate on criminal matters for it may well go to the efficacy of such legislation. If the power or direct the manner of application of penalties were to be dissociated from the power to create such penalties and were to be lodged in another authority, it is easy to see how penal legislation might seriously be affected, if not stultified."

In deciding the case their Lordships proceeded upon

"the general principle that any prerogative right to fines which as a 'royalty' passed from the Province of Canada to the Province of Ontario at the Union was a right only to such fines as might not be otherwise appropriated by the Dominion Parliament in the exercise of its exclusive right to legislate on all matters coming within the criminal law" (p. 105).

This view was expressed even assuming without deciding that the "royalties" assigned to the Provinces included fines imposed for infraction of the Criminal Law. The same remarks apply to the present case, even if fines were included in the Administration of Justice.

If Criminal Law prohibiting certain acts or omissions must necessarily include imposition of penalty and fine for enforcing such prohibitions, then Criminal Procedure must necessarily include the method of exacting such penalties and fines and realising such fines. The Code of Criminal Procedure (V of 1898) with subsequent amendments provides for the method of recovering fines. Under S. 33 imprisonment can be awarded in default of payment of fine. If the fine is not paid, the Court under S. 386 can either (*a*) issue a warrant for levy of the amount by attachment and sale of the offender's movable property or (*b*) issue a warrant to the Collector authorising him to realise the amount by execution according to civil process against his movable or immovable property. Rules can be made by the Local Government regarding the first case, while warrant in the second case is deemed to be a civil decree and is executable as such. Under S. 388 the Court has power to allow time for payment of the fine. By S. 545 a Criminal Court is authorised to order the whole or any part of the fine recovered to be applied (*a*) in defraying expenses properly incurred in the prosecution, (*b*) in payment of compensation for loss or injury, and (*c*) for compensating a *bona fide* purchaser when the property is restored to the person entitled. Thus Criminal Law and Procedure cover the entire field of creating crimes, imposing penalties and realising fines.

Imposition of fine for enforcing any law of the Province had been specifically mentioned, and assigned to the Provinces, but imposition of fine

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under a Criminal Law of the Centre had not been separately mentioned at all. Such imposition must therefore fall under the general category of Criminal Law and Procedure and be assigned to the Centre. Fines imposed for convictions under such law and directed to be applied in a specified way would, when realised, be receipts accruing in respect of such Criminal Law and Procedure and not in respect of Administration of Justice. Not being receipts accruing in respect of a Provincial subject, they could not be allocated to the Local Government as sources of Provincial revenues. Of course, any surplus, the expenditure of which had not been prescribed by a competent authority, would remain as part of the Provincial revenues.

Present position.—S. 292 of the present Act in express terms lays down that all the existing law in force in British India shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

Under the India and Burma (Transitory Provisions) Order, 1937, para. 4 (*a*), any tax, fine, penalty, or other sum of whatever nature required by or under any law as in force immediately before the commencement of Part III of the India Act to be credited to any local fund or other fund shall during the two financial years next following continue to be so credited and shall not during those years be deemed to be part of the revenues of the Province. This paragraph would apply to the fines credited to the Cantonment funds as S. 106 (*c*) was "a law in force". The section being *intra vires,* the provisions of the paragraph would be applicable, and such fines credited to the Cantonment Fund must be deemed not to form part of the revenues of the United Provinces at all, and must continue to be so credited till the 31st of March, 1939.

In the new Government of India Act, the Seventh Schedule contains both Federal and Provincial Legislative lists as well as a concurrent Legislative list. In the first List, No. 2, only Local Self-Government in cantonment areas (not being cantonment areas of Indian State troops), the regulation of house accommodation in such areas, and within British India, the delimitation of such areas are now assigned to the Federation, and not the whole subject of Cantonments. In List II, No. 1, the Administration of Justice and constitution and organisation of Provincial Courts have been assigned to the Provinces. Jurisdiction and powers of Courts with respect to matters contained in List II, are assigned separately under No. 2. Again, the whole subject of Criminal Law has not been assigned exclusively to the Federation. Offences against laws with respect to all the matters in the first two lists are assigned to the Federation and the Provinces, respectively, and Criminal Law excluding such offences, along with Criminal Procedure has been put in the Concurrent List. Instead of a provision as to the allocation of receipts accruing in respect of particular subjects, we now have S. 136 under which the revenues of the Federation include all revenues and public moneys raised or received by the Federation; and the revenues of the Province include all revenues and public moneys raised or received by a Province. The transitional provisions in S. 313 (3) (*b*) are on the same lines. Imposition of fine, penalty or imprisonment for enforcing any law is not separately men-

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tioned and is obviously covered by the category "Offences against laws" and by the general category in the concurrent Legislative list "Criminal Law". The clause permitting, 'expenditure of which the amount is prescribed by or under any law' which occurred in the old S. 72-D (3) (*iii*) has been omitted from the corresponding S. 78 in the new Act.

But as S. 106 (*c*) has in fact been deleted under the Government of India (Adaptation of Indian Laws) Order, 1937, and from 1st April, 1939, all such fines will be credited to the Provincial revenues, it is unnecessary to consider the propriety of the deletion. Of course, under S. 292, the provision would remain in force if not deleted.

I agree that the whole suit should be dismissed with costs.

Varadachariar, J.—I agree that the suit must be dismissed with costs. As the material facts and the relevant provisions of law have been set out in the judgments which have just been delivered, I shall state my reasons very briefly.

In view of our conclusion that the suit fails on the merits, the objections taken on behalf of the Government of India to the maintainability of the suit do not call for more than a brief notice. The maintainability of the suit was objected to on two grounds: (1) that the case did not involve a dispute of the kind contemplated by S. 204 of the Government of India Act, 1935, and (2) that the Government of India was not the party against whom the plaintiff was entitled to claim the reliefs prayed for in the plaint.

To take the second objection first, it must be conceded that there was considerable force in it so far as the reliefs originally prayed for were concerned, because the Government of India did not collect or receive any portion of the fines to which the suit relates. But after the addition of the prayer for a declaration that S. 106 (*c*) of the Cantonments Act, 1924, was *ultra vires* the Central Legislature, the learned counsel for the defendant recognised that this objection lost its force. It cannot be denied that the Government of India to whom the administration of cantonments has been entrusted has maintained and does continue to maintain that S. 106 (*c*) of the Cantonments Act was valid and on this footing has disputed the plaintiff's claim to credit the fines in question to Provincial revenues. This is certainly sufficient to entitle the plaintiff to ask for the declaration now prayed for, as against the Government of India. The absence of the Cantonment Boards from the array of parties is, for the reasons given by My Lord, immaterial so far as the prayer for declaratory relief is concerned.

In connection with the first objection, the learned Advocate-General of India had to draw a distinction between the position as it was prior to 1937 (when Part III of the Government of India Act of 1935 came into force) and the position of affairs subsequent to 1937; and his contention was based on the relative position of the United Provinces administration and the Government of India during the earlier period. I did not understand the learned counsel for the defendant to contend, or at any rate he did not seriously maintain, that even if there had been in existence a "legal right", the mere absence of a *remedy* or of a tribunal before which the person entitled to the

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right could have claimed relief would justify the dismissal of a suit instituted before a tribunal which has admittedly been brought into existence by the Act of 1935. The decision in *The 'Alexander'*[1], is authority for the proposition that a person to whom a right had accrued might avail himself of a remedy which was given by a statute enacted subsequent to the date of the accrual of the right. The contention of the learned counsel was that prior to 1937 the Government of the United Provinces had no "legal right" which could be said to have been infringed or which it could not seek to vindicate with the aid of the procedure provided for by S. 204 of the Act of 1935. This contention as to the absence of a "legal right" he sought to support by two arguments: (1) that the original absence of a remedy at law implied the non-existence of a legal right, and (2) that during the antecedent period, the Government of the United Provinces and the Government of India were not two independent legal entities or juristic persons with reference to whom it could be predicated that the one had a *right* as against the other.

As to the first of the two arguments just referred to, I agree with my learned brother that the non-existence of a remedy at law is not a conclusive test against the existence of a "legal right" and that on the true construction of S. 204 of the Government of India Act, this Court has only to see whether there was a right recognisable by law and not one enforceable in a Court of Law. The second argument seems to me, however, to be more substantial. As explained in Holland's *Jurisprudence* (Chapter VIII), the conception of a "legal right" involves the existence of at least two persons, that is, the person entitled and the person obliged to do or forbear—to borrow the phraseology of Holland, "the person of inherence" and "the person of incidence". It was rightly maintained by the learned Advocate-General of India that prior to the coming into force of the new Constitution, all rights and liabilities pertaining to the Government of India or to the Governments of the Provinces had to be enforced only by or against the Secretary of State for India and that the Governments of the Provinces were only subordinate administrations bound to carry out the directions of the Central Government and of the Secretary of State. On this basis, it will not be reasonable to treat the Government of the United Provinces as having *legal rights* against the Government of India. But the learned counsel had to concede that in this respect, the position had become different, under the new Constitution; and in the view that even after the coming into force of the new Constitution, the Government of India has been taking up an attitude which entitles the Government of the United Provinces to claim the declaratory relief now prayed for, this objection, based upon the antecedent state of things, is not fatal to the maintenance of the suit so far as it relates to the declaratory relief.

Dealing with the merits, I would like to state at the outset that though the plaint challenged the validity of all the six sub-clauses comprised in clause (*c*) of S. 106 of the Cantonments Act of 1924, the learned counsel

1. (1841) 1 W. Rob. 288: 166 E.R. 580.

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for the plaintiff recognised in the course of the argument that the contention was untenable at least in respect of sub-cls. (*i*) and (*v*). As the benefit of the "Devolution Rules" could be claimed by the plaintiff only in respect of items not otherwise *validly* disposed of, he had to admit that there could be no basis for the contention of *ultra vires* in cases in which by legislation in force even prior to the Devolution Rules or by the express provisions of the very enactment which created particular offences, there was a direction to credit to the Cantonment Fund the fines realised in particular classes of cases. Even as regards items enumerated in the other sub-clauses, the contention that the provision was *ultra vires* fails on two grounds: (*i*) that the very provision on which the plaintiff's claim is based, namely, the language of item 17 in the list of Provincial subjects appended to the Devolution Rules, reserves "legislation by the Indian Legislature as regards . . . any Courts of criminal jurisdiction", and (*ii*) that in any view as to the inter-relation of the various items in the two parts of that Schedule (Central and Provincial) the competency of the Indian Legislature to make laws within the limits prescribed by S. 65 of the Government of India Act of 1919 is placed beyond doubt by S. 84 (2) of that Act.

The learned counsel for the plaintiff attempted to read the reservation in the concluding part of item 17 in the list of Provincial subjects as limited to "constitution, powers, maintenance and organization of Courts", the words immediately preceding the reservation, and as not qualifying the whole item opening with the words "administration of justice". Apart from the difficulty created by the punctuation in the way of so reading the words of reservation, this does not seem to me to be a natural reading of the item taken as a whole. It is only when full effect is given to the reservation of the Indian Legislature's power in this item that due effect will be given to the inclusion of "criminal law including criminal procedure", as item 30 in the list of central subjects. Item 41 in the central list is the corollary to the reservations made in various items of the Provincial list in respect of the power of the Central Legislature to deal with matters included in the provincial list.

Item 50 in the provincial list does not seem to me to throw any light on the point now under consideration. It relates only to *legislation* by the Provincial Legislatures including the power to prescribe penalties, and among them "fines". The insertion of an express power in this behalf cannot be held to suggest or preclude by any kind of implication any inference as to the right to *collect* or appropriate fines prescribed by existing enactments of the Provincial Legislature or by enactments of the Central Legislature. It has not been disputed by the learned Advocate-General of India that, in the ordinary course, the power to collect fines imposed on conviction would have passed to the Provincial Government under the head of "administration of justice" (item 17). It is the reservation of the power of the Central Legislature in that very article, so far as Courts of criminal jurisdiction are concerned, that enables the Central Legislature to deal with fines which would otherwise have passed under that article. The decision of the Judicial Com-

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mittee in *Toronto City Corporation* v. *The King*[1], is authority for the proposition that a power to legislate in respect of criminal law and criminal procedure includes a power to prescribe the destination of the fines realised in the course of the administration of criminal justice.

As I have already observed, a second answer to the plaintiff's contention is furnished by S. 84 (2) of the Government of India Act of 1919 which in terms provided that nothing in that Act or in any rule made thereunder should be construed as diminishing in any respect the powers of the Indian Legislature as laid down in S. 65 of the Act. The apparent conflict between this provision and S. 129-A of the Act can be avoided by reading S. 129-A in the manner suggested by my Lord. As explained in his judgment, and in paragraphs 141 to 143 of the Statutory Commission's Report, the distribution of functions between the Central and Provincial Governments and Legislatures by the Devolution Rules was introduced by the Act of 1919 only as a matter of practical and administrative arrangement, the Central Legislature nevertheless remaining "theoretically entitled to legislate over the whole field." Having regard to the formalities to be gone through before any proposal could become law in this country, there was nothing illogical in Parliament assuming that notwithstanding the theoretical continuance of the full powers of the Central Legislature, it would not attempt to change the Devolution Rules in contravention of S. 129-A of the Act.

The learned counsel for the plaintiff attempted to press into his service a suggestion thrown out by my learned brother in the course of the argument to the effect that the words "nothing in this Act . . . shall be construed as limiting" in S. 84 (2) may not suffice to effectuate a ***real*** continuance of the full power of the Indian Legislature, but only prevent the Court from construing the Act in such a way as to invalidate any Act passed by the Central Legislature. On this assumption, it was suggested that on the repeal of the Act of 1919, the restraint thus imposed on the Court must be held to have disappeared and that the Court must now construe the Act according to the natural meaning of the words used. In support of this argument, reliance was placed on the latter portion of S. 84, cl. (2), which in terms precludes the question of *ultra vires* being raised in any legal proceeding. This does not seem to me to be a proper interpretation of the language of the clause. When an enactment states that nothing therein ***shall be construed*** as having a particular effect, it does not seem to me right to interpret that provision merely as prohibiting a Court from placing a particular construction on the enactment. It is the method usually adopted for declaring that even if on account of the imperfections of language the words found in the enactment should ***seem to suggest*** a particular meaning, such was not the true intention of the Legislature. The latter part of S. 84 (2) cannot, in my opinion, be used to limit the significance of the earlier words, because the latter part relates not only to Acts of the Central Legislature but also to Acts of the Local Legislature, whereas the earlier

1. (1932) A.C. 98.

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portion relates only to Acts of the Indian Legislature. It follows that notwithstanding the Devolution Rules framed under the Government of India Act of 1919, the Indian Legislature was competent to enact S. 106 (*c*) of the Cantonments Act of 1924.

Suit dismissed.

K.S.

IN THE FEDERAL COURT OF INDIA.

APPELLATE JURISDICTION.

[On appeal from the High Court at Lahore.]

PRESENT:—SIR MAURICE GWYER, C.J., SIR SHAH SULAIMAN AND SIR S. VARADACHARIAR, JJ.

Dr. Hori Ram Singh .. .. .. *Appellant* *

v.

The Crown .. .. *Respondent.*

The Government of India Act (1935), *S.* 205—*Jurisdiction of Federal Court in Criminal cases—"Judgment, decree or final order"—If includes judgment or order in criminal cases—S* 270 (1)—*Consent of the governor for prosecution of public servant for offences under Ss* 409 *and* 477-*A, Indian Penal Code—When necessary.*

The appellant, a member of the Punjab Provincial Subordinate Medical Service was charged with having (1) committed criminal breach of trust in respect of some medicines (an offence punishable under S. 409, I.P.C.); and (2) with intent to defraud, omitted to record entries in the stock book of medicines in his possession belonging to the district board (an offence punishable under S. 477-A, I.P.C.). The preliminary objection that sanction under S. 270 (*i*) of the Government of India Act, 1935, was necessary was allowed by the Sessions Judge who acquitted him. The High Court reversed the decision, set aside the acquittal and ordered a re-trial. On appeal to the Federal Court,

Held per *Gwyer, CJ.*—The words "Judgment, decree or order" in S. 205 of the Government of India Act, 1935, ought to receive no narrow interpretation and the Federal Court has jurisdiction in criminal as well as civil cases.

Per Sulaiman, J.—The order of the High Court directing the re-hearing of the criminal appeal is not a judgment or final order within the meaning of S. 205 of the Government of India Act, 1935 and there can be no appeal against it.

Per Varadachariar, J.—It cannot be said that the word "judgment" is not comprehensive enough to include a judgment pronounced in a criminal case.

By the Court.—If the allegations in a suit or criminal proceeding cannot be held to relate to "any act done or purporting to be done in the execution of his duty" by the defendant or accused "as a servant of the Crown" the consent of the authorities would *prima facie* not be necessary for the institution of the proceedings. Consent of the governor under S. 270 (1) of the Constitution Act is necessary for the charge under S. 477-A, I.P.C., though not for that under S. 409, I.P.C.

Dr. Hori Ram Singh in person.

M. Sleem (*Advocate-General, Punjab*) and *S. K. Ahmed* instructed by *Tarachand Brijmohan Lal* for Respondent.

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*Case No. 1 of 1939. 12th April, 1939.

Gwyer, C.J.—I have had the opportunity of reading the judgment prepared by my brother Varadachariar and I find myself so completely in agreement with it that I think it unnecessary to deliver a separate judgment of my own. I will only add, since the question of jurisdiction has been mentioned, that I have no doubt that this Court has jurisdiction in criminal as well as civil cases. It would indeed be very surprising if it were otherwise, since it has been in the criminal courts that many of the great constitutional questions of the past have been determined; and in my opinion the words "judgment, decree or final order" ought to receive no narrow interpretation.

I concur with my brethren in holding that the appeal should be allowed as regards the charge under S. 477-A of the Indian Penal Code and dismissed as regards the charge under S. 409.

Sulaiman, J.—The facts of this case are fully given in the judgment to be delivered by my brother Varadachariar. Although no objection had been raised by learned counsel to the maintainability of this appeal, I had expressed a doubt regarding it in the course of the hearing. The question being one of jurisdiction, I feel that I should not ignore it.

Criminal Jurisdiction—The first question is whether a criminal appeal at all lies to the Federal Court. The mere fact that the Federal Court has framed rules for such appeals is not by itself conclusive. The doubt is created by the observations made by their Lordships of the Privy Council in the somewhat analogous case of *Chung Chuck* v. *The King*[1] In that case the decision turned on the interpretation of r. 2 of the Order in Council, dated the 23rd January, 1911. Under that rule an appeal lay as of right from any final judgment of the Court, and at the discretion of the Court from any other judgment. Rule 1 defined "judgment" as including "decree, order, sentence or decision". Their Lordships pointed out that although the word 'sentence' is appropriate to some procedure in criminal law and is chiefly heard in criminal trials, there is a great difference between a conviction and a sentence and it would be very strange if there were an appeal against sentence and not against conviction; the word 'sentence' is a well-known word in common law and it is not applied so as to give the right to appeal in criminal cases. The word 'decision' if it stood alone may embrace matters of both civil and criminal laws but the word is not used alone here. One cannot take one word out of this Order and say that it may include criminal law; one must look at the whole of the Order in Council. Now r. 2 (*a*) certainly referred to civil matters and for purposes of an appeal fixed a value for the subject-matter of the suit, and r. 2 (*b*) began with the words "subject to the provisions of these rules". Their Lordships thought that the word "other" refers and relates back to the same sort of judgment as those which are referred to in r. 2 (*a*), that is to say, a judgment where the matter in dispute amounts to or involves some claim to property. Other provisions of the order related to subject-matters and did not appear to include criminal matters. In particular, there was provision for "stay of execution" which was entirely appropriate in a civil case and was not so

1. (1930) A.C. 244.

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appropriate in a criminal case; nor was there any provision made for a man who had been sent to prison. Their Lordships accordingly held that the words were not wide enough to include a criminal judgment.

Some of these considerations are applicable to the provisions of the Government of India Act as well. S. 205 (1) refers to an appeal from 'any judgment, decree or final order'. It does not even use the word 'decision' much less 'sentence'. Judgment, decree or final order taken together are words commonly used in the Code of Civil Procedure where judgment is followed by a decree or final order. The words 'final order' are still more appropriate in a civil case where a clear distinction exists between a final order and an interlocutory order. There is no other provision in this part of the Act which would suggest that criminal cases are included. Indeed. S. 206 specifically speaks of 'civil cases'. When providing an appeal to His Majesty in Council from the Federal Court the words 'decision' and 'judgment' are used in S. 208. Section 209 (1) again uses the words 'judgment, decree or order' which is substituted for that of the High Court. Sub-S. (3) refers to 'a stay of execution' and does not refer to granting bail or releasing accused person from custody. The criminal jurisdiction of the Federal Court is mentioned in S. 210 (2) but only as regards punishment of any contempt of Court.

On the other hand, it cannot be doubted that the words 'judgment and final order' in themselves are certainly wide and can include a criminal judgment and a criminal order. Although S. 206 is confined to 'civil cases', S. 205 has no such restriction. Similarly the words 'judgment or order' in S. 209 are also wide enough. Sub-S. (3) can be made applicable to a criminal case before the accused is actually sent to prison. The realization of fine or sending him to prison or the carrying out of a sentence of whipping or death can certainly be postponed if a stay of execution is ordered. Section 210 refers to all courts in British India. These may well include not only civil but also criminal courts.

The main object of the establishment of the Federal Court is to get decided substantial questions of law as to the interpretation of this Act or any Order in Council made thereunder, so as to introduce uniformity throughout India. Section 270 which contains an indemnity for past acts to government servants prevents criminal proceedings from being instituted against a government servant under certain conditions. The question whether the continuance of the criminal proceedings would or would not be contrary to the express provisions of this section can arise only in a criminal case. If a criminal case in which such a question arises is not allowed to be brought up to the Federal Court at all, the Federal Court can never be called upon to interpret this particular section. The Privy Council may not grant special leave to appeal unless it be shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. (In re *Abraham Mallory Dillet*[1]) Again in the

1. (1887) 12 A C. 459.

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Seventh Schedule containing the Legislative lists there may, as is often common, be penalties prescribed in various legislations for breach of conditions laid down therein, the validity of which may be challenged only in a criminal case. The validity of the criminal legislations themselves may be challenged only in criminal courts. All such matters would be outside the jurisdiction of the Federal Court if no criminal case is allowed to be brought before it. But there is no inherent right of appeal to a higher tribunal, the right being only a creature of statute. The question is not free from doubt, but I am prepared to assume for the purposes of this case that the words 'judgment or final order' in the section apply to criminal cases as well. But the further question still remains whether the order of remand was a 'judgment' or 'final order'.

Judgment.—In the Indian Code of Civil Procedure judgment is quite separate and distinct from decree. Under S. 2 (9) judgment means the statement given by the Judge of the grounds of a decree or order; the judgment is merely the statement of the grounds, but must have been given in a case in which a decree or order exists. If in the expression 'judgment, decree or final order' in a civil case the word 'judgment' were to have the Indian sense, then it will mean the statement of the grounds in a case where either a decree or a final order exists and not in any other case, as appeal from a judgment standing by itself would have no meaning. Appeal from judgment would then indicate the appeal from any finding in a case terminated by a decree or a final order.

In England under S. 225 of the Judicature Act judgment includes decree. In that sense in a civil case the word 'decree' in the expression 'judgment, decree or final order' would be superfluous. Indeed, although wider, the operative part of a judgment is almost like an Indian decree. Decree was a term, which, in Equity practice, corresponded to judgment at Common Law. Decree is the equivalent to the term judgment in the Queens' Bench Division. A judgment is a decision obtained in an action, and any other decision is an order (per *Cotton, L.J.*, in Ex parte *Chinery*[1]). The forms of judgment given in the Annual Practice, Appendix D, are exactly like the forms of decrees in the Indian Code, Appendix D. According to the English practice both judgment and decree can be final or interlocutory according as they do or do not finally determine the rights of the parties and conclusively dispose of the whole matter in dispute. Black in his book on Judments defined a judgment

"as the determination or sentence of the law pronounced by a competent Judge or Court as the result of an action or proceeding instituted in such Court affirming that upon the matters submitted for decision a legal duty or liability does or does not exist. An interlocutory judgment is one which determines some preliminary or subordinate point or plea or settles some step, question or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of Court." . .

1. (1884) 12 Q.B.D 342.

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On the other hand the learned author defined an order

"as the mandate or determination of the Court upon some subsidiary or collateral matter arising in an action, not disposing of the merits but adjudicating a preliminary point by directing some steps in the proceedings".

The word 'judgment' occurs in clause (10) of the Letters Patent of the Allahabad High Court and clause (15) of the Letters Patent of the Calcutta, Madras and Bombay High Courts, and 'final judgment' in clauses (30) and (39) respectively. As they had been drafted in England, the first interpretation put upon the word was more or less in the English sense, and not that used in the Civil Code. The earliest leading case of Calcutta was the *Justices of the Peace for Calcutta* v. *Oriental Gas Co.*[1] Couch, C.J., defined judgment as meaning

"a decision which affects the merits of the question between the parties by determining some right or liability. It may either be preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined".

In *Ebrahim* v. *Fuckhrunnissa Begam,*[2] Garth, C.J., observed that:

"The word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character, which merely decides some isolated point, not affecting the merits or result of the entire suit."

Although purporting to follow these definitions, the Calcutta High Court gradually widened the scope of its meaning In the latest Full Bench case of *Brajagopal Ray Burman* v. *Amarchandra Bhattacharji,*[3] Rankin, C.J., observed:

"On the whole, and not without some doubt, I think that the mere circumstance that an order puts in peril the finality of a decision given in the respondent's favour, does not of itself make the order a 'judgment' within the meaning of clause 15 of Letters Patent."

The learned Chief Justice at page 140 doubted whether the correct technical use of the word 'judgment' in England is a safe guide. The High Courts of Bombay and Patna have purported to accept the definition of Couch, C.J., generally. But in Calcutta, Bombay and Madras orders in Civil Revision were regarded as judgments until the Letters Patent were amended in 1919, which made an appeal impossible.

The latest Full Bench case of the Madras High Court is *Tuljaram Rao* v. *Alagappa Chettiar,*[4] where White, C.J., held at page 7 that:

"If its effect, whatever its form may be, and whatever may by the language of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or its effect, if it is complied, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

1. (1872) 17 Suth. W.R. 364 at 370-372.
2. (1878) I.L.R. 4 Cal. 531 at 534.
3. (1928) I.L.R. 56 Cal. 135 at 144 (F.B.).
4. (1910) 21 M.L.J. 1: I.L.R. 35 Mad. 1 (F.B.).

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The Lahore High Court appears to have adopted the view of White, C.J.

In the Full Bench of the Allahabad High Court, *Muhammad Naim-ul-lah Khan* v. *Ihsan-ul-lah Khan,*[1] Edge, C.J., at p. 228 observed:

"In my opinion the judgment referred to in S. 10 of the Letters Patent is the express decision of a Judge of the Court which leads up to, and originates, an order or decree."

On p. 232 the opinion was expressed that orders in Civil Revision were not judgments and therefore not appealable under the Letters. The Full Bench case has naturally been followed in subsequent cases.

The observation of Lord Sumner in *Sabitri Thakurain* v. *Savi,*[2] that what clause 15 of the Calcutta Letters Patent expressly provides is an appeal to the High Court's appellate jurisdiction from a decree of the High Court in its original ordinary jurisdiction, was not understood in India as containing a definition of the word "judgment". But their Lordships of the Privy Council had occasion to define the word 'judgment' in two cases coming from the Bombay High Court. In *Tata Iron and Steel Co., Ltd.* v. *The Chief Revenue Authority of Bombay,*[3] Lord Atkinson, relied on *Onslow* v. *Commissioners of Inland Revenue,*[4] and pointed out that a final judgment was different from final order as used in the 39th clause of the Bombay Letters Patent. In *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee,*[5] Sir John Edge laid down that:

"The term judgment in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense."

This observation was attempted to be distinguished, by drawing a distinction, perhaps without a difference, in *Ishwari Prasad* v. *Sheotahal Rai,*[6] in view of a practice that had grown up to treat certain orders as being judgments. The same view was expressed in the Full Bench case of *Sital Din* v. *Anant Ram,*[7] where it was also held that judgment includes a final order. Both these cases were decided before knowing the exposition of the meaning of 'final order' by their Lordships of the Privy Council in *Abdul Rahman* v. *Cassim & Sons,*[8] to be mentioned hereafter. It may also be noted that in *Bhogi Lal's case,*[5] their Lordships had not said that the term 'final judgment' in clause 39 of the Bombay Letters Patent means final decree in civil cases, but that the term 'judgment' in the Letters Patent of Bombay means in civil cases a decree, and not a judgment in the ordinary sense. In a

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1. (1892) I.L.R. 14 All. 226 (F.B.).
2. (1920) 40 M.L.J. 306: L.R. 48 I.A. 76: I.L.R. 48 Cal. 481: A.I.R. 1921 P.C. 80 at 82 (P.C.).
3. (1923) 45 M.L.J. 295: L.R. 50 I.A. 212: I.L.R. 47 Bom. 724 (P.C.).
4. (1890) 25 Q.B.D. 465.
5. (1925) 49 M.L.J. 25: A.I.R. 1925 P.C. 155 (P.C.).
6. (1926) I.L.R. 48 All. 684: 24 A.L.J. 892 at 893.
7. (1933) I.L.R. 55 All. 326: 31 A.L.J. 127 (F.B.).
8. (1932) 64 M.L.J. 307: L.R. 60 I.A. 76: I.L.R. 11 Rang. 58: A.I.R. 1933 P.C. 58 (P.C.).

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later case of *Shahzadi Begam* v. *Alakh Nath*,[1] a Full Bench of the Allahabad High Court of which I was a member at the time, dissented from the opinion of White, C J., expressed in the Madras Full Bench, and it was pointed out that

"the test laid down by the learned Chief Justice of the Madras High Court is put in too wide a language and cannot be accepted as laying down the correct criterion",

and it was further observed that their Lordships' observation in *Bhogi Lal's case*,[2] made it clear that the word 'judgment' used in the Letters Patent is not to be taken in its widest scope. The Allahabad Full Bench at p. 687 declined to accept the contention that

"Every order passed by a single Judge which puts an end to or terminates the proceeding or which has by implication the necessary effect resulting in such a termination is a judgment".

Shortly after this Allahabad Full Bench case came the Full Bench decision of the Rangoon High Court in *Dayabhai Jiwandas* v. *Murugappa Chettiar*,[3] where at p. 269 the view of White, C.J., was dissented from and Page, C.J., observed that

"Judgment means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. A final judgment is a decree in a suit by which all the matters at issue therein are decided. A preliminary or interlocutory judgment is a decree in a suit by which the right to the relief claimed in the suit is decided, but under which further proceedings are necessary before the suit, in its entirety, can be determined."

In view of the observation, made by their Lordships of the Privy Council, the word "judgment" cannot now be taken in its widest possible sense so as to include every order which terminates a proceeding pending in a High Court so far as that Court is concerned.

In criminal cases the position is still stronger. In England judgment is equivalent to a judgment of conviction or acquittal and is distinct from other orders in a criminal case. This will appear from an examination of paragraphs 260-264 in Vol. 9 of *Halsbury's Law of England* (Hailsham Edition).

In the Indian Code of Criminal Procedure judgment is not defined, but various sections suggest what it means. Ss. 404 and 415-A no doubt refer to appeal from judgment or appealable judgment respectively. But under Ss. 263 and 264, the judgment in a summary trial has to contain the finding and sentence or other final order. Under S. 305, in a jury trial the order of conviction or acquittal in accordance with the opinion of the Jury is the judgment. Under S. 309, in a case tried with Assessors the final order, which is followed by the sentence, is the judgment. Section 367 suggests what the contents of a judgment should be, and what it should comprise of when it be a judgment of conviction and what if it be a judgment of acquittal. Section 370 also requires a record of the offence complained of or proved, the plea of the accused and the final order. As final orders like

1. (1935) I.L.R. 57 All. 983: 1935 A.L.J. 681 at 685 (F.B.).
2. (1925) 49 M.L.J. 25: A.I.R. 1925 P.C. 155 (P.C.).
3. (1935) I.L.R. 13 Rang. 457: A.I.R. 1935 Rang. 267 (F.B.).

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those under Ss. 144 and 145 could not be judgments, a special provision has been made in S. 367 (6) that certain orders should be deemed to be a judgment. The Code provides appeals from certain appealable orders, and S. 423 provides appeals from conviction and sentence. Thus "judgment" in the Code means a judgment of conviction or acquittal.

Even in Madras, in *Emperor* v. *Chinna Kaliappa Goundan*,[1] White, C.J., at page 131 held that an order of dismissal of a complaint under S. 203 is not a judgment within the meaning of S. 360 and this was the opinion of the majority. This opinion was later followed by another Division Bench of the Madras High Court in *Emperor* v. *Maheshwara Kondaya*,[2] where it was held that an order of discharge is not a judgment, as

"a judgment is intended to indicate the final order in a trial terminating in either the conviction or acquittal of the accused".

Thus neither under the English nor the Indian Law the term "judgment" in a criminal case includes an interlocutory order. In S. 205 (1) of the Act, the word "judgment" does not occur by itself but is used in conjunction with final order. When both the terms judgment and final order are used together in one expression, they undoubtedly connote different and distinct meanings, and judgment cannot be interpreted as embracing even interlocutory orders, which would make the category "final order" wholly superfluous and unnecessary. It is true that in the Federal Court Rules unfortunately the definitions of judgment, decree and order have been borrowed from the Code of Civil Procedure; but that of course is only for the purposes of the rules and cannot be taken in any way to control the proper meanings to be given to those terms in the Act itself, even if an inconsistency were inevitable.

I am of the opinion that the order of the High Court directing a rehearing of the criminal appeal by the Sessions Court is not a judgment within the meaning of S. 205 of the Government of India Act.

Final Order.—The next question is whether it is a final order. The order of the High Court is final in the restricted sense that it disposes of the matter pending before the High Court finally, the case going back to the Sessions Judge. But it is by no means final so far as the case itself is concerned, because the appeal is still before the Sessions Judge and will have to be disposed of on its merits and then only a final order passed. Thus, ordinarily speaking, an order sending the case back to the Appellate Court cannot be considered to be a final order within the meaning of S. 205 (1) of the Act. The words "final order" do not occur in the present Criminal Procedure Code. As the same words would apply both to civil and criminal cases, it would not be inappropriate to consider the meaning of "final order" as used in the Civil Procedure Code. These words occur in S. 109, C.P.C., where an appeal lies in certain cases from a decree or final order passed on appeal by a High Court. Their Lordships have had occasion to consi-

1. (1905) 16 M.L.J. 79: I.L.R. 29 Mad. 126 (F.B.).
2. (1908) I.L.R. 31 Mad. 543 at 545.

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der what is meant by the words "final order". The words "final order" are ordinarily used in contrast with interlocutory order. But in *Rahimbhoy Habibbhoy* v. *Turner*[1] and *Muzhar Hossein* v. *Radha Bibi*,[2] both of which were under S. 595 of the Civil Procedure Code of 1882 their Lordships laid down that an order even though not final in the ordinary sense would be final if it decides the cardinal point in the case notwithstanding that there might be subsidiary enquiries to make. In the present case there is no doubt that a cardinal point has been decided by the High Court adversely. The accused's objection was as to the legality of the proceedings which went to the root of the matter and which if decided in his favour would result in the dismissal of the complaint outright. If the proceedings were really in contravention of the provisions of S. 270 and were void *ab initio*, the merits of the case should not be gone into at all.

But their Lordships have in two more recent cases expressed a somewhat different view. In *Ramchand Manjimal* v. *Goverdhandas Vishindas Ratanchand*,[3] their Lordships, following two English decisions (*Salaman* v. *Warner*[4] and *Bozson* v. *Altrincham Urban District Council*[5]) laid down that an order refusing stay of suit under the Arbitration Act was not a final order, as it did not finally dispose of the rights of the parties but left them to be determined by the Courts in the ordinary way.

The definition of final order as given in *Salaman's case*[4] was as follows. Lord Esher, M.R., observed:

"If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes, of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

Fry, L.J., remarked:

"I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined."

Lopes, L.J., said:

"I think that a judgment or order would be final within the meaning of the rules, when, whichever way it went, it would finally determine the rights of the parties."

But in *Bozson's case*,[5] Lord Alverstone, C.J., held:

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

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1. (1890) L.R. 18 I.A. 6: I.L.R. 15 Bom. 155 (P.C.).
2. (1894) 5 M.L.J. 20: L.R. 22 I.A. 1: I.L.R. 17 All. 112 (P.C.).
3. (1920) 39 M.L.J. 27: L.R. 47 I.A. 124: I.L.R. 47 Cal. 918: A.I.R. 1920 P.C. 86 (P.C.).
4. (1891) 1 Q.B. 734.
5. (1903) 1 K.B. 547.

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In *Abdul Rahman* v. *Cassim & Sons*,[1] Sir George Lowndes distinguished the two earlier cases of their Lordships on the ground that they had been decided under S. 595 of the old Code where the wording was materially different and also because in both special leave had been given, and then laid down that "the test of finality is whether the order finally disposes of the rights of the parties". In *Ramchand Manjimal's case*,[2] the appellate Court in India had been of the opinion that the order had gone to the root of the suit, namely, the jurisdiction of the Court to entertain it and it was for this reason that the order was thought to be final. But their Lordships held that:

> "this was not sufficient. The finality must be a finality in relation to the suit. If after the order, the suit is still a live suit, in which the rights have still to be determined, no appeal lies".

In that case the appeal had been allowed by the High Court, the decree of the Subordinate Judge set aside and the suit remanded to the original court for trial on the merits. It was also pointed out before their Lordships that there was undoubtedly some divergence in the views expressed in the English cases upon which the judgment in *Ramchand Manjimal's case*,[2] founds, but their Lordships considered that the rule deduced for guidance under the Code of Civil Procedure was clear and unambiguous and should be decisive in all such cases. If the effect of the order from which it is sought to appeal is not to dispose finally of the rights of the parties, then, even though it decides an important and even a vital issue in the case, it leaves the suit alive and provides for its trial in the ordinary way.

As the "final order" may be either in a civil or criminal case the definition given by their Lordships in the civil case must by analogy be applied to a criminal case as well. In the present case, the appeal has not yet been tried on the merits. It is still to be finally decided by the Sessions Judge whether the accused was or was not guilty of the offences with which he had been charged. The question of want of consent, although vital for the purposes of the proceedings as it went to the root of the matter so far as their continuance is concerned, is after all a preliminary question as to whether the proceedings had been properly instituted or not. The criminal case is still a live case, and the innocence or the guilt of the accused has not been finally determined. The question raised was one of jurisdiction of the Magistrate to entertain the complaint and was therefore analogous to the question of jurisdiction raised in *Abdur Rahman's case*[1] Although the point is certainly a cardinal one, the order of remand cannot be regarded as a final order within the meaning of S. 205 (1). The accused may ultimately not be found guilty at all. If the accused is hereafter found guilty by the Sessions Court and convicted and sentenced, he can come to the High Court in Revision; and in case the High Court adheres to its view and the Revision is dismissed, the order would become final; and from that order he may come to the Federal Court under S. 205 (1). But until that

1. (1932) 64 M.L.J. 307: L.R. 60 I.A. 76: I.L.R. 11 Rang 58: A.I.R. 1933 P.C. 58 (P.C.).

2. (1920) 39 M.L.J. 27: L.R. 47 I.A. 124: I.L.R. 47 Cal. 918: A.I.R. 1920 P.C. 86 (P.C.).

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stage arrives he is not in my opinion entitled to appeal from the High Court's order.

Section 270 (1).—Holding the view that no appeal at all lies at this stage, I would have feared that it would be somewhat awkward for the Sessions Judge if I were to express any definite opinion that consent of the Governor was necessary for either of the two charges in this particular case. If no appeal lies, the order of the High Court must stand and the Sessions Judge is bound to re-hear the whole appeal, and yet he may feel embarrassed by any contrary opinion expressed by the Federal Court. But the opinion of the majority is that the appeal should not fail on any such preliminary grounds. Further, a statement of the true legal position may help in applying the legal principles to the facts of the case. I therefore proceed to deal with that question also.

It must be conceded that the protection given to public servants under S. 270, which applies both to civil and criminal proceedings, is intended to be real and not merely illusory. The intention seems to be to prevent them from being unnecessarily harassed, and the criminal prosecution, except with the previous consent of the Governor-General or the Governor, is prohibited and proceedings started without such consent declared illegal. Sub-Section (1) stands as follows:—

"No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province of the Governor of that Province in his discretion."

The main question for consideration is the interpretation of the words "any act done or purporting to be done in the execution of his duty as a servant". The Act being a recent one, no case turning on the interpretation of S. 270 (1), other than the one under appeal, has been brought to our notice. Besides the cases under S. 80, C.P.C., there are a very large number of cases under S. 197, Cr.P.C., showing a considerable conflict of opinion among the Indian High Courts as to the applicability of that section. The words of that section are not exactly identical with those in the section before us. There we have the words "while acting or purporting to act in the discharge of his official duty", which have caused a divergence of opinion on the true significance of the words "while acting or purporting to act". It is therefore best to focus attention on the words actually used in S. 270 (1).

Sessions Judge's Opinion.—The learned Sessions Judge in an elaborate judgment discussed the legal aspects of the case and also considered certain apparently conflicting rulings, and then came to the conclusion that the previous sanction of the Governor was necessary for both the charges. For want of such sanction he held all the proceedings to be void and "acquitted" the appellant. The acquittal of the accused was obviously wrong, as that would have prevented further proceeding even after the necessary consent

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of the Governor had been obtained. If the prosecution is defective for want of proper consent, the proceedings would be void and the complaint would be dismissed. The Sessions Judge took the view that every criminal breach of trust would require a previous consent. This was putting it rather too widely. He should have really considered whether on the facts as alleged by the prosecution or at any rate as found by the Magistrate, consent was necessary. If not, he would have to go into the merits and ascertain the facts himself, and then again decide whether on the facts so appearing consent was or was not necessary.

High Court's View.—The High Court in Revision took a contrary view, set aside the Sessions Judge's order of acquittal and "returned the record to him for trial on the merits", by which presumably the High Court meant re-hearing of the appeal on the merits. The Bench appear to have taken the view that consent would never be necessary in case of criminal breach of trust, nor even in the case of falsification of accounts. They apparently thought it unnecessary to consider whether on the facts as found by the Magistrate, which were for re-consideration before the Sessions Judge, the act had purported to be done in execution of duty so as to make the previous consent necessary. In fact they have said that:

> "it does not appear to them even arguable that theft, or embezzlement or breach of trust committed by a servant of the Crown can be said to be done in the execution of his duty as a servant of the Crown".

But S. 477-A in express terms covers the case of an officer, who wilfully falsifies accounts which may be his duty to maintain. They have apparently put theft, embezzlement, or breach of trust on exactly the same footing as falsification of accounts, and have not considered the charge of falsifying the accounts separately from that of criminal breach of trust. This is ignoring the significance of the words "purporting to be done" which are no less important. They have thought that:

> "an act done or purporting to be done in the execution of his duty as a servant of the Crown cannot by any stretching of the English language be made to apply to an act which is clearly a dereliction of his duty as such".

But if an act has purported to be done in execution of duty, it may be done so, only ostensibly and not really, and if done dishonestly may still be a dereliction of duty.

The High Court Bench have taken the view that:

> "the section is clearly meant to apply to an act by a public servant which could be done in good faith, but which possibly might also be done in bad faith...... ....The section cannot be meant to apply to cases where there could be no doubt that the act alleged must be in bad faith."

So far as sub-S. (1) is concerned, the question of good faith or bad faith cannot strictly arise, for the words used are not only "any act done in the execution of his duty" but also "any act purporting to be done in the execution of his duty". When an act is not done in the execution of his duty, but purports to have been done in the execution of his duty, it may very well be done in bad faith; and even an act which cannot at all be done

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in good faith may purport to be done in execution of duty if another is made to believe wrongly that it was being done in execution of duty. It is therefore not possible to restrict the applicability of the section to only such cases where an act could possibly have been done both in good and bad faith. Of course, the question of good or bad faith cannot be gone into at the early stage at which objection may be taken. Making false entries in a register may well be an act purported to be done in execution of duty, which would be an offence, although it can never be done in good faith. It is sub-S. (2) only which introduces the element of good faith, which relieves the Court of its obligation to dismiss the proceedings. But that sub-section relates to cases even previously instituted and in which there may not be a defect of want of consent, and is therefore quite distinct and separate, and not merely ancillary to sub-S. (1), as the learned Sessions Judge supposed. Having regard to the ordinary and natural meaning of the words "purporting to be done", it is difficult to say that it necessarily implies "purporting to be done in good faith", for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention.

Extent of the Protection.—Obviously the section does not mean that the very act which is the *gravamen* of the charge and constitutes the offence should be the official duty of the servant of the Crown. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The words as used in the section are not "in respect of any official duty" but "in respect of any act done or purporting to be done in the execution of his duty". The two expressions are obviously not identical. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in the execution of the duty. The reference is obviously to an offence committed in the course of an action, which is taken or purports to be taken in compliance with an official duty, and is in fact connected with it. The test appears to be not that the offence is capable of being committed only by a public servant and not by any one else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction. If the act complained of is an offence, it must necessarily be not an execution of duty, but a dereliction of it. What is necessary is that the offence must be in respect of an act done or purported to be done in execution of duty that is in the discharge of an official duty. It must purport to be done in the official capacity with which he pretends to be clothed at the time, that is to say under the cloak of an ostensibly official act, though, of course, the offence would really amount to a breach of duty. An act cannot purport to be done in execution of duty unless the offender professes to be acting in pursuance of his official

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duty and means to convey to the mind of another the impression that he is so acting.

The section is not intended to apply to acts done purely in a private capacity by a public servant. It must have been ostensibly done by him in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at the time. For instance, if a public servant accepts as a reward a bribe in his office while actually engaged in some official work, he is not accepting it even in his official capacity, much less in the execution of any official duty, although it is quite certain that he could never have been able to take the bribe unless he were the official in charge of some official work. He does not even pretend to the person who offers the bribe that he is acting in the discharge of his official duty, but merely uses his official position to obtain the illegal gratification.

Procedure.—S. 270 (1) directs that no proceedings, civil or criminal, shall be instituted, etc. The prohibition is against the institution itself and its applicability must therefore be judged in the first instance at the earliest stage of institution. If the prosecution case as disclosed by the complaint or the Police report, as the case may be, shows that the act purported to be done in execution of duty, the proceedings must be dropped. But if the prosecution case does not involve this, the case cannot be thrown out on the preliminary ground of want of consent of the Governor in his discretion. The mere fact that the accused proposes to raise a defence of the act having purported to be done in execution of duty would not in itself be sufficient, otherwise even a frivolous defence would prevent prosecution. The prosecution must be given a chance to prove its case. Of course, if the case as put forward fails, or the defence establishes that the act purported to be done in execution of duty, the proceedings will have to be dropped and the complaint dismissed on that ground.

Breach of Trust.—Now, dishonest misappropriation or conversion of movable property to one's use is an offence under S. 403, I.P.C.; but if the offender had been entrusted with property or with any dominion over it, the dishonest misappropriation or conversion to his use or dishonest user or disposal becomes a criminal breach of trust under S. 405; and if he had been entrusted with property or dominion over it in his capacity of a public servant, it becomes a criminal breach of trust by a public servant under S. 409.

The question whether a criminal breach of trust can be committed while purporting to act in execution of duty is not capable of being answered hypothetically in the abstract, without any reference to the actual facts of the case. An attempt to answer the question in a generalised way has been responsible for loose language used in some of the cases cited before us. It is possible to conceive of a case where a criminal breach of trust may be committed in conspiracy with other servants and payment of money is dishonestly ordered ostensibly in execution of duty. The question whe-

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ther the act purported to have been done in execution of duty or not must depend on the special circumstances of each case.

The first charge was worded generally that the accused had committed a criminal breach of trust in respect of certain specified medicines, but no objection appears to have been taken to it, nor could this defect be urged seriously in view of the provisions of S. 221 (5), Cr.P.C. If the present case had merely been that medicines were openly removed from the hospital dispensary to the house on some pretence, it might have remained ambiguous whether the act purported to be done in execution of duty or not. But apparently the case as put forward in the compounder Din Mohammad's application submitted with the Police Report, and also as found proved by the Magistrate at the trial was one of secret misappropriation or conversion to one's use. When a public servant simply embezzles some property entrusted to him and thereby commits a criminal breach of trust under S. 409, he is not doing an act, nor even purports to do an act in execution of his duty; when he commits the act, he does not pretend to act in the official discharge of his duty. A case like that would not ordinarily fall within the scope of S. 270 (1).

Falsifying Accounts.—But an offence under S. 477-A, I.P.C., is committed if an officer or servant or anyone employed or acting in such capacity, wilfully and with intent to defraud falsifies any book or account. Thus where it is his duty to maintain a record or a register, and in maintaining that register he makes some entries which are false to his knowledge, he is certainly purporting to act, though not actually acting, in the execution of his duty, because he is making certain entries in the register, knowing them to be false. He is ostensibly professing to be discharging his official duty in maintaining the register, which he is bound to maintain correctly. In making the entries he pretends or purports to act in the execution of his duty; but in point of fact he is acting in direct dereliction of it.

It has been argued by the Advocate-General of the Punjab that S. 270 (1) refers only to the commission of an act and not to omission. This may not be accurate but even quite apart from this, the falsification of accounts is by no means a mere omission. It is true that some entries are alleged to have been omitted in order to conceal the criminal breach of trust. If an omission were due merely to an honest mistake, it would certainly remain a mere omission; but where the omission of certain items is intentional so that a false balance may be shown and the real surplus may not be disclosed, it is a positive act of falsifying accounts. There is a falsification of the total just as much as that of particular entries that have been omitted.

In my opinion the consent of the Governor was necessary for the charge under S. 477-A, though not for that under S. 409, I.P.C.

Joint Trial—The last question is whether the whole proceedings should or should not be quashed on account of the joint trial. Under S. 235 (1), Cr.P.C., two offences for one series of acts so connected together as to form

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the same transaction can be tried at one trial. The offences of criminal breach of trust and falsification of accounts were so connected. The difficulty is caused by the circumstance that for one of these offences previous consent of the Governor was a condition precedent to the exercise of the Magistrate's jurisdiction. There is no specific provision in the Code to cover the present case exactly. In a case of jury trial, I would have had no hesitation in holding that the whole trial was illegal inasmuch as the accused would have been gravely prejudiced by the production of evidence relating to the offence under S. 477-A for which the Court had no jurisdiction at all to try the accused. But this case was tried by a Magistrate before whom no objection regarding the want of consent appears to have been taken. Under S. 537, Cr.P.C, the appellate Court before altering the order relating to the offence under S. 409 has to be satisfied whether the defect has in fact occasioned a failure of justice, and in determining this, the Court must have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. As however we are not to go into the merits of the case, it is not practicable to decide now whether there would or would not be a failure of justice if the appeal is re-heard as regards the charge under S. 409, I.P.C. The Sessions Judge when re-hearing the appeal would be in the best position to decide this for himself.

I would accordingly, if an appeal were to lie, remit the case to the High Court with the declaration that the following order be substituted for the High Court's order:—The order of acquittal passed by the Sessions Judge be set aside, all the proceedings so far as they relate to the charge under S. 477-A, be quashed and the case with regard to that offence dismissed on the sole ground of want of consent of the Governor, without acquitting the accused of the charge, leaving the door open for a fresh prosecution under S. 477-A, if consent of the Governor in his discretion is obtained hereafter; and the appeal be sent back to the Sessions Judge for re-hearing as regards the charge under S. 409, I.P.C., leaving it open to the Sessions Judge to order a re-trial if he comes to the conclusion that the joinder of the two charges has occasioned a failure of justice.

Varadachariar, J.—This is an appeal against a judgment pronounced by the High Court at Lahore, in the exercise of its criminal appellate jurisdiction; that Court has certified that the case involves a question as to the interpretation of S. 270 (1) of the Government of India Act, 1935, namely, whether the consent of the Governor of the Province was necessary for the prosecution of the appellant for alleged offences under Ss. 409 and 477-A of the Indian Penal Code.

A question was mooted, in the course of the argument before us, whether S. 205 of the Government of India Act, 1935, contemplated appeals in criminal cases. The juxtaposition of the words "judgment, decree or final order" is, no doubt, suggestive of civil litigation; but it cannot be said that the word "judgment" is not comprehensive enough to include a judgment pronounced in a criminal case; *see* S. 366 of the Criminal Procedure

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Code and other sections in that chapter, and also clause (41) of the Letters Patent of the Chartered High Courts. Unlike S. 206 of the Constitution Act, S. 205 is not in terms limited to civil cases; and it is worth noting that S. 210 (2) places orders of this Court on the same footing as orders made "by the highest Court exercising civil or criminal jurisdiction, as the case may be". As no objection has been taken on behalf of the Crown to the maintainability of the appeal, I proceed to deal with the case on the assumption that the appeal was competent.

In view of the course of the argument before us, it is necessary to refer in some detail to the nature of the charges against the appellant. He had for many years been a Sub-Assistant Surgeon in the Punjab Provincial Subordinate Medical Service. In March, 1937, when he was in charge of the rural hospital at Mithankot, he was suspected of dishonestly removing to his own quarters certain medicines belonging to the Hospital. He was at that time under orders of transfer to a new station and was arranging to hand over charge shortly to his successor. Acting on a report sent by the compounder of the hospital to the Secretary of the District Board, a Deputy Superintendent of Police caused a search of his house to be made; and he examined the contents of some of the boxes belonging to the Appellant which seemed to have been packed ready to be taken by the Appellant when leaving the station. As the result of this search and of some further investigation, proceedings were instituted in June, 1937, before the First Class Magistrate at Dera Ghazi Khan and charges were framed against the Appellant under Ss. 409 and 477-A. The first charge was:

"that being a public servant and in such capacity entrusted with medicines of the hospital which were the property of the District Board, Dera Ghazi Khan, the accused committed criminal breach of trust in respect of certain medicines (specified in the charge) and thereby committed an offence punishable under S. 409 of I.P.C.'

The second charge was:

"that being a public servant, he, wilfully, and with intent to defraud, omitted to record entries in the stock book of medicines for 1937 relating to certain medicines belonging to the District Board and in his possession and thereby committed an offence punishable under S. 477, I.P.C."

The Appellant denied the charges. He denied that the disputed medicines were recovered from his boxes as alleged by the prosecution. He alleged that they were in his room, as he was taking steps to complete the preparation of his stock book. As regards the omission to enter certain medicines in the stock book, he pleaded that it was not dishonest but was merely due to oversight. It does not appear from the judgment of the Magistrate whether the objection based on the absence of the Governor's consent to the prosecution was taken before him. On the evidence, the Magistrate found the Appellant guilty of both the offences charged and sentenced him to six months' rigorous imprisonment.

On appeal, the learned Sessions Judge of Dera Ghazi Khan dealt with the objection under S. 270 (1) as a preliminary point; and, as he came to the conclusion that the proceedings could not be instituted except with the Governor's consent, he "acquitted" the Appellant, holding that the pro-

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ceedings were without jurisdiction. In this view, he did not deem it necessary to deal with the evidence against the accused. I may observe in passing that the proper order to be passed on this footing was not one of *acquittal*; but, so far as this appeal is concerned, nothing turns on this matter of form.

The Crown appealed to the High Court at Lahore against the order of acquittal; and a Division Bench (Sir Douglas Young, C.J. and Blacker, J.) set aside the order and returned the records to the Sessions Court, for disposal of the appeal on the merits. The learned Judges do not seem to have felt any hesitation at that time in holding that S. 270 (1) could not apply to the case. It does not appear whether, at the hearing of the appeal, their attention was drawn to the conflicting rulings under S. 197 of the Criminal Procedure Code. When the Appellant applied for a certificate under S. 205 of the Constitution Act, the attention of the High Court seems to have been drawn to some of these decisions and the learned Judges granted the certificate, with the observation that it might be possible to found on them an argument that the consent of the Governor was necessary in a case like the present.

The Appellant, who appeared in person before us, invited us to deal with the whole case on the evidence; but, in the absence of special reasons, we saw no justification for doing so. He next contended that as his own plea was to the effect that he did not act dishonestly and, whatever he did, he did only in the performance of his duty, the case must be held to fall within the terms of S. 270 (1). I cannot accede to this argument. As the consent of the Governor, provided for in that section, is a condition precedent, to the institution of proceedings against a public servant, the necessity for such consent cannot be made to depend upon the case which the accused or the defendant may put forward *after* the proceedings had been instituted, but must be determined with reference to the nature of the allegations made against the public servant, in the suit or criminal proceeding. If these allegations cannot be held to relate to "any act done or purporting to be done in the execution of his duty" by the defendant or the accused "as a servant of the Crown", the consent of the authorities would, *prima facie*, not be necessary for the institution of the proceedings. If, in the course of the trial, all that could be proved should be found to relate only to what he did or purported to do "in the execution of his duty", the proceedings would fail on the merits, unless the Court was satisfied that the acts complained of were not done in good faith [S. 270 (2)]. Even otherwise, the proceedings would fail for want of the consent of the Governor, if the evidence established only official acts. As the Appellate Court has not pronounced any opinion on the evidence, we are not in a position to say whether on the facts *proved*, the proceedings could be held to fail on either of the above grounds. At this stage, we have only to see whether the case alleged against the Appellant or sought to be proved against him relates to acts done or purporting to be done by him "in the execution of his duty".

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The Appellant pressed us to hold that, even judged by the above test, the charges framed against him, including the one under S. 409 of the Indian Penal Code, did not clearly exclude the possibility of the acts complained of being acts done in his official capacity. He also urged that the charge under S. 409 was vague and, without further investigation, it could not be determined whether it related to an official act or not. I find myself unable to accept these arguments, so far as the charge under S. 409 is concerned. Read in the light of S. 221 of the Criminal Procedure Code, the charge must be taken to allege that the Appellant dishonestly misappropriated or converted to his own use property which had been entrusted to him in his official character. It is not clear from the record whether the proceedings in this case were initiated by a complaint or by a police report; but taking into account all the materials which appear to have been collected before the proceedings were instituted, I am of the opinion that so far as the charge under S. 409 was concerned, the acts in respect of which he was intended to be prosecuted could not be regarded as acts done or purported to be done in execution of his duty.

The learned Judges have dealt with both the charges, *i.e.*, the one under S. 409 and the other under S. 477-A, as on the same footing; it, however, seems to me necessary to draw a distinction, for the present purpose, between the charge under S. 409 and the charge under S. 477-A. Though a reference to the capacity of the accused as a public servant is involved both in the charge under S. 409 and in the charge under S. 477-A, there is an important difference between the two cases, when one comes to deal with the *act complained of*. In the first, the official capacity is material only in connection with the "entrustment" and does not necessarily enter into the later act of misappropriation or conversion, which is the act complained of. In the charge under S. 477-A, the official capacity is involved in the very act complained of as amounting to a crime, because the *gravamen* of the charge is that the accused acted fraudulently in the discharge of his official duty. The consent of the Governor would thus be *prima facie* necessary for the institution of proceedings against the Appellant under S. 477-A. The learned Advocate-General of the Punjab sought to found an argument on the fact that the Appellant is in the present case charged not with an *act*, in the sense of making a fraudulent entry in the course of his official duty, but with an *omission* to make an entry which it was his duty to make. I do not think that anything can be made to turn on this distinction. Apart from the principle that, for the purposes of the criminal law, acts and illegal omissions stand very much on the same footing, the conduct of the Appellant in maintaining the accounts, which it was his duty to keep, has to be dealt with *as a whole* and the particular omission cannot of itself be treated as an offence except as a step in the Appellant's conduct in relation to the maintenance of the register which it was his duty correctly to maintain.

It only remains to deal with the arguments urged on the one side or the other as to the test to be applied in determining whether or not the act complained of is one "purporting to be done in execution of his duty" as a public servant. I would observe at the outset that the question is sub-

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stantially one of fact, to be determined with reference to the act complained of and the attendant circumstances; it seems neither useful nor desirable to paraphrase the language of the section in attempting to lay down hard and fast tests. For instance, it was said in *Abdul Hadi Mussalman* v. *Mishra*,[1] that:

"we are not concerned with the act itself so much as the capacity in which the act is performed".

An observation of that kind does not seem to be very helpful and may even prove misleading. Again, expressions like "cloak of office" and "professed exercise of office" may correctly fit in with certain cases, but they may not always be appropriate to describe or delimit the scope of the section. The question does not seem to have arisen for decision under S. 270 (1) of the Constitution Act; we were accordingly referred by way of analogy to a number of rulings under S. 197 of the Criminal Procedure Code and one or two decisions under S. 80 of the Civil Procedure Code. The judgment in *Rai Mahal Panday* v. *Maung Po Sein*,[2] dealt with a provision corresponding to sub-S. (2) of S. 270 and throws no light on the present question.

The reported decisions on the application of S. 197 of the Criminal Procedure Code are not by any means uniform. In most of them, the actual conclusion will probably be found to be unexceptionable, in view of the facts of each case; but, in some, the test has been laid down in terms which it is difficult to accept as exhaustive or correct. Much the same may be said even of decisions pronounced in England, on the language of similar statutory provisions (*see* observations in *Booth* v. *Clive*[3]). It does not seem to me necessary to review in detail the decisions given under S. 197 of the Criminal Procedure Code which may roughly be classified as falling into three groups, so far as they attempted to state something in the nature of a test. In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it *cf.*. In re *Sheik Abdul Khadir Saheb*,[4] *Kamisetty Raja Rao* v. *Ramaswamy*[5], *Amanat Ali* v. *Emperor*[6], *Emperor* v. *Maung Bo Maung*[7] and *Gurushidayya Shantivirayya Kulkarni* v. *Emperor*[8]). In another group, more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first is the correct view. In the third group of cases, stress is laid almost exclusively on the fact that it was *at a time when* the accused was engaged in his official duty that the alleged

1. A.I.R. 1935 Nag. 52.
2. A.I.R. 1938 Rang. 189.
3. (1851) 10 C.B. 827: 138 E.R. 327.
4. (1916) 33 I.C. 648.
5. (1927) 52 M.L.J. 647: I.L.R. 50 Mad. 754.
6. A.I.R. 1929 Cal. 724.
7. (1935) I.L.R. 13 Rang. 540: A.I.R. 1935 Rang. 263 (F.B.).
8. I.L.R. (1939) Bom. 119: A.I.R. 1939 Bom. 63.

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offence was said to have been committed (see *Gangaraju* v. *Venki*,[1] quoting from Mitra's Commentary on the Criminal Procedure Code). The use of the expression "while acting", etc., in S. 197 of the Criminal Procedure Code (particularly its introduction by way of amendment in 1923) has been held to lend some support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test. To take an illustration suggested in the course of the argument, if a medical officer, while on duty in the hospital, is alleged to have committed rape on one of the patients or to have stolen a jewel from the patient's person, it is difficult to believe that it was the intention of the Legislature that he could not be prosecuted for such offences except with the previous sanction of the Local Government.

Two reported decisions, one in *Ganapathy Goundan* v. *King-Emperor*,[2] under S. 197 of the Criminal Procedure Code, and the other in *Dakshina Ranjan Ghosh* v. *Omar Chand Oswal*,[3] under S. 80 of the Civil Procedure Code, may be referred to as instructive, since in each of them two acts were complained of and, notwithstanding the apparent connection between the acts in the sense of relation in *times* or *opportunity*, the Court held that one of the acts was an official act but not the other. In the Madras case, a Village Magistrate held in confinement certain persons who were suspected to have committed a murder, and also tortured them in order to extort a confession from them. He was charged for committing offences under Ss. 330, 343 and 348 of the Indian Penal Code. *Wallace, J.*, held that sanction to prosecute him under Ss. 343 and 348 was required under S. 197 of the Criminal Procedure Code, but not for prosecuting him under S. 330. In the Calcutta case, a trader sued a police officer for recovery of two sums of money, namely, Rs. 50 being damages for wrongful arrest and Rs. 75 being the amount alleged to have been extorted by the police officer from the plaintiff. As regards the second head of claim, the learned Judges were of opinion that no notice under S. 80 of the Civil Procedure Code was necessary, as "nobody could suppose that he was purporting to act in his official capacity in demanding and obtaining the sum of Rs. 75".

Should it, however, be assumed that the true import of S. 197 of the Criminal Procedure Code was that stated in the passage from *Mitra* quoted in *Gangaraju* v. *Venki*,[1] I must observe that, in that view, that section cannot be treated as bearing a true analogy to S. 270 (1) of the Constitution Act. The latter section does not use the expression "while acting", etc., but makes it clear that the act complained of should have been done or should purport to have been done in the execution of official duty—it does not even say "in the course of such duty". There are, in my opinion, strong reasons against placing an unduly wide interpretation on this provision. It was, no doubt, intended to afford a measure of protection to public servants; but it was not part of the *normal* protection of such servants.

1. (1929) 57 M.L.J. 31: I.L.R. 52 Mad. 602 at 605.
2. (1931) 62 M.L.J. 223: A.I.R. 1932 Mad. 214.
3. (1923) I.L.R. 50 Cal. 992.

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That it was meant to provide for an exceptional situation is shown by the fact that it relates only to acts done at a particular juncture, namely, before the commencement of Part III of the Act. Section 270 (1) applies not only to criminal proceedings, like S. 197 of the Criminal Procedure Code, but also to the institution of civil proceedings. In the initiation of criminal proceedings, the protection of public interest is the main concern, and it may well be left to the Local Government to determine the question of the expediency of a prosecution from that point of view. But when a citizen seeks a civil remedy against a public servant, the Legislature must be presumed to have been very cautious in depriving the aggrieved citizen of redress in a Court of law and any restrictions on such a remedy imposed in the interest of the public servant should not be lightly extended so as unduly to restrict the remedy of the citizen.

I am accordingly of the opinion that the consent prescribed by S. 270 (1) of the Act was not required for the institution of proceedings against the Appellant under S. 409 of the Indian Penal Code.

I must, however, state, with due respect to the learned Judges of the High Court, that in one or two places in the judgment under appeal, their observations are much too widely worded. For instance, in one place they observe that:

"the section cannot be meant to apply to cases where there could be no doubt that the act alleged must be in bad faith".

If this observation was intended to relate to sub-S. (1) of S. 270, it obviously cannot be correct; because the question of good faith or bad faith is expected to be decided by the Court after trial and, according to sub-S. (2), the proceedings will be dismissed by the Court, unless it is satisfied that the acts complained of were not done in good faith. It does not seem to me right to introduce the question of good faith or bad faith at the stage to which sub-S. (1) of the section relates. I may, in this connection, refer to two decisions under S. 80 of the Civil Procedure Code whose language is almost identical with that of sub-S. (1) of S. 270. In *Koti Reddi* v. *Subbiah*,[1] a Full Bench of the Madras High Court held that the notice required by that section must be given even to a public officer who had acted *mala fide* in the discharge of his duty. Sir John Wallis quoted Baron Parke's observation in *Kirby* v. *Simpson*,[2] to the effect that a person may act maliciously and yet in the execution of his office. *Sadasiva Iyer, J.*, stated (on p. 811) that "the question of the good faith or the bad faith of the public officer............is irrelevant" at that stage. The Madras decision was followed by the Calcutta High Court in *Dakshina Ranjan Ghosh* v. *Omar Chand Oswal*.[3]

Again, towards the conclusion of the judgment under appeal, the learned Judges observe that the words "act done or purporting to be

1. (1918) 34 M.L.J. 494: I.L.R. 41 Mad. 792 (F.B.).
2. (1854) 10 Ex. 358: 156 E.R. 482.
3. (1923) I.L.R. 50 Cal. 992.

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done in the execution of his duty" cannot by any stretch of the English language be made to apply to an act which is clearly a dereliction of his duty. The word "dereliction" may reasonably include negligence in discharging a duty. But it seems to me that an act is not less one done or purporting to be done in execution of a duty because the officer concerned does it negligently.

In my opinion the order of the High Court should be modified by quashing the proceedings against the appellant so far as the charge under S. 477-A of the Indian Penal Code is concerned and directing the Sessions Court to deal with the appeal only so far as it relates to the charge under S. 409. I agree with my learned brother that it must be left open to the Sessions Judge to consider whether it is necessary to order a re-trial on the ground of possible failure of justice or prejudice to the accused by reason of the joint trial of the two charges.

By the Court.—The case will be remitted to the High Court with a declaration that the following order ought to be substituted for the order of the High Court, dated 20th October, 1938:—

"That the case be sent back to the Sessions Judge for hearing on the merits as regards the charge under S. 409 of the Indian Penal Code; that the order of acquittal passed by the Sessions Judge be set aside; and that the proceedings under S. 477-A of the Code be quashed for want of jurisdiction, the consent of the Governor not having been obtained."

It will be open to His Excellency, after considering the facts of the case, to give his consent to a fresh prosecution under S. 477-A, if he should think fit; and it will be equally open to the Sessions Judge to order a re-trial if he is satisfied that the joinder of a charge which the Court had no jurisdiction to hear has prejudiced the accused person in his defence and thereby occasioned a failure of justice.

There will be no order as to costs.

K.S. *Appeal allowed in part.*

IN THE FEDERAL COURT OF INDIA.

PRESENT:—SIR MAURICE GWYER, C.J., SULAIMAN AND VARADACHARIAR, JJ.

Shyamakant Lal .. *Appellant**

v.

Rambhajan Singh and others .. *Respondents.*

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), Ss. 13 and 14 re-enacting Ss. 16 and 17 of the Bihar Money-lenders Act (III of 1938)—Constitutional validity—Retrospective effect—Government of India Act, 1935, Ss. 205 and 209 (1)—Jurisdiction of Federal Court to recognise the law as re-enacted after the decision of the High Court and to remit the case to the High Court without discussing the law as it stood at the time of the High Court decision—Order of High Court denying a party the benefits under Ss. 16 and 17 of the Money-lenders Act, 1938—If "Final order" appealable under S. 205, Government of India Act, 1935.

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*Case No. 2 of 1938. 11th May, 1939.

S. 16 of the Bihar Act III of 1938 compelled an execution Court to estimate the value of the property and that portion of such property (brought to sale in execution) the proceeds of the sale of which it considers will be sufficient to satisfy the decree. S. 17 enjoined that the proclamation of sale shall include only so much of the property of the judgment-debtor the proceeds of the sale of which the Court considers will be sufficient to satisfy the decree and such property shall not be sold at a price lower than the price specified in the said proclamation. Civil Procedure Code, O. 2, r. 66 as amended in Patna enjoined that the Court should not enter its own valuation in the proclamation of sale. The Courts below upheld the contention of the decree-holder that the sections were repugnant to an existing Indian Law and so void, under S. 107 of the Government of India Act, 1935. After the High Court decision, Bihar Act VII of 1939 was passed and received the Governor-General's assent. It reproduced in Ss. 13 and 14, Ss. 16 and 17 of the Act of 1938. The provisions were to have retrospective effect. On further appeal, the Federal Court held that although the Bihar Money-lenders (Regulation of Transactions) Act purports to regulate the transactions of money-lenders it does not in terms profess to exercise powers only belonging to Provincial Legislature under the Provincial List. The reservation of the Act for the consideration of the Governor-General and his subsequent assent to it make any challenge that it is repugnant to an existing Indian Law now impossible and it is unnecessary to have an academic discussion as to validity of the provisions of the repealed Act.

Per *Sulaiman, J.*—There is no repugnancy between the impugned sections (new S. 13 corresponding to old S. 16) and Civil Procedure Code, O. 21, r. 66 as amended in Patna.

Held, further, the Federal Court in the exercise of its Appellate Jurisdiction can remit a case to the High Court with a declaration that there shall be substituted for the judgment, decree or order of the High Court a judgment, decree or order which recognises the state of the law as it now exists without discussing the law as it existed at the time when the High Court had seisin of the case. Ss. 205 and 209 (1) of the Constitution Act gives the Federal Court that power.

Held, further, per Gwyer, C.J. and Varadachariar, J. (*Sulaiman, J., dissenting*).—The dismissal of the appeal by the High Court having had the effect of finally denying to the appellant the advantage conferred on him by Ss. 16 and 17 of the Money-lenders Act (a valuable substantive right) must to that extent be treated as determining a question of rights and not merely a question of procedure and an appeal lies against such order to the Federal Court.

Per *Sulaiman, J.*—The order of the High Court relates to the mode of sale only and is interlocutory in character and is neither a 'judgment, decree or final order' within the meaning of S. 205 (1) of the Government of India Act. The certificate given by the High Court cannot be conclusive on the point. No appeal lies to the Federal Court.

Appeal from a decision of the High Court at Patna.

Rai Guru Saran Prasad and *Rai Paras Nath* for Appellant.

L. K. Jha and *K. N. Varma* for Respondents.

Baldeo Sahay (*Advocate-General*) and *C. P. Sinha* for Bihar Government.

Gwyer, C.J.—The judgment which I am about to read is that of my brother Varadachariar and myself.

In this appeal from the High Court at Patna, the question which this Court was originally asked to determine was whether S. 16 of the Bihar Money-lenders Act (III of 1938) was void as being repugnant to a provision of an "existing Indian Law" within the meaning of S. 107 of the Constitution Act.

The Bihar Act, which received the assent of His Excellency the Governor of Bihar on 6th July, 1938, and came into force on 15th July,

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provided by S. 16 that when an application was made for the execution of a decree passed in respect of a loan or the interest on a loan by the sale of the judgment-debtor's property, the Court executing the decree should, after hearing the parties, estimate the value of the property and of that portion of the property which, if sold, would in its opinion be sufficient to satisfy the decree. S. 17 of the Act then provided (*a*) that the proclamation of the intended sale in such a case should include only so much of the property of the judgment-debtor as would in the opinion of the Court produce sufficient to satisfy the decree; and (*b*) that that property should not be sold at a lower price than the price specified in the proclamation. There are provisoes to the section to which it is not for the moment necessary to refer.

The "existing Indian Law" to which these provisions were said to be repugnant is a proviso which the Patna High Court, under its rule-making power, had added to O. 21, r. 66, of the Civil Procedure Code. This was to the effect that no estimate of the value of the property should be inserted in the sale proclamation other than estimates, if any, made by the decree-holder and judgment-debtor respectively, accompanied by a statement that the Court did not vouch for the accuracy of either. The proviso had come into force on 1st March, 1936.

The appellant, against whom a mortgage decree for more than a lakh of rupees had been passed, applied on 15th August, 1938, for an order under Ss. 16 and 17 of the Bihar Act, for the purpose of restricting the execution sale to such portion of the mortgaged property as might be considered by the Court sufficient to satisfy the decree. The Court dismissed the application, on the ground that the questions sought to be raised thereby had been disposed of by earlier orders passed before the Act had come into force. On appeal against this order, the judgment-debtor contended that the enactment of S. 16 of the Act enabled him to present a fresh application for the relief for which he asked; and it was by way of answer to this contention that it seems to have been urged for the first time on behalf of the decree-holder that Ss. 16 and 17 of the Act were void for repugnancy under S. 107 of the Constitution Act. A Division Bench of the Patna High Court upheld this contention of the decree-holder and dismissed the appeal. The reasons for their decision have been set out in another judgment of the same Bench, *Vishwanath Narayan Singh* v. *Sri Mahant Harihar Gir*[1], which they purported to follow in the case under appeal; and it appears from that judgment that the learned Judges held S. 16 of the Act to be void because when read S. 17 it was in their opinion repugnant to the proviso which the High Court had added to O. 21, r. 66, of the Civil Procedure Code.

When the appeal before this Court was opened, it was brought to our notice that, since the above decision of the High Court, the Bihar Legislature had repealed certain provisions of the Act of 1938 (including Ss. 16 and 17) and had substantially re-enacted them in the Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939); that this Act had been reserved for the consideration of His Excellency the Governor-General;

1. (1938) I.L.R. 17 Pat. 714.

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and that it had received His Excellency's assent on 15th April, 1939, and had come into force on 3rd May, last. By reason of the provisions of S. 107 (2) of the Constitution Act, it follows that no part of the new Act can now be challenged on the ground only of its repugnancy to an existing Indian Law; and it was therefore contended that, as the sections (Ss. 13 and 14) of the new Act, which in substance re-enact Ss. 16 and 17 of the Act of 1938 are by clear implication retrospective in effect, the appellant was entitled to take advantage of the provisions of the new Act, and that a discussion of the validity of Ss. 16 and 17 of the earlier Act could be no more than academic.

We entertain no doubt that Ss. 13 and 14 of the new Bihar Act are retrospective in the sense that they apply to proceedings pending at the time when the Act came into force, for they refer to applications made and decrees passed "before or after the commencement of this Act".

Counsel for the respondent did not and could not contend otherwise; but he made a half-hearted attempt to argue that the Act was not beyond challenge, because while it purported to be made in the exercise of the powers conferred on the Provincial Legislature by the Provincial Legislative List in the Seventh Schedule of the Constitution Act, it travelled nevertheless into subjects falling within the concurrent Legislative List in that Schedule There appears to us to be no substance in this contention. Although the Act purports to regulate the transactions of money-lenders, it does not in terms profess to exercise powers *only* belonging to the Provincial Legislature under the Provincial Legislative List. In these circumstances, the new Act could only be challenged on the ground that it is repugnant to an existing Indian Law; and, as we have pointed out above, the reservation of the Act for the consideration of the Governor-General and His Excellency's subsequent assent to it make such a challenge now impossible.

Accordingly, it only remains to consider whether this Court in the exercise of its appellate jurisdiction can remit the case to the High Court with a declaration that there shall be substituted for the judgment, decree or order of the High Court a judgment, decree or order which recognises the state of the law as it now exists without discussing the law as it existed at the time when the High Court had seisin of the case. We are of opinion that Ss. 205 and 209 (1) of the Constitution Act give us this power. There is no doubt that a High Court possesses such a power in dealing with appeals from Courts subordinate to itself: *see* S. 107 and O. 41, r. 33, of the Civil Procedure Code; and we think that, in the absence of any evidence of a contrary intention, it is to be assumed that the powers of this Court as a Court of Appeal are not less wide. The English case of *Quilter* v. *Mapleson*[1] was cited to us, but it is not conclusive, for, under O. 58, r. 1 of the rules of the Supreme Court, appeals to the Court of Appeal are by way of rehearing, and Jessel, M.R., in that case said:—

"On an appeal strictly so-called, such a judgment can only be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be

1. (1882) 9 Q.B.D. 672.

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given as ought to be given if the case came at that time before the Court of first instance". See also *Attorney-General* v. *Birmingham, etc., District Drainage Board*[1]

The order does not however apply in the case of appeals to the Judicial Committee; but nevertheless the Committee in *K. C. Mukerjee* v. *Mst. Ram Ratan Kuer*[2] where an Act passed while the appeal was pending deprived the appellant of the right which he had sought to enforce by bringing the appeal, found no difficulty in dismissing the appeal on that ground. The very general terms of Ss. 205 and 209 (1) of the Constitution Act justify us in holding that this Court has, in a case like the present, powers no less wide than those exercised in their own spheres by the Court of Appeal in England and by the Judicial Committee.

We may add that there is no substance in another contention of counsel for the respondents that litigants can only avail themselves of the rights given by S. 13 of the new Act in cases where a proclamation of sale has not been issued before 3rd May, 1939, the day on which the Act came into force. On the natural construction of S. 13 of the Act the judgment-debtor can, if he so desires, file an application to-day for an order under that section; and, that being the legal position, there is still less reason for declining to take the section into account in dealing with the present appeal.

We are of opinion therefore that the passing of the new Act has made it unnecessary to consider any of the questions discussed by the High Court, and that our judgment must be in the appellant's favour for the reasons which we have given.

Our brother Sulaiman, though otherwise in agreement with us, holds that no appeal lies to this Court in the present case. We are unable to concur in that opinion. We think that the order of the High Court in this case must be treated as a final order for the purposes of S. 205 of the Constitution Act. If the appellant's application related only to the settlement of the proclamation, it is true that an order dealing with that application could not be regarded as determining the rights of the parties in any measure so as to make it a final order.

A question of this kind must be determined with reference to the substance of the dispute between the parties and not merely in the light of the fact that the application is one made to the Court before whom an application to execute a decree is pending. The appellant's petition to the Court of first instance was presented under Ss. 16 and 17 of the Bihar Act of 1938, and though one of the matters to be dealt with on such an application relates to entries to be made in the proclamation of sale, the sections confer on the judgment-debtor a valuable substantive right, namely, the right to insist not only that so much alone of the attached or the mortgaged property as the Court considers sufficient to satisfy the decree should be brought to sale, but also that that property should not be allowed to be sold for less than the price fixed by the Court. This provision is very different from what is known as fixing the upset price in ordinary Court sales. In the latter case it is open to the Court or to the selling officer to reduce the upset price from time

1. (1912) A.C. 788.
2. (1935) 70 M.L.J. 105: L.R. 63 I.A. 47: I.L.R. 15 Pat. 268 (P.C.).

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to time, if there are no bidders willing to bid at that price. But in cases falling under Ss. 16 and 17 of the Bihar Act, we find no warrant for the assumption that for want of bidders at the price fixed by the Court under S. 16 (or on appeal) the price can be reduced on the ground of want of bidders. On the other hand, the second proviso to S. 17 indicates that the property may be sold for a lower price, only if the decree-holder consents in writing to forego so much of the amount decreed as is equal to the difference between the highest amount bid and the price specified for the property in the sale proclamation. The Act contains no provision as to what is to happen if the decree-holder is not prepared to adopt this course. But such as they are, there can be no doubt that Ss. 16 and 17 taken together secure a substantial benefit to the judgment-debtor, namely, that he shall not by reason of any forced sale in a Court auction be deprived of his property for less than its fair value. The dismissal of the appeal in this case by the High Court has had the effect of finally denying to the appellant this advantage, and the order of the High Court must to this extent be treated as determining a question of rights between the parties and not merely a question of procedure. The right which the appellant has thus lost is different from what is available to him under O. 21, r. 90, of the Civil Procedure Code, because under the latter provision he cannot claim relief merely on the ground of inadequacy of price but only by proving that serious inadequacy of price has resulted from fraud or material irregularity in publishing or conducting the sale.

The case will be remitted to the High Court with a direction to discharge their order of 22nd September, 1938, and the lower Court's order of 22nd August, 1938, and to give liberty to the appellant to file an application under S. 13 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939.

There will be no order as to costs.

Sulaiman, J.—The application made to the Subordinate Judge under Ss. 16 and 17 of the Bihar Money-lenders Act (III of 1938) had prayed for,

> "making an estimate of the value of the mortgaged property and of such portion of it as might by its sale be sufficient to satisfy the decree, and to order only that portion to be included in the sale proclamation".

The learned Subordinate Judge also took the application to be one,

> "praying for fixing a valuation of the property in execution and for issue of sale proclamation in respect of a portion of the property that the Court might think sufficient to satisfy the decree".

He, however, declined to fix any valuation and rejected the application on the sole ground that similar objections had been previously decided against the judgment-debtors, and they could not raise them over again on account of the coming into force of the new Act.

The applicants filed a Miscellaneous Appeal in the Patna High Court purporting to be both under S. 47, Civil Procedure Code, and the Money-lenders Act, S. 16 (2) of which provided for a special appeal from an order under S. 16. No appeal was provided for from an order under S. 17. Indeed the stage contemplated by S. 17 had not arrived till then.

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In a previous appeal, *Vishwanath Narayan Singh* v. *Sri Mahant Harihar Gir*[1], decided on the 20th September, 1938, the High Court had come to the conclusion that both the sections were repugnant to O. 21, r. 66, as amended by the Patna High Court, and had upheld the order of the lower Court, 'refusing to fix the value of the property to be sold'. In the present case; the High Court after remarking that

> "the question involved in this appeal is whether the learned Subordinate Judge who is executing a mortgage decree ought to have fixed, under S. 16 of the Bihar Money-lenders Act, the value of the mortgaged property and such portion thereof as is sufficient for the satisfaction of the decree",

held that, for the reasons given in their previous judgment, S. 16 was void and dismissed the appeal. It was not said in express terms in this case that S. 17 also was void, though that was implied. No other point appears to have been argued or considered.

From the High Court's order, one of the judgment-debtors has appealed to this Court. I intimated to the appellant's counsel that in my view no appeal lies. Now an appeal would lie to the Federal Court only if the order of the High Court dismissing the appeal were either a judgment or a decree or a final order within the meaning of S. 205 (1) of the Government of India Act, 1935. The certificate given by the High Court cannot be conclusive on this point.

'Judgment'.—The meaning of the word 'judgment' was discussed in the case of *Hori Ram Singh* v. *The Crown*[2], decided on the 12th April, 1939. In that case, the Chief Justice held that the words 'judgment, decree or final order' ought to receive no narrow interpretation, and accepted the maintainability of the appeal. *Varadachariar, J.*, held that the word 'judgment' is comprehensive enough to include a criminal judgment, and proceeded to deal with the case on the assumption that the appeal was competent. On the other hand, I had occasion to refer at some length to the meaning of the word 'judgment' as used in the Indian Code of Civil Procedure, in the Letters Patent and also as used in England, and referred to several Full Bench decisions of the Indian High Courts and some decisions of their Lordships of the Privy Council. I pointed out that in England the term 'judgment' in the Queen's Bench Division was equivalent to 'decree' in Equity practice, and "a judgment is a decision obtained in an action and any other decision is an order".

> "Now, in legal language, and in Acts of Parliament, as well as with regard to the right of the parties, there is a well-known distinction between a 'judgment' and an 'order'. No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word 'judgment' shall in other Acts of Parliament include an 'order'." (Per *Cotton, L.J.*, in Ex parte *Chinery*[3].)

Judgment is regarded as a determination by a Court of Law, as the result of an action or proceeding upon the matters submitted for decision, that a legal duty or liability does or does not exist. That the word 'judgment'

1. (1938) I.L.R. 17 Pat. 714.
2. (1939) 2 M.L.J. Supp. 23.
3. (1884) 12 Q.B.D. 342 at 345.

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does not include every order is also apparent from the observation of Sir John Edge in *Sevak Jeranchod Bhogi Lal* v. *Dakore Temple Committee*[1]:

"The term judgment in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense".

I emphasized in *Hori Ram Singh's case*[2] that

"In S. 205 (1) of the Act, the word 'judgment' does not occur by itself, but is used in conjunction with 'final order'. When both the terms judgment and final order are used together in one expression, they undoubtedly connote different and distinct meanings and judgment cannot be interpreted as embracing even interlocutory orders, which would make the category of 'final order' wholly superfluous and unnecessary".

'Final Order'.—In *Hori Ram Singh's case*[2], I also discussed in some detail the meaning of the expression 'final order', and referred to cases decided by their Lordships of the Privy Council, particularly, *Abdul Rahman* v. *Cassim*[3], where Sir George Lowndes had pointed out that in *Ramchand Manjimal's case*[4],

"the Appellate Court in India was of the opinion that the order had gone to the root of the suit, namely, the jurisdiction of the Court to entertain it and it was for this reason that the order was thought to be final".

But his Lordship held that,

"this was not sufficient. The finality must be a finality in relation to the suit. If after the order, the suit is still a live suit, in which the rights have still to be determined, no appeal lies."

It was emphasized that if the effect of the order from which it is sought to appeal is not to dispose finally of the rights of the parties, then even though it decides an important and even a vital issue in the case, it leaves the suit alive and provides for its trial in the ordinary way.

'Decree'.—As pointed out by me in *Hori Ram Singh's case*[2], the term 'judgment' in England includes decree, and decree must therefore involve a determination of the rights of the parties.

Even in India decree is defined in S. 2 (2), Civil Procedure Code, as

"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."

The determination of any matter within S. 47, Civil Procedure Code, is no doubt included in that term, but S. 47 deals with the determination of questions arising between the parties relating to the execution, discharge or satisfaction of the decree and not to the particular mode of executing the decree which may be ordered. That is dealt with in the rules contained in O. 21. R. 66 of that order does not in so many terms refer to the determination of any question arising between the parties to the proceedings, but lays down how the Court is to cause a proclamation of the intended sale to be made where any property is ordered to be sold by public auction, and

1. (1925) 49 M.L.J. 25 (P.C.).
2. (1939) 2 M.L.J. Supp. 23.
3. (1932) 64 M.L.J. 307: L.R. 60 I.A. 76: I.L.R. 11 Rang. 58 (P.C.).
4. (1920) 39 M.L.J. 27: L.R. 47 I.A. 124: I.L.R. 47 Cal. 918 (P.C.).

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sub-S. (2) provides what particulars should be specified in the proclamation of sale, and these include everything which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

The directions issued by the Court under O. 21, r. 66, Civil Procedure Code, as originally enacted requiring the specifications to be made in the proclamation of sale cannot be regarded as judicial adjudication of the rights of the decree-holder or of the judgment-debtor. They appear to possess some characteristics of an administrative order directing how the proclamation of sale should be drawn up before the auction sale is actually held, because it cannot be suggested that by those directions the Court determines the exact value of the property so as to be finally binding on any party. At best it can arrive only at an approximate estimate of the value. Some Courts have actually gone as far as to say that an order under O. 21, r. 66 is not a judicial order but merely an administrative one. It would be quite sufficient to say that the order is not a judicial adjudication of any question arising between the parties to the execution, but merely the issuing of directions as to the mode of proclamation of sale. It is really difficult to see how the approximate estimation of the value of the property can ever be regarded as a determination of any question arising between the decree-holder and the judgment-debtor within the meaning of S. 47, Civil Procedure Code. Indeed, as was laid down by their Lordships in *Saadatmand Khan* v. *Phul Kuar,*[1] a remedy is provided (under S. 311 corresponding to O. 21, r. 90) for the judgment-debtor to question the valuation and have the sale set aside if the gross under-valuation amounts to a material irregularity and he sustains substantial injury thereby. The drawing up of the proclamation and the entering of the required specifications as fairly and accurately as possible are not matters relating to the execution of the decree itself so much as relating to the method of proclamation of sale.

There seems to be a perfect unanimity among all the Indian High Courts that the fixing of the value of the property under this rule is by no means an adjudication within the meaning of S. 47, Civil Procedure Code and such an order is not appealable as a decree. The leading case is a Full Bench case of the Madras High Court, *Sivagami Achi* v. *Subramania Aiyar*[2], of course, followed in subsequent Madras cases—*Kaveribai Ammal* v. *Mehta & Sons*[3], *Avudainayagappa Pillai* v. *Sundaranandam Pillai*[4] and *Meenakshisundaram Pillai* v. *Chokkalinga Pathan*[5]. In the second case it was laid down that an order fixing a price to be entered in the proclamation of sale is not a judgment within the meaning of cl. 15 of the Letters Patent. The same view has prevailed in Allahabad—*Ajudhia Prasad* v. *Gopi Nath*[6],

1. (1898) L.R. 25 I.A. 146: I.L.R. 20 All. 412 (P.C.).
2. (1903) 14 M.L.J. 57: I.L.R. 27 Mad. 259 (F.B.).
3. (1923) 46 M.L.J. 71.
4. A.I.R. 1924 Mad. 767.
5. (1929) 56 M.L.J. 624.
6. (1917) I.L.R. 39 All. 415.

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Hira Lal v. *Tikam Singh*[1], *Muhammad Zakaria* v. *Kishan Narain*[2], *Kaisar Beg* v. *Sheo Shankar Das*[3], *Nathu Lal* v. *Shrimati Yashodha Devi*[4] and *Ram Charan Sahu* v. *Jumna Prasad Sahu*[5]. In this last case it was held that an order fixing the valuation for the purposes of the sale proclamation is not a decree within the meaning of S. 47, Civil Procedure Code. A similar view has been expressed in other High Courts—*Krishnarao Ambadas Pimpladkar* v. *Krishnarao Raghunath Talekar*[6], *Devendra Nath Basu* v. *Kailash Chandra Kalu*[7], *Basanta Kumar Chowdhury* v. *Baikunta Nath Chakravarty*[8], *Tikait Gayan Nath Sahi* v. *Pandit Malhjyi Vaidya*[9] *and Sain Das* v. *Punjab National Bank, Ltd.*[10] It was obviously on account of this consensus of opinion as to an order passed under O. 21, r. 66, relating to valuation not being appealable that the Patna Legislature thought it fit to add sub-S. (2) to S. 16 of the Bihar Money-lenders Act, making an order under that section an appealable order; nonetheless the order cannot be regarded as a decree.

No Appeal.—The main question in the present case was as to the estimation of the value of the mortgaged property and a sufficient portion thereof, and at a later stage its entry in the proclamation of sale for the benefit of intending purchasers. S. 16 (1) merely makes it obligatory on the execution Court to estimate the value of the property and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree. The Proviso reserves the power to the Court to order the whole of the property to be sold if it is satisfied that by reason of the nature of such property or any other special circumstances such property cannot reasonably or conveniently be sold in part. The estimate of the value is obviously only an approximate one and not by any means exact. The property can certainly be sold for a higher price; and of course it is also possible that there may be no bidders willing to offer bids up to the estimated price. If there is any surplus, it will go to the judgment-debtors. Such an estimation cannot therefore be considered as a determination of any rights or liabilities so as to constitute a judgment or decree; nor can it even be regarded as a final order because it determines nothing finally, nor even puts an end to the proceedings. It is merely ancillary and subsidiary, and is nothing more than a mere step of preparation for the sale being effected. It follows that the order passed by the High Court dismissing the appeal possesses the same characteristics and is in essence of the same nature. That too neither determines the rights or the liabilities of the parties, nor even

1. A.I.R. 1926 All. 401.
2. (1925) I.L.R. 48 All. 260.
3. (1930) I.L.R. 53 All. 391.
4. A.I.R. 1932 All. 136.
5. A.I.R. 1932 All. 696 (1).
6. (1928) I.L.R. 52 Bom. 444.
7. A.I.R. 1925 Cal. 318.
8. A.I.R. 1926 Cal. 610.
9. A.I.R. 1925 Pat. 588.
10. A.I.R. 1929 Lah. 815.

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decides any question arising between the parties relating to the execution, discharge or satisfaction of the decree. It merely affirms the order refusing to estimate such value, and therefore relates to the mode of sale only, and is interlocutory in character. There is no final decision yet, as even after the disposal of the case by the High Court, the proceeding is still a live proceeding and will continue.

Even if the stage contemplated by S. 17 had been reached, the proclamation of sale would have included only so much of the property of the judgment-debtor the proceeds of the sale of which the Court considered would be sufficient to satisfy the decree. The further provision that such property shall not be sold at a price lower than the price specified in the sale proclamation would be a direction to the sale officer not to accept any bid which is lower than the price specified. This at best is fixing a minimum price which the sale officer should accept. It does not prevent the acceptance of a higher offer; nor does it expressly prevent the Court from re-valuing the property, in case no bids up to the minimum are received. The two provisos added to the section refer to matters relating to the portion of the property to be sold, with which we are not concerned in this appeal. The mere inclusion of the whole or a part of the property in the proclamation of sale would also not be regarded as any final adjudication of any rights or liabilities so as to become a judgment, decree or final order. Not even a special appeal is provided for from such an order. All that has happened is that the execution Court has failed to estimate the value of the property, and the proclamation of sale would when issued contain two estimates as given by the decree-holders and the judgment-debtors and would include the entire mortgaged property. That in my view does not amount to any final disposal of the rights of the parties at all. In my opinion, the order of the High Court dismissing the appeal from the Subordinate Judge's order refusing to fix the valuation or to specify a portion of the mortgaged property in the proclamation of sale is neither a judgment, decree nor final order within the meaning of S. 205 (1) of the Act. No appeal therefore lies to the Federal Court.

Even if no appeal lies at this stage, it cannot be suggested that no other remedy whatsoever would be open to the judgment-debtors. If the provisions of the section were obligatory on the execution Court a non-compliance with them would certainly be a material irregularity, if not also an illegality, and the sale itself could be challenged on such a ground under O. 21, r. 90, Civil Procedure Code, if substantial injury is caused by the omission. The order of the High Court in appeal may then possibly be a final order subject to an appeal to the Federal Court. As in the opinion of the majority the appeal lies, I must proceed to consider it on the merits.

Patna Rule.—Under O. 21, r. 66 (1) (*e*), Civil Procedure Code, as enacted, the proclamation was to specify as fairly and accurately as possible several enumerated particulars, and "every other thing which the Court considers it material for a purchaser to know in order to judge of the nature and value of the property." There was some difference of opinion as to the proper inference to be drawn from the observation of Lord Hobhouse in the

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case of *Saadatmand Khan* v. *Phul Kuar,*[1] which had been decided under the corresponding S. 287 of Act XIV of 1882. Contrary to what was held at Madras, but in partial conformity with the opinions expressed at Calcutta and Allahabad, the Patna High Court considered that it was the duty of the Courts to settle the value, even if the judgment-debtor was absent, and that any valuation other than that fixed by the Court is calculated to mislead possible bidders and would be wrong, and the Court should not insert in a sale proclamation the valuation assessed by the decree-holder or the judgment-debtor—*Raghunath Singh* v. *Hazari Sahu,*[2] *Beni Prasad* v. *Edal Singh*[3] and *Damrupat* v. *Rameshwar*[4]. Later the Patna High Court changed its policy, and by an amendment of the rule, which came into force on the 1st March, 1936, provided that—

> "no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either shall be inserted in the sale proclamation".

The prohibition is obviously deliberate and it casts an obligation on an execution Court to see that no other estimate, not even that made by itself, is inserted in the sale proclamation, and enjoins upon the Court to notify therein that the Court does not vouch for the accuracy of either estimate.

The Money-lenders Act.—With the professed object of regulating money-lending transactions and granting relief to debtors the Bihar Legislature intervened and attempted to make it obligatory on an execution Court to determine the value and enter the same in the proclamation of sale, so that the property is not to be sold for less than the specified value. S. 16 of the Bihar Act III of 1938 compelled an execution Court, "notwithstanding anything to the contrary contained in any other law or in anything having the force of law" to "hear" the parties to the decree and "estimate the value of such property and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree". S. 17 enjoined that the proclamation of sale "shall include only so much of the property of the judgment-debtor the proceeds of the sale of which the Court considers will be sufficient to satisfy the decree and such property shall not be sold at a price lower than the price specified in the said proclamation". The two provisoes dealt with the portions that are to be ordered to be sold. Thus there was a direct conflict between the amended O. 21, r. 66, enjoining that the Court should not enter its own valuation in the proclamation of sale, and S. 17 which necessitated a price being specified in it.

High Court's View.—In the earlier case the High Court had taken the view that Ss. 16 and 17 must be read together, and that it was S. 17 which specified the purpose of ascertaining the value of the property, providing among others that the property should not be sold for a price lower than

1. (1898) L.R. 25 I.A. 146: I.L.R. 20 All. 412 (P.C.).
2. A.I.R. 1917 Pat. 381 (F.B.).
3. A.I.R. 1919 Pat. 373.
4. A.I.R. 1923 Pat. 445.

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that specified in the sale proclamation. According to their view S. 16, read with S. 17, enjoined the Court to estimate the value and mention it in the sale proclamation, that is to say, the Court was to vouch for the absolute correctness of the value as fixed by it. As to the contention that S. 16 itself was not repugnant to the rule they had remarked—

"This argument would have been of some force if S. 16 would have stood by itself and would have been self-contained which it is not. It is followed by S. 17 without which it would have been an absolutely useless piece of legislation".

They had further held that

"Ss. 16 and 17 ordered the Courts to fix the value very carefully, make their orders appealable to higher tribunals, and by necessary implication compel them to put the value fixed by them in the sale proclamation, and to sell the property only if the price fetched is according to the value fixed by them unless some other considerations arise".

They accordingly remarked that they were "clearly of opinion that S. 16, which must be read with S. 17, was repugnant to O. 21, r. 66, Civil Procedure Code." Following their previous ruling they held in the present case also that S. 16 of the Act was, on account of its repugnancy, void.

The New Act.—The Bihar Act of 1938 had been passed with the assent of the Governor of the Province only. The Bihar Legislature has passed a fresh Money-lenders Act (VII of 1939), which was reserved for the assent of the Governor-General, and it came into force on the 3rd May, 1939, during the pendency of this appeal. The provisions of old Ss. 16 and 17 have been re-produced verbatim in Ss. 13 and 14, with a few additions, mainly to make the sections retrospective.

I prefer to base my opinion that the High Court's view cannot be accepted on a two-fold ground: (1) because the provisions of the old S. 16 corresponding to the new S. 13 are not in fact repugnant to O. 21, r. 66, Civil Procedure Code, as amended by the Patna High Court and (2) because the old section has now been replaced by the new section, which as a result of the assent of the Governor-General must in any case prevail.

Section 107 of the Government of India Act.—Under S. 107 (1) of the Act,

"if any provision of a Provincial Law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact or to any provision of an existing Indian Law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal Law, whether passed before or after the Provincial Law or, as the case may be, the existing Indian Law shall prevail and the Provincial Law shall, to the extent of the repugnancy, be void".

During the transitional period the Federal Laws under S. 316 of the Act mean the laws of the Indian Legislature, passed in the exercise of the powers conferred by the provisions of the Act after the commencement of Part III. Under S. 311 (2) 'existing Indian Law' means, *inter alia,*

"any law or rule . . . . passed or made before the commencement of Part III of this Act by any authority . . . . being an authority . . . . having power to make such a law or rule".

It has not been suggested that the provisions of the Bihar Act are repugnant to any laws of the Indian Legislature passed after the coming into force of the new Government of India Act. The only suggestion is

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that they are repugnant to an existing Indian Law. Now S. 107 (1) does not mean that a Provincial Law must yield if it is repugnant to any existing Indian Law whatsoever. It will give way (to the extent of the repugnancy) only if it is repugnant to an existing Indian Law "with respect to one of the matters enumerated in the Concurrent Legislative List", unless the assent of the Governor-General or of His Majesty has been obtained as is referred to in sub-S. (2). If it is with respect to a matter falling within the Provincial Legislative List and not the Concurrent Legislative List, then it would prevail even as against an existing Indian Law. On the other hand, the provisions of S. 100 make it clear that if the matter falls within the Federal Legislative List, then the Provincial Legislation is altogether *ultra vires*, even though it may also fall under the Provincial or the Concurrent List.

Principles of Construction.—When the question is whether a Provincial legislation is repugnant to an existing Indian Law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further repugnancy must exist in fact, and not depend merely on a possibility.

"Their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the Province of Ontario where the prohibitions of the Canadian Act are not and may never be in force." (*Attorney-General for Ontario* v. *Attorney-General for the Dominion*[1].)

It is a well-established principle that if the invalid part of an Act is really separate in its operation from the other parts and the rest are not inseverably connected with it, then only such part is invalid, unless, of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be *ultra vires* in the former, while *intra vires* in the latter:

"The test is said to be whether a statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remained from what it would be with the omitted portions forming part of it". (See *The King* v. *Commonwealth Court of Conciliation*[2].)

A particular section of an Act however may not be an isolated and independent clause, and may form part of one connected indissoluble scheme for the attainment of a definite object; in which case it would have to be considered as an inseparable part of the whole. A law which is *ultra vires* in part only may thereby become *ultra vires* in whole if the object of the Act cannot at all be attained by excluding the bad part. If the offending provisions are so interwoven into the scheme of the Act that they are not severable, then the whole Act is invalid: In re *Initiative and Referendum Act*[3]. For

1. (1896) A.C. 348 at 369-70.
2. 15 C.L.R. 1 at 22.
3. (1919) A.C. 935 at 944.

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instance, the whole texture of the Act was found inextricably interwoven in *Attorney-General for British Columbia* v. *Attorney-General for Canada*[1].

The words "to the extent of the repugnancy" occurring in S. 107 indicate that it is not essential that the whole Act nor even a whole section must be declared invalid, but that it is necessary to ascertain exactly how much of it is void on account of repugnancy. In India a clear distinction exists between a provision being *ultra vires* by virtue of S. 100 on account of overlapping and its being void under S. 107 (1) owing to repugnancy to the extent of such repugnancy. Unlike the former, there is competency to enact in the latter case, but the legislation is invalid to a limited extent on account of a conflict.

Repugnancy.—The conditions required for a repeal by implication are naturally stringent. The rule laid down in *Kutner* v. *Phillips*[2] was

"A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together. . . . Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied . . . or unless there is a necessary inconsistency in the two Acts standing together".

The question has been discussed in two Australian cases more recently. In *A.-G. for Queensland* v. *A.-G. for Commonwealth*[3], Higgins, J., said:

"What does 'repugnant' mean? I am strongly inclined to think that no Colonial Act can be repugnant to an Act of the Parliament of Great Britain unless it involves, either directly or ultimately, a contradictory proposition—probably, contradictory duties or contradictory rights".

Again, in *Clyde Engineering Co., Ltd.* v. *Cowburn*[4], the learned Judges observed:

"When is a law 'inconsistent' with another law? Etymologically, I presume that things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or other provision in one law conflicts directly with the command or power or provision in the other. Where two Legislatures operate over the same territory and come into collision, it is necessary that one should prevail; but the necessity is confined to actual collision, as when one Legislature says 'do' and the other says 'don't'" (p. 503).

Griffith, C.J., remarked:

"The test of inconsistency is, of course, whether a proposed act is consistent with obedience to both directions" (p. 504).

The opinion of the majority (Knox, C.J. and Gavan Duffy, J., with the concurrence of Isaacs, J.) was that,

"Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it" (p. 478).

1. (1937) A.C. 377 at 388.
2. (1891) 2 Q.B. 267.
3. 20 C.L.R. 148 at 167-8.
4. 37 C.L.R. 466.

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In this view it may be humanly possible to obey both, simply by not doing what is declared by either to be unlawful, though permitted by the other, and yet there may be palpable inconsistency. It may be conceded that the test of a possible obedience to both is not absolute. But as between the new S. 13 (old S. 16) and O. 21, r. 66 as in force in Bihar, there is not even a question of a right conferred by one being taken away by the other; much less do the words of their Lordships in *A.-G. for Ontario* v. *A.-G. for the Dominion*,[1] "it is obvious that their provisions could not be in force within the same district or province at one and the same time" apply to them.

Impugned Section.—The existing S. 13 (as did the repealed S. 16) merely enjoins the estimation of the value of the property and that of a sufficient part thereof, and does not itself deal with the entry of the same in the proclamation of sale. It is therefore not in conflict with O. 21, r. 66. Nor is there anything in the proviso permitting the Court to order the whole property to be sold which clashes with the rule. Unless the value is in some way estimated, it is impossible for the Court to ascertain what portion of the property would be sufficient to satisfy the decree, which consideration is enjoined upon the Court under the terms of the mortgage decree itself passed under O. 34, r. 5 (3), and Form No. 6 of Appendix D. There is an analogous provision in O. 21, r. 64, which applies to attached properties. The ascertainment of the value would also enable the Court to fix the order of the sale of the various items so as to adjust equities. The estimation can be made known in ways other than by merely entering it in the proclamation of sale. The High Court has not taken away the discretion of the Courts to divide the property into lots under O. 21, r. 67 (3), or of the sale officers under r. 69 to adjourn the sale on the ground of gross inadequacy of the bids, if the estimation of the value is brought to their notice otherwise (*e.g.*, by production of a certified copy of the order). It would be of help later to the Court itself in deciding whether there has been any substantial injury caused in case any material irregularity or fraud was committed in publishing or conducting the sale. It follows that although the new S. 14 may, to some extent, be dependent on the new S. 13, as the price can be entered in the sale proclamation only after it has been ascertained by the Court, S. 13 in itself is by no means inseparably connected with S. 14, and can indeed stand alone by itself. The estimation of the price is one thing, and its entry in the proclamation of sale is quite another thing. The two are distinct and can be easily separated, as in their true import they are severable. As the former is easily separable and enacts different and distinct provisions and is not in reality dependent on the latter, there is no reason why the former should not stand merely because the latter may be repugnant. Repugnancy should not be extended to a section by implication if it does not in fact exist. In my opinion there is no repugnancy between the new S. 13 (old S. 16) and the amended O. 21, r. 66.

The second ground is that we can in appeal take into account the imperative provisions of the new Money-lenders Act which has already

1. (1898) A.C. 348.

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come into force, and which automatically repeals the old Act. Of course, we are not bound to do so, as the appellant can move the Execution Court afresh to act under the new Act and indeed it is the duty of that Court so to act even without an application. But in *Quilter* v. *Mapleson,*[1] it was held that an appellate Court could grant relief according to the new law which had come into force in the meantime even though the judgment of the Court below had been correct according to the law as it then stood. It may, however, be pointed out that under the English O. 58, r. 2, appeals were by way of "re-hearing" and the appellate Court had power not only to make any order which ought to have been made by the Court below, but also to make such further or other order as the case may require. The last words occur in the Indian Code of Civil Procedure, O. 41, r. 33 also; but that has not been made applicable to the Federal Court.

Under S. 205 (2) the Federal Court has power to grant leave to appeal on any ground other than what had been raised in the Court below. Again under S. 209 (1) the Federal Court where it allows an appeal can give a declaration as to the judgment, decree or order which is 'to be substituted' for the judgment, decree or order appealed against, and not merely a declaration as to the judgment, decree or order which ought to have been passed by the High Court.

No doubt in *Ponnamma* v. *Arumogam*[2], their Lordships applied S. 545 of the Ceylon Code, without taking into account in favour of the appellant a new Ordinance adding a proviso to that section that a suit should not fail for want of Letters of Administration, and remarked that

> "Their Lordships have only to say whether that judgment was right when it was given".

But their Lordships took case to observe at page 391 that

> "The objection of want of administration is one of substance and the appellant's case did not fail by reason only that letters of administration to the intestate's estate have not been granted."

Their Lordships of the Privy Council, in a recent case, *K. C. Mukerji* v. *Mst. Ram Ratan Kuer*[3], did take into consideration against the appellant a new Act which was passed during the pendency of the Privy Council appeal, by which the appellant's rights had been taken away. Their Lordships on the basis of the new enactment dismissed the appeal. Although that was a converse case, the principle undoubtedly applies. Accordingly there seems to be no good ground why the Federal Court may not, if it so thinks fit, dispose of the appeal on the basis of the new enactment.

As the Patna Rule came into force in 1936 and therefore did not exist at the time of the passing of the Act, it cannot be regarded as having been included in the Code of Civil Procedure existing at the time (Entry 4 of List III). But the amendment of O. 21, r. 66 was certainly a matter of Civil Procedure. The rule made by the High Court, under the powers

1. (1882) 9 Q.B.D. 672.
2. (1905) A.C. 383.
3. (1935) 70 M.L.J. 105: L.R. 63 I.A. 47. I.L.R. 15 Pat. 268 (P.C.).

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conferred upon it by Ss. 122 and 124, Civil Procedure Code, was therefore an existing Indian Law with respect to a matter enumerated in List III. Ss. 13 and 14 of the Money-lenders Act of 1939 even if repugnant to the rule must prevail under S. 107 (2) of the Government of India Act, because the assent of the Governor-General has been obtained.

Accordingly if an appeal were to lie, I would allow the appeal and remit the case to the High Court with the declaration that the following order be substituted for the High Court's order:—

The appeal is allowed, the order of the Subordinate Judge set aside and the case remanded to him for disposal according to the provisions of Ss. 13 and 14 of the Bihar Money-lenders Act (VII of 1939). In the circumstances, all parties should bear their own costs.

K.S. *Appeal allowed.*

RULES

New rule regarding provision for appeals against orders passed under certain sections of the Madras Agriculturists Relief Act.

Fort St. George October, 27, 1939, (G.O. No. 2633, Development).
No. 855:

Rules framed under powers conferred by sub-section (1) and clause (*c*) of sub-section (2) of section 28 of the Madras Agriculturists Relief Act. 1938 (Madras Act IV of 1938).

AMENDMENT

After rule 7 of the said rules, the following rule shall be added, namely:—

"8. Appeals shall lie from any of the following orders passed by a court under the Act, namely:—

(*a*) an order under section 18 (1) amending or refusing to amend a decree;

(*b*) an order under section 19 amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree;

(*c*) an order under section 20 staying or refusing to stay proceedings in execution of a decree;

(*d*) an order under section 22 directing or refusing to direct the refund of any sum realized in execution of a decree;

(*e*) an order under section 23 setting aside or refusing to set aside any sale or foreclosure of immovable property; and

(*f*) an order under section 24 directing or refusing to direct the repayment of any purchase money realized in execution of a decree;

as if the order related to the execution, discharge or satisfaction of the decree within the meaning of section 47 of the Code of Civil Procedure, 1908".

Rules regarding applications to civil courts for scaling down of non-decreed debts.

Fort St. George October 27, 1939, (G.O. No. 2634, Development).
No, 856:

Rules framed under powers conferred by sub-section (1) and clauses (*b*) and (*c*) of sub-section (2) of section 28 of the Madras Agriculturists Relief Act, 1938 (Madras Act IV of 1938).

RULES.

1. In these rules—

(*a*) "Act" means the Madras Agriculturists Relief Act, 1938;

(*b*) "Court" means the court having jurisdiction under these rules; and

(*c*) expressions used in these rules but not defined herein shall have the same meaning as in the Act.

2. (1) Where any debt, other than a decree-debt, is due by any person claiming to be an agriculturist entitled to the benefits of the Act in respect of such debt, the debtor or the creditor, may

apply to the court for a declaration as to the amount of the debt due by the debtor to the creditor:

Provided that no such application shall be presented or be maintainable if any suit for the recovery of the debt be pending.

(2) The provisions of sub-rule (1) shall also apply to any person claiming that his debt has been discharged by virtue of the provisions of the Act.

3. (1) Every application under rule 2 shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints.

(2) There shall be affixed to every such application whether by the debtor or by the creditor a court-fee stamp of the value of 12 annas.

4. (1) Every application presented by a debtor shall contain the following particulars, namely:—

(*a*) the name and address of the applicant;

(*b*) the name and address of the creditor in respect of whose debt the application is presented;

(*c*) a statement that the debtor claims to be an agriculturist entitled to the benefit of the Act in respect of the debt of the creditor as against whom the application is presented;

(*d*) the particulars of the debt in respect of which the declaration is claimed, including all matters necessary to invoke the jurisdiction of the court to have the debt scaled down; and

(*e*) the amount for which the applicant prays that the debt may be reduced.

The provisions of sub-rule (1) shall apply *mutatis mutandis* to an application presented by a creditor.

5. The application shall be rejected if it does not comply with any of the requirements of rule 4

The rejection of an application under this rule shall not preclude the applicant from presenting a fresh application.

6. (1) On receipt of an application under rule 4, the court shall, unless it rejects it under rule 5, pass an order fixing a date for hearing the application.

(2) Notice of the order under sub-rule (1) shall be served on the creditor and the debtor.

7. On the date originally fixed under rule 6 or on any subsequent date to which the application may be adjourned by the court, the court shall, after taking such evidence or making such enquiry as it may consider necessary, pass such order on the application as it thinks fit.

8. If, at any time, while an application is pending in the court, a suit is filed by the creditor for the recovery of the debt which is the subject-matter of the application, the court shall dismiss the application.

9. The order of the court declaring the amount of the debt under rule 7 shall be subject to appeal and second appeal as if it were a decree in an original suit.

10. The courts having jurisdiction under these rules shall be the courts which would have jurisdiction to entertain suits for the recovery of the debts as unscaled.